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CASES ARGUED AND DETERMINED

~~MASSACHUSETTS~~ IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

MARCH — SEPTEMBER 1874

JOHN LATHROP
REPORTER

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FOR the sake of securing greater promptness of publication, the Reporter has printed the cases in the order of decision, without reference to terms of court; and has indicated in a line at the head of each case, the county in which it arose, the dates of the argument and judgment, and the judges present. When only one date is so given, the case was argued and determined on the same day.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WILLIAM L. BURT *vs.* MERCHANTS' INSURANCE COMPANY.

Suffolk. January 26. — March 17, 1874. AMES & DEVENS, JJ., absent.

The value of land taken for a post-office in Boston, pursuant to the St. of 1873, c. 189, and the U. S. St. of 1873, c. 227, is to be estimated as of the time of filing the petition, and not as of the time of the trial and verdict.

In estimating the value of land taken under the Gen. Sts. c. 43, § 55, and under the St. of 1873, c. 189, the situation of the estate and the manner of its occupation are to be taken into consideration, but no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole.

A bill of exceptions should not set forth the whole charge to the jury, but only the points of law raised at the trial and the rulings thereon.

PETITION filed April 16, 1873, under the St. of 1873, c. 189, § 2,* by William L. Burt, as the agent employed by the United

*** The St. of 1873, c. 189, is entitled "An act giving the consent of the Commonwealth to the United States for the purchase of additional land in the city of Boston for the sub-treasury and post-office site," and is as follows:**

"SECT. 1. The consent of the Commonwealth is granted to the United States to purchase additional land for the site of the new post-office and sub-treasury building in the city of Boston, the said additional land lying adjoining the tract already purchased by the United States, in the block bounded by Devonshire, Water, Congress and Milk Streets, and constituting, with the tract already purchased, the entire block or square bounded by Devonshire,

States under said statute, to the Superior Court for this county, against the Merchants' Insurance Company, and Charles D. Head

Water, Congress and Milk Streets. The said tracts of additional land are, first, an estate now or formerly owned by the Merchants' Insurance Company; second, an estate now or formerly owned by Peter B. Brigham; third, an estate now or formerly owned by Edward Wigglesworth; fourth, an estate now or formerly owned by Thomas Wigglesworth; fifth, an estate now or formerly owned by Thomas Goddard, trustee; and all of said estates constitute the estate lying between the property already acquired by the United States on the west, and Congress Street on the east, Water Street on the north, and Milk Street on the south. Jurisdiction is ceded to the United States over said tracts respectively, or any part or portion thereof, when the United States shall become the owner thereof: *provided, always*, that the Commonwealth shall retain and does retain concurrent jurisdiction with the United States in and over all the lands aforesaid, so far that civil and criminal processes issuing under the authority of the Commonwealth may be executed on said land, and in any buildings erected or to be erected thereon, in the same way and manner as if jurisdiction had not been granted as aforesaid; and *provided*, that the exclusive jurisdiction shall revert to and revest in the Commonwealth of Massachusetts, whenever said lands shall cease to be used by the United States for public purposes.

"SECT. 2. If the agent or agents employed by the United States, and the person or persons owning or interested in either of said estates, cannot agree upon the price to be paid for their interest therein, the agent or agents of the United States may apply by petition to the superior court for the county of Suffolk, such petition to be made separately as to each of said estates, describing the estate and praying to have a valuation thereof made by a jury, and the court, after due notice to the owner or owners of the estate described in such petition, and to all parties interested therein, to be given in such manner as the court may order, is empowered and required to hear the parties and finally determine the value of their said estate (taking into consideration the injury or benefit, if any, which said owners or persons interested may sustain in any adjoining estate) by a jury, who shall be sworn to faithfully and impartially make such appraisement and valuation. And if any person or persons other than the owner or owners of said estate shall appear and claim any interest in said estate, the value to the owner of the fee, and to all persons interested in said estate, shall be ascertained and apportioned in the same manner as is provided for the assessment of damages in section fifty-five of chapter forty-three of the General Statutes; and the clerk of the superior court for civil business, for the county of Suffolk, shall issue writs of *venire facias* for jurors to make the appraisements and valuations aforesaid, and shall therein require the attendance of said jurors on such day as the court shall order, and said writs shall be severally issued, delivered, transmitted, served and returned in the same manner as now provided as to other

and Francis Curtis, receivers of said company, which had been declared insolvent. The petition described the first estate men-

juries by chapter one hundred and thirty-two of the General Statutes, and the value aforesaid having been ascertained by the verdict of said jury, and said verdict accepted and recorded by said court, and the amount thereof paid or tendered, within one month after final judgment, to the said owner or owners or persons interested, or their agent or attorney, together with their reasonable costs and expenses to be taxed by said court, or in case of their neglect or refusal to receive the same, the amount of said verdict, costs and expenses having been paid into the treasury of the Commonwealth, for their use and subject to their order, the fee of said estate shall be forever vested in the United States: *provided, however*, that neither the United States, nor their agent or agents, shall enter into or take possession of said estates, respectively, or exercise any act of ownership thereon, until the amount of said verdict, costs and expenses aforesaid shall have been actually paid as aforesaid; and *provided, also*, that all the charge of said application and appraisement shall be paid by the United States. The applications aforesaid may by agreement of parties be heard and determined together, but a separate valuation shall be made and a separate verdict rendered in each case.

"SECT. 3. This act shall be void unless a suitable plan of the additional land obtained or purchased by the United States under this act, shall be filed in the office of the secretary of the Commonwealth within one year after the title shall be acquired.

"SECT. 4. This act shall take effect upon its passage." (April 15, 1873.)

The act of Congress of March 3, 1873, c. 227, 17 U. S. Sts. at Large, 510, 524, provides: "That the following sums be, and the same are hereby, appropriated for the objects hereinafter expressed:" "To enable the Secretary of the Treasury to obtain by purchase, or to obtain by condemnation in the courts of the State of Massachusetts, the several lots or parcels of land lying easterly of the present site of the new post-office in Boston, and bounded by said site, Water Street, Congress Street and Milk Street, upon the lines of said streets as they are now established or may hereafter be established by due process of law, and for repairing the injuries to the post-office building caused by fire, and to extend the building over said site, eight hundred thousand dollars: *Provided*, that no money appropriated for this purpose shall be used or expended in the purchase of the several lots or parcels of land for said site until a valid title thereto shall be vested in the United States, nor until the State of Massachusetts shall cede its jurisdiction over the same, and shall duly release and relinquish to the United States the right to tax or in any way assess said site and the property of the United States that may be thereon during the time that the United States shall be or remain the owner thereof: *And provided further*, that the Secretary of the Treasury shall make no purchase of land under this provision until the city of Boston shall cause the triangular space between Congress, Pearl, Milk and Water Streets to be opened to the

tioned in § 1, being the estate of the Merchants' Insurance Company, on the corner of Congress and Water Streets in Boston, and alleged that the plaintiff had attempted to purchase the said land of the defendants, and that the parties could not agree upon the price to be paid therefor; and prayed to have a valuation of the defendants' estate made by a jury in the manner provided in said chapter.

Trial before *Rockwell*, J., who, after verdict, allowed the following bill of exceptions:

"The receivers of the Merchants' Insurance Company were the general owners of said estate. Charles L. Haley was the lessee thereof, and Avery & Harris were sub-lessees under said Haley. The buildings on the land were totally destroyed by fire November 9 and 10, 1872, and only land was taken.

"The defendants offered evidence to show the value of said estate at the time of trial, claiming that the valuation to be made was to be the value of the estate at the time of the trial, as the nearest approach to the time of the taking, and not the value at the time of filing the petition: to which evidence the plaintiff objected; but it was admitted.

"The plaintiff asked for the following instructions: That in this case, under the St. of 1873, c. 189, the jury are to determine the value of the land of respondents, and their respective interest therein, at the time of filing the petition in this case, to wit, April 16, 1873, and not at any subsequent time, nor at the time of the hearing before the jury: That in no event, as against the said petitioner, is the value of said land to be increased beyond its fair cash market value, by reason of any apportionment of damages between the respective parties claiming an interest in said land; notwithstanding the jury should be of opinion that, as between the respondents, under their several contracts and leases, the aggregate value of their respective claims might or should exceed, or fall short, of the fair cash market value of said land, free from and not subject to any lease or contract made upon or concerning said land, as against the petitioner: That, as

public and graded and paved at the expense of the city, and shall widen Milk and Water Streets, where the buildings have been destroyed by fire, to a width of at least sixty feet."

against the United States, the petitioner, the jury are to determine the value of said land, as land, at its fair cash market value, free from, and not subject to, any lease or contract made upon it, and as though one person owned it as one estate in fee, with interest thereon from April 16, 1873. These instructions the presiding judge refused to give."

The bill of exceptions then set forth at length the entire charge to the jury; so much of which as is material to the understanding of the points decided by the court was as follows:

"The object of the proceeding is to ascertain the value of certain real estate which the government of the United States manifests a desire to purchase, and to pay therefor the fair market value of the interest and claims of the respective owners of the estate. It is the fair market value that you are to ascertain; and your verdict will consist of several items, substantially these: In the first place, you will ascertain the total amount of the value to the owners of the estate, estimating the same as an entire estate and as if the same was the sole property of one owner in fee simple; and that may not improperly be called the total value of the estate. In the next place, you will ascertain the fair market value of the estate to the Merchants' Insurance Company, who, in this case, are the owners of the fee of the land. In the third item, you will ascertain and find the fair market value of the interest and term of Haley, the first lessee. In the fourth item, you will ascertain the fair market value of the interest and term of Harris & Avery, the sub-lessees. And the sum of the last three items will be equal to the first; for it is a division that you are to make among these several parties in interest. The time at which these values is to be ascertained and fixed is the present time, the time of the trial and verdict, as being nearest the time when the purchase would be made and completed.

"You will, then, proceed to consider the evidence in that light, to ascertain the fair market value at this time. And I have stated that the first thing for you to ascertain is the total market value of the entire estate, to be ascertained from the evidence; that is, its value to the owners of the estate, estimating the same as an entire estate as if the same was the sole property of one owner in fee simple; and I add now, regard being had to the situation of the estate, and the manner of its occupation, that may

not improperly be called the total value. You are to estimate it at its value to the owners of the estate, not to the owner, — to the owners of the estate. It is the value to all the owners that is to be found ; and you are to estimate the same as an entire estate as if the same was the sole property of one owner in fee simple ; not as the sole property of the owner in fee simple, but as if it was the sole property of one owner in fee simple. You will then ascertain the value to the owners as an entire estate and as if there was but one owner in fee simple. You must, therefore, ascertain the value to all the owners ; and, in doing so, you must estimate it as an entire estate and as if the same was the sole property of one owner in fee simple. Thus you will get the total value, or the fund which you are to divide among the several owners.

“ Now, the several owners in this case are, first, the Merchants’ Insurance Company, who own the fee of the land ; another owner is Haley, who leased this property of the Merchants’ Insurance Company, for fifteen years from the 1st of March, 1870, and who has parted, substantially, with the value of his lease, for a consideration, but the term which he has conveyed to the sub-lessees is a little shorter in point of time than the lease to him ; he is, therefore, an owner of this property, and he holds an interest in a term. The other owners are Harris & Avery, the sub-lessees, who hold the lease under Haley. These, then, are the three owners ; and it is the value to them that you are to ascertain. And, when you come to apply the rule, that it is to be estimated as an entire estate as if the same was the sole property of one owner in fee simple, you will remark that it is not the same as if the language was, ‘ the value to the owner of the estate in fee simple.’ It is the value as it would be to one owner in fee simple ; and then that total value is to be divided between this owner in fee simple and the owners of the terms.

“ The counsel for the United States contend, that this total value to all the owners of the estate is not so large as it would be if the term created by the leases was not in existence. In speaking of the term created by the leases in this connection, I may as well call it a term, though it belongs to the two owners, — Haley and Avery & Harris. The counsel for the United States contend that the value of the entire estate, estimated as I have stated, should

not be found by you to be so large as it would be if the term created by those leases was not in existence. That is to say, that the existence of the term diminishes the total value of this property, estimated in this way, from what it would be if there was no such term. The term which remains is eleven years and eight months. Does that term affect the total value of this estate to the owners? You will consider that in weighing the evidence, and making up this first item in your verdict; and if you find, upon the whole evidence, that the existence of that term makes the total value of this estate, estimated as I have said, less than it would be if the term was not in existence, you will regard that fact in making up your verdict, and make it up at the value, as you determine it ought to be, in the present situation of the estate, and the manner of its occupation. If you are satisfied, from the whole evidence in the case, that the existence of that term has no effect upon the total value, you will so find; and your verdict on that particular item will not be affected by the existence of the term.

“ Having ascertained the total value, in this first item of your verdict, you have then to ascertain three things more; and, when you have ascertained them, you will have ascertained three items which will exhaust this total value, into which this total value will be divided. And the rules by which you are to ascertain them are these:

“ In ascertaining the value of the interest and claim of the owners of this estate in fee, the Merchants' Insurance Company, you will look at their interest. You will see that they have conveyed a part of the interest which they held; you will ascertain the fair market value of their interest, as it stands to-day, with a term created upon it by their lease having about eleven years and eight months to run; and consider, also, that that lease secures to them \$15,000 rent, annually, payable quarterly, according to the terms of the lease. And you may, if you please, and it seems good to you, consider in this valuation the term as an incumbrance upon the fee of the estate owned by the Merchants' Insurance Company; and you may, if you please, come at the result of what the fair market value of their interest is, by ascertaining its value as a fee, and then deducting from that value the value of this incumbrance. And the incumbrance is made by the term, and the

term is owned by the other parties ; and if there is anything in the case to induce you to believe that the injury of that incumbrance to the owners of the fee is exactly equal to the value of the term to the tenants, it may be the proper way for you, having ascertained the injury which the term makes to the owners in fee simple, to consider that as the value of the term to the tenants, and then to divide that value between the tenants, thus making the third and fourth items of your verdict.

“ But you may not be of that opinion. It is not for the court to decide facts upon the evidence ; it is only for the court to suggest the rules of law, in the light of which you are to examine the testimony. There are various provisions in these leases ; and you will recollect them, and have them before you. And if those leases, by virtue of any or all of their provisions, alter that fact, and show to you that the injury which this term considered as an incumbrance creates to the owners of the fee, the diminution of their value is not in amount the same as the value of the term to the tenants, you will then make the division in the light of those facts. That is to say, the division will be different from what it would be if you did not arrive at that opinion, by taking something from one and adding it to the other, and still leaving the sum of the three last items in your verdict equal to the total value as ascertained by the first item.

“ Having proceeded thus, if you choose to adopt this method, you will have found, first, the total value, according to the law ; you will then have divided it into three parts, and assigned each part to the three several owners, and thus have performed your duty.

“ The total market value of the entire estate is first to be ascertained from the evidence ; that is, its value to the owners of the estate, estimating the same as an entire estate as if the same was the sole property of one owner in fee simple, regard being had to the situation of the estate, and the manner of its occupation. The owners are the Merchants' Insurance Company, holding the fee, Haley, the lessee, and Harris & Avery, the lessees under him. It is the value to all these owners that is to be ascertained as the first item in your verdict. That will be the sum which the United States are to pay, and may properly be called the total value. This sum is the aggregate value of the entire estate to

the owners before named, estimating it as an entire estate as if the same was the sole property of one owner in fee simple. This is not the same as the value of this estate to the owner of the fee in it, but is larger, and includes that. You are to ascertain the total value from the evidence.

"The counsel for the United States contend that this total value is not so large as it would be if the term created by the leases was not in existence. If you are satisfied that the existing term of eleven years and eight months affects this total value in that way, you will consider it in weighing the evidence, and making up this first item in your verdict." To all these rulings and instructions and refusals to instruct, the plaintiff excepted.

Exceptions were also taken by Avery & Harris, but as these were not passed upon by the court they are omitted.

G. P. Sanger & G. A. Somerby, (T. S. Dame with them,) for the petitioner.

B. F. Brooks & G. O. Shattuck, (O. W. Holmes, Jr. & M. Storey with them,) for the receivers of the Merchants' Insurance Company. The time at which the value of the land to be paid for by the United States to these respondents is to be taken is not expressly fixed by statute; but the price to be fixed by the jury must be the price at the time when the owner shall have a right to it. It has been laid down by many cases hereafter cited, that the right to damages on the one side, and the title to the estate taken on the other, vest at the same moment. The land remains the respondents' until the title passes to the United States; and their title cannot be divested without giving them the value of what is then taken from them. Therefore the value must be estimated as nearly as practicable at the time of the taking. The question thus modified is, When is the land taken? The answer must be drawn from a construction of the statutes which take the land, in the light of general principles of constitutional law.

The enacting or imperative clause of the act of Congress is simply, "The following sums are hereby appropriated." The clause concerning this land goes no further than to state that one item of the appropriation is made "to enable" the secretary to buy the land of the parties *in pais*, or "to obtain it by condemnation in the courts of Massachusetts." The act, on its face, only

purports to provide a fund, and to authorize a certain person to spend it in a certain way.

If there is a purchase *in pais*, the act of the parties, not the statute, transfers the title. But the secretary has not bought our land, and is trying to obtain it by condemnation in the Massachusetts courts, which is the other method of acquisition provided by the act. That is an acquisition subsequent to the passing of the act. For that simply permits the secretary to "obtain by condemnation;" that is, as the result of a process instituted for the purpose of obtaining it. Moreover, the title will not pass by force of the act of Congress. That act does not confer the jurisdiction on the state court by virtue of which the condemnation is made. If it had attempted to do so, it would be held that such a jurisdiction could not be created in that way. 1 Kent Com. (12th ed.) 402. By the mere fact of authorizing proceedings in the state courts, the United States submit to the authority of the state legislature; for those courts cannot proceed in the case without an act of the state legislature specially authorizing them to do so. Besides, the appropriation is made on the condition that the state shall cede jurisdiction and relinquish other rights, which expressly requires the concurrence of the state legislature.

The act of Congress, therefore, goes no further than to permit the acquisition of certain property under or by means of the state laws; and the taking is by the act of the state legislature. *Burt v. Merchants' Ins. Co.* 106 Mass. 356, 363. *Gilmer v. Lime Point*, 18 Cal. 229, 258.

By that act the "fee of said estate shall be forever vested in the United States," when the amount of the verdict, &c., is paid, and not before; and until such payment, the United States are neither to take possession nor exercise any act of ownership. The taking therefore is at the date of payment, and not before. The reason for thus postponing the vesting of the title in the United States is similar to that which has dictated the clause in many state constitutions requiring payment before the appropriation of private property. The remedy against a private individual may be worthless because he has no money. The remedy against the United States is nearly worthless, because it is expensive, dilatory and uncertain, and depends on the consent of the defendant. If, however, the title of the United States had vested at an earlier

time, the state legislature would not have undertaken to prohibit their dealing with the land in accordance with their rights. The simpler course was adopted of giving them no rights until the owners of the land were secure.

There are two classes of cases. In one class, which includes the taking of land for streets and railroads under our laws, the title is held to pass at the time of the resolve to lay out the street or the location of the railroad, although the resolve may not be carried out, and the location is liable to be subsequently changed or abandoned. And on this ground, and no other, the right to damages is held to vest at the same time, and the damages are therefore estimated as of that date, with interest. "The effect of the location is to bind the land described to that servitude, and to conclude the land-owner and all parties having derivative interests in it from denying the title of the company to their easement in it. We think, therefore, that the filing of the location is the taking of the land. It is upon that, that the owner is forthwith entitled to compensation; it is that act which gives the easement to the corporation, and the right to have damages to the owner of the land." Per Shaw, C. J., *Boston & Providence Railroad v. Midland Railroad*, 1 Gray, 340, 360. Similar language is used with regard to the laying out of ways, and the time of estimating damages is fixed with reference to that consideration. The defendants "are withholding nothing from the plaintiff; not the estate taken, for that the public have acquired. . . . The true rule would be, as in the case of other purchases, that the price is due and ought to be paid at the moment the purchase is made. . . . The damages must be appraised as they would have been on the day of the taking. . . . The jury were correctly instructed, that in the estimate of damages done to an estate partly taken for the public use, the value of the estate on the day of the taking was the true value to be taken by the jury, in their appraisement of the damages," &c. *Parks v. Boston*, 15 Pick. 198, 208. *Harrington v. County Commissioners*, 22 Pick. 263, 268. *Hallock v. County of Franklin*, 2 Met. 558, 559. *Shaw v. Charlestown*, 3 Allen, 588. *Whitman v. Boston & Maine Railroad*, 7 Allen, 813, 826. *Edmonds v. Boston*, 108 Mass. 585, 550.

The second class contains every case which has been decided

under statutes which resemble this in providing that the title shall pass when the money is paid. In these cases, unlike the last, the parties seeking to obtain the land are the movers, for the very reason that they cannot get the title until after verdict and payment; and it is uniformly held, not only that they have no vested rights in the land, but that they are at liberty to withdraw from the proceedings before that time. It is held, conversely, that the party whose land is proceeded against has no vested right to his damages. *Baltimore & Susquehanna Railroad v. Nesbit*, 10 How. 395, 399. *Graff v. Baltimore*, 10 Md. 544, 552. *Stacey v. Vermont Central Railroad*, 27 Vt. 39. *Graham v. Connersville & New Castle Junction Railroad*, 36 Ind. 463.

As the damages to be estimated are those to which the owners will have a vested right hereafter, and as exact evidence of what they will be is not attainable, it follows that in this class of cases, evidence of the value at the point of time nearest to the payment, that is, at the time of the trial, is admissible to show what the value will be then; and this view is equally supported by the principle of both classes of cases.

F. V. Balch, for Haley. It is not true that the United States cannot be called upon to pay anything more than the fair cash value of the land, unaffected by any lease or contract; but if it is, the judge gave substantially the ruling prayed for.

The whole estate is here taken, and the contract of leasing destroyed. *Dyer v. Wightman*, 66 Penn. State, 425. It was not so in *Edmonds v. Boston*, 108 Mass. 535. There, only part of each tenement being taken, the leases were not destroyed; moreover, all that case says is, that the rulings were sufficiently favorable to the landlord. It is elementary law that a contract, *e. g.* a charter, may be taken by eminent domain and must be compensated for. Here, not only the land, but the contract, is taken, for the reversion is taken and the lease passes as incident. A man who leased his estate five years ago, on a long lease, for double what it would bring today, and to a solvent tenant, has something more valuable than the land and building; he has the land and building, and a valuable contract besides, and the whole is taken by the government. Any law which should forbid the jury to give full compensation for the whole — contract as well as land and building — would be unconstitutional; and the law un-

der which we are proceeding must be so construed as to make it constitutional, if possible.

The only just rule is that the landlord is to have the value of his rent and the reversion, and the tenant the value of his term subject to the rent, that is, each is to have the fair market value of what is taken from him, or in other words, the amount of the injury to him. Suppose, as is often the case, one owner has agreed with adjoining owners to supply steam, and all parties have built in conformity, and his estate is taken; is not he to be compensated for his contract? But this would be a weaker case than ours, for such a contract might not pass with the reversion. The case of *Edmands v. Boston*, expressly says, regard being had to its "manner of occupation." In *Brown v. Providence, Warren & Bristol Railroad*, 5 Gray, 35, evidence was admitted of the terms of the existing lease. The case of *Boston & Worcester Railroad v. Old Colony Railroad*, 12 Cush. 605, 611, is in our favor; the peculiar occupation of the owner there being something which would not pass to a purchaser, evidence that that occupation made the estate more valuable to him was excluded. But here the valuable lease would pass with the reversion. If the reversion alone had been taken, the United States would have had of course to pay its value, why should they pay less because they get the term too?

E. Avery, (*E. D. Sohler* with him,) for Avery & Harris.

GRAY, C. J. This is a proceeding for the assessment of damages to the owners of land appropriated to the use of the United States for the enlargement of the post office in Boston, in accordance with statutes duly passed by Congress, and by the legislature of the Commonwealth. U. S. St. 1873, c. 227. St. 1873, c. 189. *Burt v. Merchants' Ins. Co.* 106 Mass. 356.

The rights of the government on the one hand, and of the owners of the land on the other, are secured by a provision in the act of Congress that no money appropriated for the purpose shall be expended until a valid title to the land shall be vested in the United States; and by provisions in the statute of Massachusetts that the title shall vest in the United States only upon payment of the amount of the assessment made by the jury and confirmed by the court, and that until such payment the United States shall not enter into or take possession of the land, or exercise any act

of ownership thereon. By the effect of these provisions, the final decision in the case fixes the time when the compensation shall be paid to the owners of the land, and the title shall vest in the United States. *Baltimore & Susquehanna Railroad v. Nesbit*, 10 How. 395.

But the compensation to be paid by the government and received by the owners of the land must be estimated according to the value of the land at the time of the filing of the petition. This affords a definite and invariable rule, which has relation to the time at which the property is designated and set apart for the public use, the owners ascertained who are entitled to be compensated, and the judicial proceedings instituted for the purpose of determining such compensation ; and is not liable to be affected by the duration of these proceedings, or by increase or diminution in value, whether occasioned by the taking itself, or by acts of the owners, lapse of time, or other circumstances. In all these respects, it is a juster measure of compensation than a valuation of the estate at any subsequent point of time. And it accords with the rule as settled in this Commonwealth in the analogous cases of lands taken for highways and railroads.

It is true that in those cases the right in the lands vests in the public upon the location of the way ; and that has been assigned in the later decisions as a sufficient reason for estimating the damages as of the time when the land is set apart for the public use. But it is not the only reason. In the leading case of *Parks v. Boston*, 15 Pick. 198, 208, which was a proceeding to assess damages for land taken for a highway, Chief Justice Shaw said : " It is not, strictly speaking, an action for damages ; but rather a valuation or appraisement of an incumbrance created on the plaintiff's estate, for the use of the public. It is the purchase of a public easement, the consideration for which is settled by such appraisement only because the parties are unable to agree upon it. The true rule would be, as in the case of other purchases, that the price is due and ought to be paid, at the moment the purchase is made, when credit is not specially agreed on. And if a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, whilst they apply the axe with the other ; and this rule is departed from only because some time is necessary, by

the forms of law, to conduct the inquiry ; and this delay must be compensated by interest."

It follows that the learned judge of the Superior Court erred in instructing the jury that the value of the land was to be estimated as of the time of the trial and verdict, and that for this reason the petitioner's exceptions must be sustained, and a new trial had.

One other question, fully argued at the bar, must arise again upon a new trial, and should therefore be now considered.

The St. of 1873, c. 189, § 2, provides that if any persons, other than the owner of the estate, shall appear and claim any interest therein, the value to the owner of the fee and to all persons interested in the estate shall be ascertained and apportioned in the same manner as is provided for the assessment of damages upon the taking of lands and buildings for highways in § 55 of c. 43 of the Gen. Sts. That section provides that the jury "shall first find and set forth in their verdict the total amount of the damages sustained by the owners of such land and buildings, estimating the same as an entire estate and as if the same were the sole property of one owner in fee simple ; and they shall then apportion the total amount of damages among the several parties whom they find to be entitled, in proportion to their several interests and claims, and to the damages sustained by them respectively, and set forth such apportionment in their verdict." The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in assessing the damages for taking the land and disturbing that occupation. But no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole. *Edmonds v. Boston*, 108 Mass. 535. *Penny v. Penny*, L. R. 5 Eq. 227.

But we are of opinion that the petitioner shows no just ground of exception to the instructions in this respect. The jury were clearly directed to ascertain in the first place the total amount of the value to the owners of the estate, estimating it as an entire estate as if it was the sole property of one owner in fee simple, regard being had to the situation of the estate and the manner of its occupation ; and then divide that total value among the

owners of the fee and the lessees and sub-lessees. Some clauses in the charge to the jury, if taken by themselves, without relation to the rest of the charge, or to the evidence introduced and positions asserted at the trial, might seem to authorize the jury to assess the value of each interest separately, and return a verdict for the sum of such assessments, although it should exceed the value of the estate as a whole. But any possible misconstruction of particular passages is controlled by the context and by the distinct rules previously stated. It is to be observed also that the leases appear to have been given in evidence, not for the purpose of enhancing, but for that of lessening the value of the estate as a whole. So far as there is any obscurity in the bill of exceptions, it has been created by the irregularity, which cannot be too strongly disapproved, of setting out the charge at length, instead of merely stating the rulings upon points of law made at the trial. The remarks of Mr. Justice Story, delivering the judgment of the Supreme Court of the United States, in *Evans v. Eaton*, 7 Wheat. 856, 426, are peculiarly applicable: "The charge is spread *in extenso* upon the record, a practice which is unnecessary and inconvenient, and may give rise to minute criticisms and observations upon points incidentally introduced, for purposes of argument or illustration, and by no means essential to the merits of the cause. In causes of this nature we think the substance only of the charge is to be examined; and if it appears, upon the whole, that the law was justly expounded to the jury, general expressions, which may need and would receive qualification, if they were the direct point in judgment, are to be understood in such restricted sense." See also, to the same effect, *Magniac v. Thompson*, 7 Pet. 348, 390.

The remaining questions discussed at the argument may take a new shape or become immaterial upon a new trial, and therefore require no further notice. But, for the error as to the time of which the valuation should be made, the

Petitioner's exceptions are sustained.

JOSEPH SCHIENFELDT vs. LAWRENCE B. NORRIS.

Suffolk. March 4, 1874. WELLS & ENDICOTT, JJ., absent.

In an action of tort to recover damages for injuries sustained by the plaintiff in being run over by a wagon, the evidence for the plaintiff tended to show that before crossing the street, he looked both ways and had time to go across; that a wagon going with unusual speed, knocked him down; that the street was paved and he did not hear the wagon; that he was a few minutes crossing, and was in the middle of the street when struck; that he was not standing still at the time and was looking straight ahead; that the driver of the wagon admitted seeing the plaintiff six feet off. The evidence for the plaintiff as to the noise the wagon made was conflicting. The defendant put in evidence tending to show that the street was paved; that the wagon was a heavy one and had a heavy load; that the distance, from the place where the wagon turned into the street to the place of the accident, was six hundred and forty-four feet; that the street was a straight one, and that there was no other carriage on the street. At the close of all the evidence the defendant requested the judge to rule that the plaintiff had not shown that he was using due care, and had not shown negligence on the part of the defendant. The judge declined so to rule, and submitted the case to the jury, who found for the plaintiff. *Held*, that the questions were rightly submitted to the jury upon the evidence.

TORT, to recover damages for injuries sustained by the plaintiff in being run over by a wagon in charge of the defendant's servant in a public street, in the city of Boston. Trial in the Superior Court before *Putnam*, J., who, after a verdict for the plaintiff, allowed the following bill of exceptions:

"The evidence introduced by the plaintiff to show ordinary care on his own part and negligence on the part of the defendant's servant, was as follows: The plaintiff testified: 'I keep store on Federal Street. On Friday, September 8, 1871, at quarter past seven o'clock in the morning, I was going to my store and crossing Federal Street. I looked both ways, and had time to go through. A wagon going very fast knocked me down. The shaft hit me on the head and the back wheel went over me. I knew nothing till I was taken into the house.' *Cross-examination*. 'I looked up and down the street, both ways, before I undertook to cross, but saw no carriage. I could see a quarter of a mile up the street in the direction from which the wagon came. I saw the wagon at the same time it knocked me down. The street is paved. I did not hear the wagon nor the men. I was a few minutes crossing. I was right in the middle of the

street, in the horse car track, when I was struck. I was moving, not standing still, looking straight ahead.'

"Dennis J. Callahan testified: 'I was at my store, 273 Federal Street, and saw the mail wagon coming with unusual speed. Saw the plaintiff crossing. The team struck him and knocked him down. The team went the length of this room before it stopped. I can't tell the rate of speed, but the wagon was going faster than usual. The plaintiff was almost in the middle of the street when I saw him, walking leisurely. Was going at an ordinary rate. I am certain he was not standing still when he was struck. The wagon was going pretty fast, ten miles an hour. Have seen the same wagon every morning for a year and a half, and never saw it going so fast as on this occasion. After striking plaintiff, driver did not slacken his speed until after going the length of this court room. Did not hear the driver shout at all.'

Cross-examined. 'I was near where the plaintiff crossed. I was two houses from there, and in the opposite direction from which the wagon was coming. The team was fifty yards up the street when I saw it coming. It did not make a great deal of noise. I can't tell how far I heard it.'

"James Dillon testified: 'I was hanging out things at my store on Federal Street when the plaintiff was run over. The wagon could be seen forty or fifty yards before it reached the plaintiff. I first saw it ten or fifteen yards from the place where the man was run over, and after the crowd had collected about him, heard nothing from the driver. The wagon did not stop less than forty or fifty yards from the same. It was going unusually fast.'

"James Mahan testified: 'I saw the accident. I was standing opposite East Street, looking down Federal Street. The team was coming pretty lively, eight or ten miles an hour. I saw the old man crossing. I don't suppose they saw him. I did not see him till he was hit. Wagon went about a hundred feet before it hauled up.' *Cross-examined.* 'I was on the sidewalk, twenty-five or thirty feet off. Saw the team come into Federal Street from Broad Street. I saw and heard it four hundred or five hundred feet off. There were other people crossing and passing, but there was no other carriage. The wagon was rattling considerable. Did not hear men cry out; the wagon made noise enough to drown their voices.'

"Phebe Schienfeldt testified: 'The driver told me he saw the plaintiff six feet off. I asked him if he could not turn his horse. He said it was not so easy.'

"At the close of the plaintiff's evidence the defendant requested and the judge refused a ruling that the plaintiff had not shown that he was using due care at the time of the accident, and had not shown negligence on the part of the defendant's servant. The defendant then offered evidence tending to show that Federal Street, where the accident occurred, was paved with stone; that the wagon was a heavy one, weighing sixteen or seventeen hundred pounds, and had a load of mail matter weighing about fifteen hundred pounds; that the distance from the end of the street, where the wagon turned into the street, to the place of the accident, was six hundred and forty-four feet; that the street was a straight one, and that there was no other carriage on the street.

"At the conclusion of all the evidence the defendant requested the court to rule that there was no such evidence of ordinary care on the part of the plaintiff, or want of ordinary care on the part of the defendant's servant, as to authorize the jury in finding for the plaintiff; which the judge refused and submitted the case to the jury, and the defendant excepted."

H. F. French, for the defendant, cited the following cases: *Warren v. Fitchburg Railroad*, 8 Allen, 227, 230; *Allyn v. Boston & Albany Railroad*, 105 Mass. 77; *Wheelock v. Boston & Albany Railroad*, 105 Mass. 203; *Gilman v. Deerfield*, 15 Gray, 577; *Steele v. Burkhardt*, 104 Mass. 59, 62; *Winn v. Lowell*, 1 Allen, 177; *Counter v. Couch*, 8 Allen, 436; *Butterfield v. Western Railroad*, 10 Allen, 532; *Commonwealth v. Fitchburg Railroad*, 10 Allen, 189; *Reed v. Deerfield*, 8 Allen, 522; *Bancroft v. Boston & Worcester Railroad*, 97 Mass. 275; *Burns v. Boston & Lowell Railroad*, 101 Mass. 50; *Snow v. Housatonic Railroad*, 8 Allen, 441; *Gahagan v. Boston & Lowell Railroad*, 1 Allen, 187; *Ince v. East Boston Ferry*, 106 Mass. 149.

L. M. Child, for the plaintiff, was not called upon.

BY THE COURT. The questions of ordinary care on the part of the plaintiff and negligence on the part of the defendant were rightly submitted to the jury upon the evidence.

Exceptions overruled.

ALFRED FAUCETT & another vs. JANE A. CURRIER.

Suffolk. March 4. — March 5, 1874. WELLS & ENDICOTT, JJ., absent.

In an action against a married woman for breach of a written agreement for the purchase of land sold to her by auction, parol evidence that the plaintiff requested her to bid on the property as an under-bidder and told her that she would not be bound to take the property, but might if her husband desired, and that she did not read the agreement or know its contents when she signed it, does not show any fraud practised on third persons, or any illegal contract between the plaintiff and defendant, and is inadmissible.

CONTRACT for breach of the following agreement signed and sealed by the defendant, a married woman, under date of June 9, 1870 :

"I hereby acknowledge that I have purchased by public auction, house and lot 29 on Beethoven Street for the sum of six thousand dollars, and have paid into the hands of G. F. Hunting & Leavitt, auctioneers, the sum of one dollar as a deposit, and in part payment of the purchase money, and I hereby agree to pay the remaining sum of _____ in to the vendor on or before the 18th day of June, and in all respects on my part to fulfil the conditions of sale."

After the decision reported 109 Mass. 79, the case was heard in the Superior Court, without a jury, by *Rockwell, J.*, who rejected the following evidence offered by the defendant, and gave judgment for the plaintiff. The defendant excepted.

"The defendant offered to prove that she had known one of the plaintiffs intimately for many years ; that she met him on the premises on the morning of the sale, when he stated to her that the property was limited at, and would not be sold for less than, \$6,500, and requested her to bid thereon as an under-bidder, representing that it would aid him in making a sale ; that she then also stated to the plaintiff that she had not spoken with her husband in regard to the purchase of said property ; that the plaintiff stated to her before the sale, and after she had signed said agreement, that she need not and would not be bound to take the property, but might do so if her husband desired ; also, that she did not read or know the contents of said agreement when she signed
ne."

J. W. Hubbard, for the defendant. The request of the plaintiffs to the defendant, to bid at the auction sale, created an agency, and she is not liable to them on this agreement. Underbidding at a sale is illegal; and if the defendant bid, as an underbidder, at the request of the plaintiffs, or one of them, and to aid them in making a sale, it was illegal, and as the plaintiffs participated in this illegal act, they cannot take advantage of their own wrong. It was competent for the defendant to show that the whole transaction, including, of course, the agreement signed by the defendant, was illegal and void.

D. C. Linscott, for the plaintiffs.

GRAY, C. J. The exact question now presented was argued and decided when the case was before this court at a former stage. 109 Mass. 79. The offer of evidence fell short of showing any fraud practised on third persons or any illegal contract between the plaintiffs and defendant, and amounted to no more than an attempt of the defendant to control the effect of her formal agreement in writing by oral testimony of previous negotiations.

Exceptions overruled.

PATRICK A. O'CONNELL vs. DAVID H. JACOBS.

Suffolk. March 3. — 6, 1874. WELLS & ENDICOTT, J.J., absent.

When a case is tried by a judge without a jury, his findings on questions of fact are final.

The defendant rightfully took building materials from a building and carried them from the premises although there was room for them to remain there. On one article being demanded of him he told the plaintiff's attorney that he might have it by going to the defendant's locker, and refused to return it to the premises; and on a further demand being made, some months afterwards, he refused to return it. *Held*, that the evidence warranted the judge in deciding that the second refusal, like the first, was merely a refusal to take it back to the plaintiff's house, and that the defendant did not claim any right to retain it as his own, and did no act amounting to a conversion.

TORT in the nature of trover for the conversion of building materials. The case was heard in the Superior Court without a jury, by *Lord, J.*, who after judgment for the defendant allowed a bill of exceptions in substance as follows:

The plaintiff sought to recover the value of certain building

materials, detached from a building in Boston, the estate of the plaintiff, upon which the defendant, a mason, was employed by the tenant of the plaintiff, to make some alterations.

The plaintiff, by his attorney, leased his house, for five years, from February 1, 1872, to one Sosnosky ; the lease, among other provisions, containing the following : " The lessee being hereby conceded the right to take one of the windows out of the front basement, inserting a door and door frame, in its stead ; and converting the within apartment, the present dining room, into a store ; lowering if deemed necessary, the front entrance thereto ; provided the work shall be done in a thorough and workmanlike manner, the mason work by a mason approved by the lessor or his attorney ; and all the work, of whatever kind, in keeping with the appearance and character of the building ; and not inferior, in work, to the character of the present structure ; and all, at the cost and expense of the said lessee. The grate nor mantel, in the dining room, to be moved or altered, unless by permission in writing ; the lessee to do all repairs at his own expense, during the term of this lease."

The attorney of the plaintiff consented to the employment of the defendant, as a mason, to do the work, the said attorney selecting him for the purpose. The articles alleged to have been taken, were taken out from their places in the building by the defendant necessarily, in making the alterations which he agreed to make, and to the making of which the plaintiff's attorney assented ; there was room enough on the premises to allow the materials to remain.

The attorney of the plaintiff testified on the trial of the case, that, some time after the repairs had been made, he asked the defendant whether or not he had taken away the granite plinth with the glass therein set, as laid in the declaration ; and the defendant replied that he had ; that he, the attorney, demanded its return, and the defendant replied that he might have it by going for it to his, the defendant's locker ; that the attorney refusing to go for it to the locker of the defendant, demanded that the defendant should return it to the premises from whence he had taken it, and defendant refused so to do ; that subsequently, after the lapse of about nine months, the same attorney demanded from the defendant the return of the said property, and that the defendant refused to return it.

This, with the following answers of the defendant to interrogatories, was the only evidence of the taking and conversion offered by the plaintiff: "Somebody demanded of me a piece of stone with a glass in it, and I told the party if there was any such stone in my locker, it belonged to me, but if he wanted it he could have it. Same party came second time, and I told him he could have it by going for it to my locker, although it belonged to me."

M. O'Connell, for the plaintiff.

N. Morse, for the defendant.

GRAY, C. J. Trial by jury having been waived, all questions of law and fact were to be determined by the presiding judge in the first instance. Upon all matters of fact his determination was final, and every reasonable inference is to be made in favor of his finding. The evidence reported warranted the judge in deciding that the defendant's second refusal to return the property, like his first refusal, was merely a refusal to take it back to the plaintiff's house, and that the defendant did not claim any right to retain it as his own, and did no act amounting to a conversion.

Exceptions overruled.

JOHN COLLINS vs. NEW ENGLAND IRON COMPANY.

Suffolk. March 5. — 7, 1874. WELLS & ENDICOTT, JJ., absent.

Evidence of a custom in a trade to have printed rules and regulations requiring workmen to give notice a certain number of days before leaving, and to work out the time, or else to forfeit the wages due, is inadmissible, unless the party seeking to avail himself of the custom offers to show that the other party knew of it.

If a workman does not know of such rules when he begins work, the fact that he is afterwards informed of them and continues to work without objection, does not as a matter of law show that he assented to the rules as a part of his contract.

CONTRACT to recover of the defendant the sum of \$39.00, a balance due the plaintiff for personal services as water-tender in the defendant's rolling mill, at Readville. Trial in the Superior Court before *Putnam, J.*, who after a verdict for the plaintiff, allowed the following bill of exceptions:

"It was agreed that the plaintiff was hired for such services at the rate of two dollars per day, but the defence was that the plain-

conclusively and as matter of law show such assent, and that he agreed to forfeit his wages if he left without notice.

Exceptions overruled.

JOHN M. WAY *vs.* CHARLES H. LEWIS & another.

Suffolk. March 3. — 9, 1874. WELLS & ENDICOTT, JJ., absent.

In the absence of fraud and collusion, a judgment rendered against a principal is conclusive evidence of the debt thereby ascertained both against him and his surety on a recognizance subsequently taken on his arrest on execution.

CONTRACT on a recognizance, in which the defendant Lewis was principal, and the defendant Judson Murdock was surety.

At the trial in the Superior Court, jury waived, before *Putnam*, J., it appeared that the plaintiff commenced an action on a promissory note against the defendant Lewis, returnable at January term of the Superior Court, 1872; that the defendant appeared and filed an answer, but was afterwards defaulted, and judgment was entered for the plaintiff in June following, on which an execution was issued; that the plaintiff commenced another action returnable at the same term of court, on the same note against John Lewis and one Downing, who were indorsers on said note, and in June following obtained judgment against them on which executions issued; that in the said case against the defendant Charles H. Lewis, the plaintiff caused said Lewis to be arrested on June 20, 1872, on execution, and that the defendants in this suit entered into the recognizance upon which the present action is brought, by which they agreed to pay the sum of eight hundred dollars unless said Lewis should within thirty days from the time of his arrest deliver himself up for examination, as provided by law. It also appeared that Lewis did not deliver himself up for examination or comply with said recognizance.

At the trial the defendants offered to show that on or about March 15, 1872, said Downing, with his wife, made a mortgage to said Way on a dwelling-house in Boston, to secure the payment of \$1000, and that when said mortgage was made Downing paid to Way out of said \$1000 the promissory note, on which all of the aforesaid judgments were rendered and executions issued

and all costs and expenses relating thereto ; but the presiding judge ruled that the evidence would be incompetent as a defence to either defendant in this suit, and ordered judgment for the plaintiff, and the defendants appealed.

J. W. Hubbard, for the defendants.

L. M. Child, for the plaintiff, was stopped by the court.

GRAY, C. J. No fraud or collusion being shown, the judgment rendered against the principal was conclusive evidence of the debt thereby ascertained, both against him and against his surety on the recognizance subsequently taken upon his arrest on execution. *Heard v. Lodge*, 20 Pick. 53, 58. *Tracy v. Goodwin*, 5 Allen, 409. *Tracy v. Maloney*, 105 Mass. 90.

Exceptions overruled.



MARSHALL N. CUTTER & another *vs.* THOMAS C. EVANS.

Suffolk. March 3. — 9, 1874. WELLS & ENDICOTT, JJ., absent.

In the absence of fraud or collusion, a judgment against the defendant in an action is conclusive evidence of the debt both against him and a surety on a bond to dissolve an attachment.

To avoid such a judgment it is not sufficient to show that in the original action the defendant was, while it was pending, adjudicated a bankrupt under the laws of the United States, that the plaintiff proved his claim against his estate in bankruptcy, that the defendant's bankruptcy was suggested on the docket of the court in which the original action was pending, and that one of plaintiff's counsel was chosen assignee in the bankruptcy proceedings. The fact of bankruptcy and the proving of the plaintiff's claim should have been pleaded in bar, or a stay of proceedings obtained.

CONTRACT by Marshall N. Cutter and Benjamin F. Parker upon a joint and several bond to dissolve an attachment conditioned to pay a judgment within thirty days. The case was heard in the Superior Court upon the following agreed statement of facts :

" The writ was dated March 12, 1873. The defendant, Evans, was a surety upon the bond, and George C. Angell was principal, and the date of the bond was June 13, 1870. The original action, in which the attachment was made and the bond given, was brought in the Superior Court, for goods sold and delivered. Judgment was recovered against Angell in that action, at January

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term 1871, and has never been satisfied or reversed. The defendant offered to prove certain facts which plaintiffs objected to as incompetent and immaterial; but if the same are competent and material, the following is to be taken as a true statement thereof:

“ At July term, 1870, pending the above original action, James Sumner, an attorney at law, appeared and filed an answer therein for the defendant Angell. Thereafter, on September 27, 1870, Angell was adjudicated a bankrupt, under the laws of the United States, in the District Court of the United States for the district of Massachusetts, and on the same day, Charles G. Keyes, Angell's solicitor in bankruptcy, entered his name in said action, with Sumner's name, upon the clerk's docket, as of counsel for defendant, and made an oral suggestion of defendant's bankruptcy, which the clerk noted in pencil upon the docket, Sumner having been notified by said Angell to withdraw from the case. Keyes's name was never withdrawn. No motion or paper touching the bankruptcy was filed in this case. The plaintiffs put the action upon the trial list for January term, 1871. In January or February, 1871, one of the plaintiffs' counsel met Sumner upon the street, and said to him, 'I suppose you have no objection now to our having judgment in the Angell case.' And Sumner said 'No.' About the first day of March following, the case was reached upon the trial list, and plaintiffs were in court and said they were ready, and defendant not appearing, plaintiffs moved for a default, which was allowed. Ten days afterwards, on March 11, judgment was entered upon the default, on motion of the plaintiffs. In October, prior to the default and judgment, the first meeting in bankruptcy of Angell's creditors was held, and one of plaintiffs' counsel chosen assignee; and at the same meeting plaintiffs proved their claim, and the same was allowed; and plaintiffs appear upon the record of the bankrupt court as creditors who have proved their claim. Within thirty days after recovering the judgment, plaintiffs gave notice thereof in writing to Angell, and made demand for payment; and immediately after the expiration of the thirty days, gave similar notice to, and made demand upon Evans. Shortly after this, on April 17, 1871 Angell filed a bill in the United States District Court, asking for an injunction against plaintiffs, and, by consent, plaintiffs were

enjoined in the following terms: 'By consent in open court, ordered that injunction issue restraining respondents from levying their judgment mentioned in complainant's bill upon the person or estate of complainant, and from levying, or in any way proceeding in said judgment against the complainant, until the further order of the court.' Angell's discharge in bankruptcy was refused January 14, 1873, and the above injunction dissolved March 1, 1873.

"If these facts offered by defendant are competent, and afford a legal defence or ground for abating or barring this action, then such decree is to be made for the defendant as the court deems proper; otherwise, judgment to be entered for plaintiffs in one thousand dollars, the penalty of the bond."

On the foregoing facts judgment was ordered for the plaintiffs. and the defendant appealed to this court.

G. W. Morse, for the defendant. No creditor proving his claim in bankruptcy shall be allowed to maintain any suit therefor, and all proceedings already commenced shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable shall be allowed to prosecute any suit therefor until the question of the debtor's discharge is determined. U. S. Bankrupt Act of 1867, § 21. By the first clause, if the claim is proved pending suit, the proceeding "shall be deemed to be discharged," and no action on the bankrupt's part is necessary. There need be no formal discontinuance, the proof itself discontinues the action. It is only when the claim is provable and has not been proved and the suit is to await bankruptcy proceedings that it is necessary to plead the bankruptcy. *Geikie v. Hewson*, 5 Scott N. R. 484. *Ex parte Flower*, De Gex, 503. *Ex parte Woolley*, 1 Rose, 394. *Ex parte Glover*, 1 Glyn & J. 270. *Woodward v. Meredith*, 8 Jur. 1136. *Bennett v. Goldthwait*, 109 Mass. 494.

The facts of the case at bar show a fraud under the bankrupt act, if not at common law, and a conspiracy to defraud the surety upon the bond, the present defendant. If the plaintiffs knew that Sumner had been requested to withdraw from the case when the conversation stated took place, it was a fraud on the law deliberately planned and executed, and a judgment collusively or fraudulently obtained may be impeached when drawn

in question as in this case. *Ex parte Foster*, 2 Story, 131, 160. *In re Bellows*, 3 Story, 428, 443. *Everett v. Stone*, 3 Story, 446, 454. It is open to the sureties on a bond to impeach the judgment on which the action against them is founded for fraud, illegality, or collusion. *Heard v. Lodge*, 20 Pick. 53, 58. *Tracy v. Goodwin*, 5 Allen, 412.

H. R. Cheney, for the plaintiffs, was stopped by the court.

GRAY, C. J. The defendant, in the original action, might have pleaded in bar his bankruptcy and the proof of the plaintiffs' claim against his estate; or might, at any time after the commencement of proceedings in bankruptcy, have applied to the court in which the action was pending for a stay of proceedings. U. S. St. 1867, c. 176, § 21. *Bennett v. Goldthwait*, 109 Mass. 494. *Bradford v. Rice*, 102 Mass. 472. But not having done either, the judgment rendered against him was lawful and valid, and in the absence of fraud or collusion (of which the case affords no evidence) was conclusive both against him and against the surety on his bond to dissolve the attachment. *Tracy v. Maloney*, 105 Mass. 90. The injunction granted by the District Court of the United States, if it ever had any validity, was dissolved before the bringing of the present action. The result is that there must be

Judgment for the plaintiffs.

ALEXANDER H. WOOD & another vs. WILLIAM BOGLE.

Suffolk. March 4. — 9, 1874. WELLS & ENDICOTT, JJ., absent.

Under a lease in which the lessee covenants to pay "all taxes assessed during the term" upon a portion of the demised premises, the lessee is not entitled to a proportionate return of taxes paid by him to the lessor, although the building is, after such payment, destroyed by fire during the year for which the taxes are assessed, and the lease is thereby terminated.

CONTRACT for money had and received. The case came before this court on an appeal by the defendant from a judgment of the Superior Court for the plaintiffs upon the following agreed facts:

"The plaintiffs held a lease from the defendant of a store in the building No. 202 Washington Street, in Boston, which con-

tained the following clauses, viz.: 'To hold for the term of two years from the first day of January, 1872, yielding and paying therefor the rent of three thousand and five hundred dollars per annum, commencing on the seventeenth day of February, 1872. And the said lessees do promise to pay the said rent in monthly payments of two hundred and ninety-one and $\frac{9}{100}$ dollars, cash, always in advance, and all taxes assessed during the term upon all the buildings and premises, No. 202 Washington Street, of which the premises hereby leased are a part, and to quit and deliver up the premises to the lessor or his attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are, or may be put into by the said lessor, and to pay the rent, as above stated, during the term, and also the rent, as above stated, for such further time as the lessees may hold the same, and not make or suffer any waste thereof; and that the lessor may enter to view and make improvements, and to expel the lessee if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. And provided, also, that in case the premises or any part thereof shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then and in such case, the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by said lessor: or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives upon his giving the lessees or their legal representatives ten days' notice in writing of his said election.'

"The plaintiffs conformed to all the terms of the lease, and November 1, 1872, paid the defendant \$935.16, being \$291.66 for one month's rent in advance, and \$643.50 for the taxes assessed May 1, 1872. November 9, 1872, store 202 Washington Street, Boston, including the leased premises, was totally destroyed by fire, and the lease terminated. The plaintiffs bring this action in contract to recover \$194.44 for rent paid in advance for that portion of the month of November after the premises

were destroyed by fire, and \$303.75 for taxes paid under the lease for that portion of the year after the premises were so destroyed, viz. from November 9, 1872, to May 1, 1873. The defendant has since suit brought, paid to the plaintiffs the above sum of \$194.44 claimed on account of rent paid, but without prejudice to either party as to whether the sum of \$303.75 claimed on account of taxes paid can be recovered."

S. J. Thomas, for the plaintiffs.

H. G. Parker, for the defendant.

GRAY, C. J. The whole tax for the year upon any parcel of real estate is assessed and payable as of the first day of May. It may be assessed either to the owner or to the tenant, and if assessed to and paid by the tenant, he may recover the amount thereof from his landlord, unless there is an agreement to the contrary. Gen. Sts. c. 11, §§ 8, 9. In the present case, the lease contained an express covenant by the tenants to pay all taxes assessed during the term, and no provision for the apportionment of taxes in any event. The entire tax assessed upon the estate on the first day of May, 1872, while the lease was in force, was therefore rightly paid by the tenants, and the subsequent termination of the lease gave them no cause of action for any part thereof against their landlord. *Wilkinson v. Libbey*, 1 Allen, 375.

Judgment for the defendant.

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GEORGE FERA vs. ABBA C. CHILD.

Suffolk. March 4. — 9, 1874. WELLS & ENDICOTT, JJ., absent.

Where a lease of a part of a building provides that "all merchandise, furniture and property of any kind which may be on the premises during the continuance of this lease is to be at the sole risk and hazard of the lessee, and that if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner, no part of said loss or damage is to be charged to, or be borne by, the lessors, in any case whatever," the lessor is not liable for damage done to the lessee's goods by the bursting of a water pipe in a part of the building not let to him.

TORT to recover damages done to the goods and property of the plaintiff by the bursting of a water pipe. The case was heard

in the Superior Court, trial by jury being waived, by *Lord, J.*, who after judgment for the plaintiff allowed a bill of exceptions in substance as follows :

“ The defendant was the owner of a building in which the accident occurred. She leased the store on the first floor and the cellar of this building to George W. Vinton, by indenture dated April 9, 1866, for a term of ten years, and by indenture of the same date she leased all of said building over said store for a like term of years to William Cumston. The Vinton lease was assigned to the plaintiff in 1868, with the assent of the defendant, and the plaintiff has since occupied the leased premises thereunder. In 1869, an under-tenant of a part of the premises under the Cumston lease put in a water-closet in the entry on the second floor of the building, (being the first floor of the part under the Cumston lease,) and ran the supply pipe from this closet into the plaintiff's premises, and there entered it into a supply pipe running through the plaintiff's premises up through this entry to another water-closet in the entry in the third story of the building. It did not appear when or by whom this latter water-closet was put in. The only faucet to turn off the water from the supply pipe in question was in the plaintiff's cellar. The pipe leading from the cellar to the water-closet in the second story was not the same that supplied the premises occupied by the plaintiff. The water had been shut off in the cellar from the latter. The plaintiff testified that the pipe in the entry above was left all open. Between Saturday evening, November 30, 1872, and the following Monday morning, the supply pipe leading to this water-closet in the entry on the second floor, put in in 1869, as aforesaid, burst in the entry at or near the door leading into the closet and caused the damage complained of. The only evidence in regard to this pipe came from the plumber who put it in for the tenant as aforesaid, who testified that it was a good pipe of the size and thickness of those usually put in in Boston, and that it was boxed in. One of the plaintiff's witnesses testified that it was not boxed in, as the box had been opened for repairs. The bursting of this pipe was caused by freezing, and the only evidence in regard to this was that on said Saturday evening the thermometer stood nineteen degrees above zero ; Sunday, at noon, twenty-one degrees above, and that after that it was higher.

“ There was no evidence that the defendant had any knowledge in regard to this water-closet and fixtures. Cumston underlet the premises under his lease to one Shaler, whose sub-tenant put in the water-closet in 1869 as aforesaid. In November, 1872, Cumston's estate assigned his lease to one Morse, and it was agreed for the purposes of the trial that it was to be treated as an assignment to the defendant. There was a conflict of testimony as to whether, after this assignment, the room on the second floor opening from the entry where this water-closet was and this pipe burst, had been given up to and accepted by the defendant before the accident.

“ The court ruled that as the place where the pipe burst was not within the premises held by the plaintiff under the Vinton lease as aforesaid, the provisions in that lease that the property on the leased premises should be at the risk of the lessee, and that no part of the loss or damage to it from the causes stated should be a charge to the lessor as therein particularly set forth, did not apply to damage caused by such bursting ; that it was immaterial whether the room aforesaid was or was not surrendered, as where there were water-closets in the entries of a building let to different tenants, and in this case to tenants other than and not including the plaintiff, there was an implied agreement on the part of the owner of the building that such water-closets and fixtures should be suitable and proper and should be kept suitably and properly protected from the weather. The court found upon the evidence aforesaid that the supply pipe was either not a proper one or was not properly protected, (otherwise it would not have frozen up and burst,) and held in pursuance with the aforesaid rulings that the defendant as the owner of said building was liable for the damage occasioned by such bursting. The defendant excepted to the foregoing rulings.”

The material provisions in the lease are stated in the opinion of the court.

D. Thaxter, for the defendant.

S. J. Thomas, for the plaintiff. The lessee had not only no control over the fixtures in other parts of the building, but no access to them and no right to meddle with them. It could not have been in contemplation by the parties that he should see to the repair of such other fixtures or to their proper management

It was agreed that the assignment by Cumston of his lease to Morse was an assignment to the defendant. The assignment was prior to the injury complained of. The judge has found, as facts, that the water-closet was not a part of the premises let to the tenants, or any of them, but remained in the control of the defendant, the owner; and that the pipe burst, either from a defect in it or from want of proper protection. Whether the rooms leased to Cumston were occupied by the defendant or by a tenant of hers, was in dispute. The judge ruled this was immaterial, because, from the situation of the water-closet, separate from the rooms, and in that part of the building which she did not let, but over which she retained the control, it was her duty to see to it. Having found these facts, he ruled, as law, that the liability of the defendant followed, whether the bursting was in consequence of an original defect in the pipe, or from want of proper care of it. And this, it is submitted, was also right.

MORTON, J. This is an action to recover damages for an injury to the goods of the plaintiff in the store leased by him of the defendant, caused by the bursting of the water pipes in a part of the building not included in the lease. The plaintiff's lease contains the following provision: "And it is also hereby understood and expressly agreed by the parties to this indenture, that all merchandise, furniture and property of every kind, which may be on the premises during the continuance of this lease, is to be at the sole risk and hazard of the lessee, and that if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner, no part of said loss or damage is to be charged to, or be borne by, the lessors in any case whatever." The learned judge who presided at the trial ruled, that as the place where the pipe burst was not within the premises held by the plaintiff under his lease, the provision above quoted did not apply to damage caused by such bursting.

We are of opinion that this ruling was erroneous. The language of the provision is very broad, and by its natural import throws upon the lessee the risk of loss or damage to his property in the store, caused by the leakage or bursting of water pipes in any part of the building.

The clause immediately following this provides that the lessee shall "keep whole and in good condition, all the window and other glass on the premises, and also the pipes, faucets and water fixtures;" and a prior clause provides that the lessee shall "save the lessors and their representatives harmless from all loss or damage occasioned by the use, misuse or abuse of the Cochituate water or bursting of the pipes."

The two clauses last mentioned clearly refer to the water pipes and fixtures in the premises leased to the plaintiff, and sufficiently protect the lessor from any risk of damage by the bursting of such pipes. If the purpose of the provision we are considering was merely to exempt the lessor from liability for damage caused by the leakage or bursting of water pipes within the leased premises, it is entirely superfluous and useless.

These considerations lead to the conclusion that it was the intention of the parties to this lease, to exempt the lessor from liability for any loss or damage to the plaintiff's property, which might be caused by the use or abuse of the Cochituate water, or by the leakage or bursting of the water pipes in any part of the building. The defendant contends that she would not be liable to the plaintiff if there had been no special agreement exempting her, but the view we have taken renders it unnecessary to consider this question.

Exceptions sustained.

DAVID MOULTON & another *vs.* ALBERT BOWKER.

Suffolk. March 4, 5. — 9, 1874. WELLS & ENDICOTT, JJ., absent.

An attorney at law has authority, by virtue of his employment as such, to release before judgment an attachment of real estate.

Where in an action brought by a writ of entry it appeared that the demandant claimed title through a sale on execution of premises which had been attached on mesne process in a suit against W., and that the tenant claimed through a conveyance made by W., after the attachment had been dissolved by the attorney of the plaintiff without his knowledge or consent in the suit against W. *Held*, that the tenant, in the absence of fraud on his part, was entitled to judgment.

WRIT OF ENTRY, dated December 17, 1872, to recover the undivided half of certain premises situated in East Boston. Plea, the general issue, which was joined. At the trial in the Superior

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Court, before *Lord, J.*, the jury were directed to find a verdict for the tenant, and the following facts were reported for the determination of this court:

"On September 5, 1870, the demandants commenced an action in the Superior Court against William D. A. Whitman, in which action all the real estate of Whitman in Suffolk County was attached on mesne process on the day aforesaid. Judgment was recovered in said action against Whitman, April 2, 1872, upon which judgment execution issued, by virtue of which the demanded premises (which were subject to a mortgage) were taken and sold at public auction by a deputy sheriff on May 18, 1872, these demandants becoming the purchasers. A deed of said premises in due form was executed by said deputy sheriff and delivered to the demandants, which deed was duly recorded. No question was raised as to the legality or validity of the above proceedings. The demandants thereupon rested their case.

"The tenant offered in evidence a certified copy of a paper from the office of the clerk of the Supreme Judicial Court for Suffolk, purporting to bear date August 11, 1871, and to be signed by George W. Searle, who was shown to have been at that time the attorney of record of the demandants in their aforesaid suit against Whitman.* The demandants objected to the admission of said copy on the ground that it was immaterial, and that it did not appear that Searle had sufficient or any authority to execute such instrument or to discharge said attachment, but the objection was overruled and the paper admitted. The tenant then offered in evidence a certified copy of a memorandum from the record of this attachment in the attachment book in the office of the clerk of the Supreme Judicial Court, which was admitted under the same objection.† The tenant also put in evidence a deed of the demanded premises from Whitman to Joseph F. Wilson, dated

* DAVID MOULTON *et al.* vs. WM. D. A. WHITMAN.

Writ dated 5 Sept. 1870, returnable to Superior Court, Suffolk, Oct. term, 1870.

The attachment in this action of real estate in Suffolk Co. is hereby discharged. This discharge in no way to affect attachment in Middlesex Co.

11 Aug. 1871.

GEO. W. SEARLE, *Pltf's Att'y.*

† 1871, Aug. 11. Attachment of real estate in Suffolk County discharged by order of pltf's att'y on file.

Attest:

GEO. W. NICHOLS, *Ass't Clerk.*

December 17, 1870, and a deed of the same premises from said Wilson to the tenant, dated August 31, 1871.

"The demandants then offered to prove that Searle in discharging or attempting to discharge said attachment acted without any authority from them, without their knowledge and in fraud of their rights. The demandant Moulton was called and testified that he directed his attorney, the said Searle, to cause the real estate of said Whitman to be attached in the aforesaid suit, that he never authorized the discharge of said attachment, that said Searle never consulted or communicated with him in relation thereto, and that he had no knowledge of said attempted discharge until some time after it was made, and after said Searle had ceased to be his attorney in said suit. The other demandant, Thompson, was called, and the tenant admitted that he would testify to the same facts. The foregoing testimony of the demandants was objected to, but was admitted *de bene esse*.

"It is agreed between the parties that the only legal question raised or ruled upon was whether an attorney of record can discharge an attachment under the circumstances above testified to by Moulton, so that a subsequent purchaser without fraud on his part would take a good title. The presiding judge ruled that such discharge by the attorney of record would enable the defendant in the original action to give a valid title to the tenant, who it was agreed was cognizant of no fraud."

R. M. Morse, Jr., & A. E. Pillsbury, for the demandants. An attorney is not *dominus litis*. He has no power to give up the security of his client without payment or express authority. *Terhune v. Colton*, 2 Stockt. Ch. 21. *Tankersley v. Anderson*, 4 Desaus. 45. Nor to release sureties upon the claim of his client. *Savings Inst. v. Chinn*, 7 Bush, (Ky.) 539. *Givens v. Briscoe*, 3 J. J. Marsh. 529, 532. *Union Bank v. Govan*, 10 Sm. & M. 338. Nor to discharge a lien created by levy of execution. *Banks v. Evans*, 10 Sm. & M. 35. *Benedict v. Smith*, 10 Paige, 126. Nor to release a lien obtained by judgment, or to discharge any security resulting from his prosecution of the claim. And an honest belief that he is acting in his client's interest cannot supply the defect of authority to make such an arrangement. *Wilson v. Jennings*, 3 Ohio St. 528. He may control the manner of conducting a cause, but cannot waive any substantial acquired right of his client.

Howe v. Lawrence, 2 Zab. 99. He may not release a third person for the purpose of making him a competent witness. *Shores v. Caswell*, 13 Met. 413. *Succession of Weigel*, 18 La. An. 49. *Marshall v. Nagel*, 1 Bailey, 308. Nor discharge an indorser upon a note committed to him for collection without satisfaction or the express consent of his client. *East River Bank v. Kennedy*, 9 Bosw. 543. *Bowne v. Hyde*, 6 Barb. 392. *Kellogg v. Gilbert*, 10 Johns. 220. *Simonton v. Barrell*, 21 Wend. 362. *York Bank v. Appleton*, 17 Me. 55. *Varnum v. Bellamy*, 4 McLean, 87. Nor sell or assign a judgment of his client. *Maxwell v. Owen*, 7 Coldw. (Tenn.) 630. *Baldwin v. Merrill*, 8 Humph. 132. *Campbell's Appeal*, 29 Penn. St. 401. *Rowland v. Slate*, 58 Ib. 196. Nor discharge a judgment or execution except upon payment in full. Per Coke, C. J. 1 Rol. R. 366. *Beers v. Hendrickson*, 45 N. Y. 665. *Lewis v. Woodruff*, 15 How. Pr. 539, and cases cited. *Wilson v. Wadleigh*, 36 Me. 496, and cases cited. *Harrow v. Farrow*, 7 B. Mon. 126. *Chambers v. Miller*, 7 Watts, 63. Nor receive any other thing than lawful money in payment of his client's claim. *Stackhouse v. O'Hara*, 14 Penn. St. 88. *Harper v. Harvey*, 4 W. Va. 539, following *Smock v. Dade*, 5 Rand. 639. *Jeter v. Haviland*, 24 Ga. 252. *Miller v. Edmonston*, 8 Blackf. 291. *Jones v. Ransom*, 3 Ind. 327. *Trumbull v. Nicholson*, 27 Ill. 149, and cases cited. *Lawson v. Bettison*, 7 Eng. 401. *Kent v. Ricards*, 3 Md. Ch. 392. *Walker v. Scott*, 8 Eng. 644. *Bailey v. Bagley*, 19 La. An. 172. *Wright v. Daily*, 26 Tex. 730. *West v. Ball*, 12 Ala. 340. *Clark v. Kingsland*, 1 Sm. & M. 248. Nor indorse a note left with him for collection. *Child v. Eureka Powder Works*, 44 N. H. 354. Nor compromise a suit. By the Master of the Rolls in *Swinfen v. Swinfen*, 27 L. J. (Ch.) 35, affirmed by the Lords Justices, 2 De G. & J. 381. *Marshall, C. J.*, in *Holker v. Parker*, 7 Cranch, 436. *Stokely v. Robinson*, 34 Penn. St. 315. *Huston v. Mitchell*, 14 S. & R. 307. *Dodds v. Dodds*, 9 Penn. St. 315. *Abbe v. Rood*, 6 McLean, 106. *Derwort v. Loomer*, 21 Conn. 245. *Keller v. Scott*, 2 Sm. & M. 81. Nor employ associate counsel, save in the absence of his client. *Briggs v. Georgia*, 10 Vt. 68. Nor waive the right of inquisition. *Hadden v. Clark*, 2 Grant, 107. Nor accept service of summons. *Masterson v. Le Claire*, 4 Minn. 163. Nor consent to a judgment against his client. *People v. Lanborn*, 1 Scam. 123. Nor

enter a *retraxit*. *Lambert v. Sanford*, 2 Blackf. 187. Nor make an agreement for suspension of proceedings upon a judgment. *Pendexter v. Vernon*, 9 Humph. 84. Nor discharge a trustee. *Quarles v. Porter*, 12 Misso. 76. Nor give an extension of time upon a debt due to his client. *Lockhart v. Wyatt*, 10 Ala. 231. Nor transfer to another the property in a note committed to him for collection. Nor bind his client by an agreement to refund money overpaid. *Ireland v. Todd*, 36 Me. 149.

J. L. Thorndike, for the tenant.

GRAY, C. J. An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action; and we can have no doubt that this includes the power to release an attachment, at least before judgment, which is all that this case requires us to consider. *Lewis v. Sumner*, 13 Met. 269. *Shores v. Caswell*, Ib. 413. *Wieland v. White*, 109 Mass. 392. *Jenney v. Delesdernier*, 20 Maine, 183. *Rice v. Wilkins*, 21 Maine, 558. *Pierce v. Strickland*, 2 Story, 292. *Levi v. Abbott*, 4 Exch. 588.

The act of the demandants' attorney was therefore within his professional authority, and bound his clients, and if it was fraudulent, their remedy must be sought against him, it being agreed that the other party was not cognizant of any fraud.

Judgment on the verdict for the tenant.

FREDERICK SPOOR vs. WILLIAM TYZZER.

Suffolk. March 10, 1874. COLT & ENDICOTT, JJ., absent.

When a case is referred to arbitration to determine the boundary line between two estates, and an award is made accordingly, it is competent to show that the referee has made a mistake on his own theory; but it is not competent to show that he has erred in judgment, or that he has made a mistake in his decision as to the true starting point.

TORT for breaking and entering the plaintiff's close in Chelsea. When the cause came on for trial, by direction of the presiding

judge it was referred to William H. Whitney, a civil engineer and surveyor, under the following rule: "And now the parties appear and agree to refer this action to the determination of William H. Whitney, who is also to act as surveyor, to survey the premises, establish the line between the parties, and make report thereof to the court; judgment thereon to be final, and execution to issue accordingly." The deeds under which both parties claimed were from the Winnisimmet Company; the plaintiff's deed having the boundary at which the description commenced, a point thirty-two feet northeasterly from Beacon Street, and running northeasterly on Winnisimmet Street sixteen and a half feet; then turning at a right angle and running northwesterly to Pembroke Street, one hundred and twenty feet. The premises claimed by the defendant were next adjoining the plaintiff's, northeasterly.

The referee made a report in which he found that the plaintiff was not entitled to recover damages in the action. He also reported that he had surveyed the premises, and established the line between the parties, and found that the defendant was entitled to judgment. To this report the plaintiff filed the following objections: 1. Because the line established by the report is not in accordance with the lines and measurements in the deeds under which the parties hold their respective premises. 2. Because the line established by said report is not at a right angle with the line of Winnisimmet Street, as is required in the deeds of both plaintiff and defendant. 3. Because the monument from which the referee measured, near the corner of Winnisimmet and Beacon Streets, is not the point of beginning in the deeds of both the plaintiff and defendant, but a monument established by the City of Chelsea, long after those deeds were given, and in a different place from such corner mentioned in said deeds. 4. Because the referee has made a mistake in the measurements and distances as stated in the report, and the plan annexed thereto. 5. Because the referee has exceeded his authority in awarding that the defendant is entitled to judgment.

At the hearing in the Superior Court, before *Lord, J.*, on a motion to accept the award, the plaintiff offered in evidence the affidavits of two surveyors, to sustain his objections. The presiding judge ruled that it was competent to show that the referee

had made a mistake upon his own theory ; but that it was not competent to show that he had erred in judgment, or that he had made a mistake in his decision as to where the true starting point was ; and accepted the award. The plaintiff excepted to this ruling.

N. B. Bryant, for the plaintiff.

A. Hemenway, for the defendant, was not called upon.

BY THE COURT. The only question brought up by these exceptions is the correctness of the ruling below ; and that ruling was in exact accordance with repeated decisions of this court, the principal of which are cited in *Carter v. Carter*, 109 Mass. 306, 309.

Exceptions overruled.

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157 336

CYRUS E. HEWES *vs.* JAMES COOPER & others.

Suffolk. March 5. — 11, 1874. WELLS & ENDICOTT, JJ., absent.

The substitution by a clerical error of the creditor's name in the condition of a bond to dissolve an attachment, in the place intended for that of the original debtor, as the person to pay the judgment, does not invalidate the bond, if the intent can be distinctly ascertained from the entire instrument.

An omission to state, in the recital of a bond to dissolve an attachment, whose goods and estate are attached, will not defeat the creditor's remedy on the bond, if the bond describes correctly the suit to which the bond applies.

CONTRACT against James Cooper, George K. Babcock, Edward M. Chase, and Samuel F. Ricker, the principals and sureties on a bond alleged to have been signed and sealed by them, as follows :

“ Know all men by these presents, that we, Edward M. Chase and Samuel F. Ricker, both of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, as principals, and James Cooper and George K. Babcock, as sureties, are holden and stand firmly bound and obliged unto Cyrus E. Hewes, in the full and just sum of one hundred dollars to be paid unto the said Cyrus E. Hewes, his executors, administrators, or assigns : to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated twenty-seventh day of March, in the year of our Lord one thousand eight hundred and seventy-one.

"The condition of this obligation is such, that whereas the said Cyrus E. Hewes of Boston, said county and Commonwealth, has caused the goods and estate to the value of one hundred dollars, to be attached on mesne process, in a civil action, by virtue of a writ, bearing date March 23d, A. D. 1871, and returnable to the municipal court for civil business, next to be holden at Boston, within and for the county of Suffolk, on the first day of April next; in which said writ the said Cyrus E. Hewes is the plaintiff; and the said Edward M. Chase and Samuel F. Ricker defendants; and whereas the said defendants wish to dissolve the said attachment, according to the provisions of the general statutes, in such cases made and provided.

"Now therefore, if the above bounden Cyrus E. Hewes shall pay to the plaintiff in said action the amount, if any, which he shall recover therein, within thirty days after the final judgment in said action, then the above written obligation shall be null and void; otherwise, to remain in full force and virtue."

At the trial in the Superior Court, before Lord, J., the plaintiff offered the record of the suit, *Hewes v. Chase & another*, and the execution and officer's return thereon, and the said bond, which was drawn and witnessed by the constable who served the process, who testified to its execution. The presiding justice ruled that the plaintiff could not, on that paper, maintain his action. The plaintiff desired to go to the jury upon the question how the bond read, but the presiding judge refused to allow him to present that question to the jury, and ordered a verdict for the defendants, and the plaintiff excepted to the above rulings.

D. F. Fitz, for the plaintiff.

I. H. Wright, for the defendants.

AMES, J. The insertion of the creditor's name in the condition of the bond, in the place intended for that of the original debtor, thereby requiring literally that the creditor should pay to himself the amount of a judgment which he should recover against the other party in the suit, was a manifest clerical error, which will not vitiate the bond or defeat the intention of the parties, provided that intent can be distinctly ascertained from the entire instrument. The erroneous name may be stricken out. *Leonard v. Speidel*, 104 Mass. 356.

An imperfect recital of the preliminary facts, which is correct

as far as it goes, provided it describes correctly the suit to which the bond applies, and states with substantial accuracy the condition which is to be fulfilled, will not defeat the creditor's remedy in a suit on the bond. For this reason the omission in the bond to designate the ownership of the attached property is immaterial. The bond is substantially in conformity to the provisions of the statute.

Exceptions sustained.

WILLIAM LOWE & another vs. JULIA PIMENTAL.

Suffolk. March 10. — 11, 1874. COLT & ENDICOTT, JJ., absent.

Contract upon an account annexed will lie for labor at a rate agreed by the day, and for materials furnished at reasonable prices.

Where the plaintiff sues upon an account annexed for work done and materials furnished, and the defendant contends that there was a special contract for a round sum, and the judge rules that if the jury find a special contract, the plaintiff is not entitled to recover on his declaration, evidence of the breach of the special contract, and of the value of the work, if such contract had been completed, is immaterial.

An auditor appointed to hear the parties, examine their vouchers and evidence, state the accounts between them, and make report thereof to the court, is authorized to consider and determine whether or not work was done and materials furnished under a special contract; and his report is *prima facie* evidence of all the matters submitted to him.

When the plaintiff has put in an auditor's report in his favor and rested his case, it is within the discretion of the presiding judge, and not a subject of exception, to allow the plaintiff to put in additional testimony in support of it, at the close of the defendant's evidence.

CONTRACT upon an account annexed for work done and material furnished, in repairing and fitting up certain buildings of the defendant.

Trial in the Superior Court before *Devens, J.*, who after verdict for the plaintiffs allowed a bill of exceptions in substance as follows:

"It appeared by the testimony, that there was a conflict between the plaintiffs and the defendant as to the terms of the agreement under which the work was done. The plaintiffs contended that they performed the work and furnished the materials under an agreement that they were to receive four dollars per day for the labor of themselves and their men, and were to fur-

wish the materials at reasonable prices. The defendant claimed that the work was done and materials furnished under a special contract that the plaintiffs were to put the premises in complete condition for occupancy for the sum of twenty-five hundred dollars. The case was sent to an auditor, who found that the contract was as stated by the plaintiffs. The testimony also tended to show that the plaintiffs had left the work unfinished without the consent of the defendant, there being a dispute between them as to the terms of the contract. Thereupon the defendant claimed that the plaintiffs had no declaration upon which they could proceed to the trial of their case ; but this point was overruled. The defendant objected to the admission of the auditor's report in evidence, on the ground that it undertook, without right or authority, to report upon and find as to whether there was a special contract as alleged by the defendant, and failing in that moved that it be recommitted to the auditor to strike out that part of the report. The court overruled the objections, and admitted the report. The plaintiffs read the same and rested their case. Thereupon the defendant moved for a nonsuit, which motion was denied. The defendant then went into evidence tending to prove the special contract as alleged, and offered to show its breach by non-completion against her will, and the value of the work when completed and entire, and what it cost her to complete it. The court ruled the first offer incompetent, upon the ground that if a special contract existed for a fixed sum, nothing could be recovered by the plaintiffs under the present declaration, and the question of amount of damages for breach of special contract by the plaintiffs would not arise ; and also the assessed value of the estate. These two last offers were ruled incompetent. At end of the defendant's testimony, the plaintiffs claimed to open and extend their affirmative case, the defendant contending that they should be limited to testimony in reply. The objection was overruled, and the plaintiffs put in their entire case to sustain the auditor's report.

" The defendant asked the court to give to the jury the following instructions: 1. The burden is upon the plaintiffs by fair preponderance of evidence to satisfy the jury on their declaration that there was no special contract for this work. 2. There is no ground for claim of pay or *quantum meruit* on the plaintiffs'

theory, as their claim is that it was a special contract for four dollars per day. 3. It is not competent for the legislative power to establish what is, or is not, *prima facie* evidence in regard to an auditor's report, and the jury are at liberty to give it as much or as little weight in the balance of the proofs as they shall think it merits, upon all the facts in evidence. 4. At the strongest, it is not *prima facie* evidence of anything beyond a mere statement of the accounts. 5. The report of the auditor is merely a piece of testimony, and in its bearing upon the whole case, such weight only is to be given to it as the jury may think it fairly entitled to. If they believe its conclusion is not in accordance with the preponderance of proved facts produced at the trial, they may entirely disregard it. 6. When the statute declares it *prima facie* evidence, &c., this means only that if standing alone on both sides, it would justify the jury in following its conclusions as the basis of a verdict; but it does not shift the general burden which remains with the plaintiffs.

"Upon these prayers for instructions, the court instructed the jury as follows: The plaintiffs make a claim against the defendant upon the ground that they have rendered labor and services to her in the repair of her houses, and furnished materials therefor; that this contract was made originally for the larger house, and was afterwards extended to the other house or houses, and that in pursuance of this contract they did the work and furnished the materials they had charged. The plaintiffs further claim that there was no special agreement as to price except that they did inform the defendant what they should charge for the labor of their workmen per day, which was assented to. The plaintiffs claim to be entitled to recover of the defendant what is reasonable under this contract for the labor and the materials they have furnished. The burden of proof is on the plaintiffs to show that the contract is what they claim; that they have under it done the work and furnished the materials for which they charge. The plaintiffs further claim to have furnished a plasterer and other workmen at request of the defendant, and paid them at her request and demand the sum so paid.

"The defendant denies that the contract is as claimed, and further claims that all that was done, was done under a special contract, by which the plaintiffs agreed to do all the repairs which

they did do, in fact, including the bills of other workmen as well as furnish the materials therefor, for the sum of \$2500. If it was so, the plaintiffs cannot recover, and a verdict must be for defendant ; first, because there is no declaration in any such contract ; second, because the plaintiffs abandoned the contract without completing it ; and causelessly so, if there was such a special contract.

“ If there was no special contract to complete all the repairs at a fixed price, and the contract was as claimed by plaintiffs, the plaintiffs would be justified in stopping further work if the defendant, without right, claimed that their work was being done on a special contract, and that she should so treat it. The burden of proof is on the plaintiffs, upon the whole evidence to show that the work was done under the contract as they claim it. The first inquiry is whether the plaintiffs show this.

“ The account of the plaintiffs has been to an auditor, and his report is *prima facie* evidence. It is the finding of a person supposed to be competent upon the issue submitted to him ; it is proper for the consideration of the jury ; but when the whole case is gone into on both sides, I deem it proper to say that it does not seem to me evidence of great weight.

“ If the plaintiffs fail to show the contract, as claimed by them, the defendant is entitled to a verdict. If the plaintiffs, by fair preponderance of evidence, have shown the contract to be as claimed by them, they are entitled to recover for such labor and materials as they show to have been furnished under it ; both that done by their own servants and that done by others whom they employed at the request of the defendant.

“ To show what this work was, the plaintiffs have the auditor's report, which is *prima facie* evidence ; but the remarks heretofore made apply to the auditor's report upon this part of the case. The plaintiffs further rely upon their own testimony as to the payment by them of certain bills ; the most important, a plasterer's bill, as they say, by request of the defendant. As to the value of the labor and materials, the plaintiffs rely upon their own testimony. They cannot recover for labor more than four dollars per day, which is the price, as they say, spoken of between the parties. As to the amount of the labor and materials, and the value, the plaintiffs further rely upon evidence from their

workmen who were there. On the part of the defendant, it is denied that any such amount of labor and materials was furnished or that it was of the value claimed. Upon this question the defendant has given her own evidence; has also produced evidence of other witnesses who have examined the work and materials, as to the amount of them, and as to the value of them. This evidence is to be considered by the jury in determining how much was the amount and value of the work and materials furnished."

The defendant excepted to the above rulings and refusals to rule.

T. Riley & G. W. Searle, for the defendant.

N. C. Berry, for the plaintiffs.

GRAY, C. J. 1. By the practice in this Commonwealth, whatever might have been recovered under the common counts at common law may be the subject of a count on an account annexed. The common counts included work and labor done, and goods sold, either for a fixed price, or for their reasonable worth or value. It was therefore rightly ruled that the plaintiffs, under their declaration, might recover for labor at a rate agreed by the day, and for materials furnished at reasonable prices. Gen. Sts. c. 129, §§ 2, 87. 1 Chit. Pl. (2d Am. ed.) 335, 337.

2. The presiding judge, having ruled that if the work was done and the materials furnished under a special contract the plaintiffs could not recover under their declaration, rightly rejected, as immaterial, evidence of the breach of such special contract, and of the value of the work if such contract had been completed.

3. The auditor's report was rightly submitted to the jury as *prima facie* evidence of all facts involved in his statement of the account between the parties, including the question whether there was a special contract between them. Gen. Sts. c. 121, § 46. *Locke v. Bennett*, 7 Cush. 445.

4. It is a common and convenient practice to permit the plaintiff to rest his case in the first instance after putting in the auditor's report, and to introduce additional testimony in support of it at the close of the defendant's evidence. The order of proof was in the discretion of the presiding judge, and not a subject of exception. *Brewer v. Housatonic Railroad*, 104 Mass. 593.

Exceptions overruled.

ELIZA J. SWEETLAND, vs. EMILY STETSON.

Suffolk. March 17. — 18, 1874. COLT & ENDICOTT, JJ., absent.

An action of tort for breaking and entering the plaintiff's close may be maintained, if the plaintiff is in possession, and neither party proves title to the close.

TORT for breaking and entering the plaintiff's close, and pulling up and removing a fence. The defendant claimed title in the land on which the fence stood, and at the trial in the Superior Court before *Putnam, J.*, trial by jury being waived, put in evidence certain deeds and oral testimony. The judge found as a fact that the plaintiff was in possession of the land on which the fence stood, and described in her writ, at the time of the alleged trespass, and that the defendant upon the whole evidence had failed to establish her title to the land in controversy, and gave judgment for the plaintiff. The defendant excepted.

N. C. Berry, for the defendant. 1. The finding of the judge of the court below that the plaintiff was in possession of the land on which the fence stood, and that the defendant upon the whole evidence had failed to establish her title to the land in controversy, shows that the court mistook the law. The burden was on the plaintiff to prove her title, not on the defendant to prove hers. 2. The deeds give as one of the boundaries the line of the land of another person. This is a monument, and must govern in preference to the length of the line running to this monument.

C. R. Train, for the plaintiff, was not called upon.

GRAY, C. J. This is an action between the owners of adjacent lots of land. Each has as much land as her deed calls for. The controversy is as to a strip one foot wide on which the fence between the two lots stands. To whom this belongs depends upon the application of the description in the deeds to the land. It is true that the boundary upon the land of a third person makes that land a monument, but where the monument is is a question of fact. The judge of the Superior Court has found as facts that the defendant proved no title to the strip in question, and that the plaintiff was in possession thereof. His finding was based partly on the testimony of witnesses, and depends upon their credibility. The bill of exceptions presents pure questions of

fact, on which the decision of the court below is final. No title in either party being proved, the plaintiff's possession is sufficient to maintain this action. *Exceptions overruled.*

NEW ENGLAND HOSPITAL FOR WOMEN AND CHILDREN *vs.*
WILLIAM SOHIER.

Suffolk. March 19, 1874. AMES & DEVENS, JJ., absent.

The notice of an executor's sale of a parcel of land running through from street to street, described the estate as late the residence of T. E., and named correctly the owners of the estates bounding it on either side, and the street on which it abutted on either end, but transposed the numbers on the respective streets, so that the estate was an impossible one if determined by the numbers. *Held*, that the misdescription by the numbers did not render the notice invalid.

BILL IN EQUITY for specific performance of an agreement to purchase real estate. The defendant admitted that he entered into an agreement in writing with the plaintiff for the purchase of the property; that the plaintiff tendered a deed in due form and at the time agreed, and that he refused to accept the deed, and justified the refusal on the ground that the plaintiff was not seised in fee simple; that part of the estate was sold to the plaintiff's grantor by the executor of Thomas Emmons, under a license from the probate court, and that the notice of the sale was defective. This notice was as follows: "Executor's sale of real estate by order of the Probate Court. To be sold at public auction, the land and buildings situated on Warren Street and Pleasant Street, in the city of Boston, late the residence of Thomas Emmons, deceased, being numbered 21 on said Warren Street, bounding northeasterly thereon, there measuring 39 feet 4½ inches, more or less, and number 6 Pleasant Street, bounding southwesterly thereon 40 feet 9½ inches, running through from street to street; being bounded southerly by land of Warren Street Chapel on three lines 122 feet 6½ inches; northerly and easterly by land of Charles Rollins, Charles H. Parker, and unknown persons, about 140 feet; whole premises containing 5057 square feet, more or less. Sale on premises, entering from Pleasant Street, on Wednesday, July 15 next, 4 o'clock, P. M."

It was agreed that the numbers on Warren and Pleasant Streets were so arranged that No. 21 Warren Street was on the northeasterly side of that street, and No. 6 Pleasant Street was on the southwesterly side of that street, and that the estate described in the petition of the executors and sold by them, extended from the southwesterly side of Warren Street to the northeasterly side of Pleasant Street.

The only defect relied upon in the above notice was that arising from the transposition of the numbers on said streets.

Hearing before *Endicott, J.*, who reserved the case for the decision of the full court.

S. E. Sewall & T. F. Currier, for the plaintiff, were stopped by the court.

F. C. Welch, for the defendant. The notice was inaccurate, because it transposed the numbers on said streets. *Wellman v. Lawrence*, 15 Mass. 326. *Hoard v. Hoard*, 41 Ala. 590. *Steinmetz v. Signer*, 23 Ind. 386. In a city the number of an estate on a street is relied upon in preference to the description. No one carries in his mind the points of the compass as to the situation of estates in relation to streets, or any other given boundary. The notice was further calculated to mislead because it read "Sale on premises entering from Pleasant Street;" that is from 6 Pleasant Street. The boundary by land of Warren Street Chapel, mentioned in the notice, does not cure the defect, for no one would suspect from the appearance of the building that it was used as a chapel.

GRAY, C. J. The notice identifies the premises to be sold so clearly that no one disposed to bid at the sale would have any difficulty in ascertaining what estate was meant. It describes the estate as "late the residence of Thomas Emmons," and truly names the owners of estates bounding it on either side, and the streets on which it abuts at either end. The further description by numbers which designate estates on the opposite side of each street, being an impossible description, *falsa demonstratio*, does not render the notice invalid.

Decree for the plaintiffs.

PETER ZIMMER vs. JACOB SCHLEEHAUF.

Suffolk. March 12. — 23, 1874. COLT & ENDICOTT, JJ., absent.

In an action of tort to recover damages for slander and malicious prosecution, if the defendant after verdict against him and before judgment is adjudicated a bankrupt under the U. S. St. 1867, c. 176, such a claim is not provable against his estate, under § 19 of said act, and he is not entitled to a continuance of the action to await the proceedings in bankruptcy, but the plaintiff is entitled to judgment.

TORT to recover damages for slander and malicious prosecution of the plaintiff. After verdict and before judgment the defendant filed his petition in the District Court of the United States for the district of Massachusetts, for proceedings in bankruptcy upon his estate, and was duly adjudicated a bankrupt under the bankrupt law of the United States. These proceedings having intervened between verdict and judgment, the defendant moved for a continuance of this action to await the proceedings in the Bankrupt Court, and the plaintiff moved for judgment.

At the hearing in the Superior Court, *Lord, J.*, overruled the motion of the defendant and allowed the motion of the plaintiff, and ordered judgment to be entered on the verdict, to which order the defendant excepted.

B. E. Perry & S. W. Creech, Jr., for the defendant. It is admitted that the claim is not a "debt" until judgment; but it is contended that it is a "liability" within the meaning of the fourth clause of § 19 of the bankrupt act, which is as follows: "In all cases of contingent debts, and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend."

A. Russ & T. H. Tyndale, for the plaintiff.

GRAY, C. J. The bankrupt act of 1867, c. 176, § 19, declares that no debts, other than those therein specified, shall be proved against the bankrupt's estate. The plaintiff's claim does not come within either of the specified classes. It is conceded that it was not "a debt existing at the time of the adjudication of bankruptcy," because a claim for damages in an action of tort

does not become a debt by verdict before judgment. It was not a demand for or on account of goods taken or withheld, nor a liability upon any contract. The only "contingent debts and contingent liabilities" allowed to be proved are those "contracted by the bankrupt." The plaintiff's cause of action did not arise out of any contract, or any injury to property, but out of a personal tort. It was therefore not provable under the bankrupt act, and the provision of § 21 for a stay of proceedings has no application.

Exceptions overruled.

CHARLES W. SEABURY vs. METROPOLITAN RAILROAD COMPANY.

Suffolk. March 24. — 26, 1874. AMES & DEVENS, JJ., absent.

The allegation in a bill in equity that land is held subject to a restriction against building, and that adjoining land is believed to be held under a like restriction, without showing such a relation between the owners of the two parcels as would enable the one to enforce such restriction against the other, discloses no ground for relief.

BILL IN EQUITY for an injunction, alleging that the plaintiff was and had for a long time been the owner and occupant of a certain parcel of land situated on the southerly side of Marlborough Street, and between Gloucester and Fairfield Streets, in Boston, and also of the building standing on said parcel of land, used by the plaintiff as a dwelling and residence for himself and his family; that among the terms, conditions and restrictions of the sale and grant of said parcel of land unto the plaintiff was the condition and restriction that it and the buildings thereon or to be erected thereon should be used only for the purposes of a residence and dwelling, and that no stable other than a private stable should be erected thereon, and that no offensive or improper use should be made of the same; said conditions and restrictions as the plaintiff avers and believes being made for the benefit, comfort and convenience of those occupying said parcel of land and premises in the vicinity thereof; that the plaintiff is informed and believes that like conditions and restrictions were imposed upon each and every of the present purchasers and owners of land upon said Marlborough Street, which is a street of

great width and beauty, and in every way desirable for private residences ; that the Metropolitan Railroad Company has purchased, or in some manner become possessed of a large parcel of land upon said Marlborough Street and adjacent to the plaintiff's said parcel of land ; and upon said parcel of land, purchased or otherwise obtained as aforesaid, said corporation has erected a large stable, which said corporation uses and occupies for keeping a great number of horses and carriages and other property ; that the plaintiff avers and believes that said corporation holds said parcel of land subject to the restrictions and conditions imposed as aforesaid upon the plaintiff and others ; that the plaintiff avers that said corporation erected or caused to be erected said stable, and has used and occupied, and does now use and occupy said stable, for keeping a great number of horses and carriages, without having obtained authority therefor from the mayor and aldermen of the city of Boston ; and that the erection, use and occupation of said stable as aforesaid has diminished the value of property on said street, and especially the premises of the plaintiff, and the noise and ill odor proceeding from said stable, in consequence of its use and occupation as aforesaid, is greatly detrimental to the health and comfort of the occupants of houses in the neighborhood, and especially to the health and comfort of the plaintiff.

The prayer was for a writ of injunction, enjoining and restraining the defendant from in any manner using or occupying said stable hereafter for the keeping of horses or carriages as aforesaid, and commanding and enjoining said defendant to remove said stable so erected, used and occupied as aforesaid, from said parcel of land on Marlborough Street ; and for such other and further relief in the premises as the circumstances of the case required.

The defendant demurred to all of the bill except that part thereof which is in the following words : "and the noise and ill odor proceeding from said stable, in consequence of its use and occupation as aforesaid, is greatly detrimental to the health and comfort of the occupants of houses in the neighborhood, and especially to the health and comfort of the plaintiff," on the ground that the plaintiff had not in his bill stated such a case as entitled him to relief in equity ; and to the part of the bill not demurred to the defendant filed an answer.

The case was reserved by *Devens*, J., upon the bill and demurrer for the consideration of the full court.

E. O. Shepard, for the defendant. It is not alleged that the conditions and restrictions under which the defendant holds its land were made for the benefit of the plaintiff, or for the benefit of the parcel of land he holds; nor is it alleged that the plaintiff and defendant derive title from or hold under a common grantor. The conditions are like conditions, and the plaintiff believes his were imposed for the benefit of his parcel "and premises in the vicinity thereof;" but what premises in the vicinity thereof, and whether he includes therein the defendant's land, is not stated; neither is it stated that the conditions annexed to the defendant's land were imposed by anybody under such circumstances that the plaintiff has acquired any equitable right to have them enforced. *Jewell v. Lee*, 14 Allen, 145.

P. A. Collins, for the plaintiff. The defendant corporation is without right, and in violation of the terms and restrictions of its deed, which terms and restrictions are for the common benefit of owners of land upon said Marlborough Street, injuring the property of the complainant. *Whitney v. Union Railway Co.* 11 Gray, 359. *Parker v. Nightingale*, 6 Allen, 341. *Schwoerer v. Boylston Market Association*, 99 Mass. 285. *Linzee v. Mixer*, 101 Mass. 512.

BY THE COURT. The bill does not show such a relation between the plaintiff and the defendant, as to entitle him to enforce the alleged restrictions. As the bill may be amended by leave of a single justice in this and other respects, no further opinion is given on its sufficiency.

Demurrer sustained.

BENJAMIN F. BROWN vs. HENRY D. GILMAN.

SUPERIOR COURT, March 28, 1874. AMES & DEVENS, JJ., absent.

By the ~~22nd~~ rule of this court a petition to prove exceptions under the Gen. Sts. c. 115, § 11, must be filed in this court within twenty days after the party seeking to establish the truth of his exceptions has had notice of the refusal of the judge to allow them.

Where a verdict was rendered for the plaintiff at September term, 1872, exceptions filed by defendant in due season at that term, time extended for filing amended exceptions, judgment on the verdict September term, 1873, of which the defendant had notice, and the court adjourned without day October 10, 1873, without any further order being made in the case, the exceptions disallowed February 14, 1874, and the petition to prove the exceptions filed in this court February 25, 1874. *Held*, that the twenty days began to run at least from October 10, 1873, and that the petition was filed too late.

PETITION to prove exceptions under the Gen. Sts. c. 115, § 11. The petitioner was the defendant in the case of *Gilman v. Brown*, tried in the Superior Court, Norfolk County, at September term, 1872, before Lord, J. The docket entries showed that a verdict was entered for the plaintiff September 25, 1872, that the defendant filed exceptions September 28, that the court adjourned without day October 2, and that during the term the following entry was made: "Time extended for filing amended exceptions;" that at September term, 1873, of said court, judgment was ordered on the verdict, and that the court adjourned without day October 10. The following was indorsed on the bill of exceptions: "Disallowed, Otis P. Lord. This entry is made February 14, 1874." "Filed February 21, 1874." The petition to prove the exceptions was filed in this court February 25, 1874, and it was admitted that the petitioner had complied with the formal requirements of the twenty-eighth rule of this court.

R. Lund & S. W. Harmon, for the petitioner. The exceptions sought to be proved are the same filed at September term, 1872. The presiding judge objected to some statements therein, and the exceptions were amended and presented to him, and we were unable to get him to either allow them or disallow them until February 14, 1874.

W. Colburn, for the defendant.

C. J. The statute provides that "if the justice fails to sign and return the exceptions, or alters any

statement therein, and either party is aggrieved, the truth of the exceptions presented may be established before the Supreme Judicial Court upon petition." Gen. Sts. c. 115, § 11. The twenty-eighth rule of this court requires that the petition shall be filed "within twenty days after notice of such refusal." Taking the most favorable view for the petitioner, it is clear that he fails to bring himself within the rule. Even if the judge before whom the case was tried in the court below did not fail to sign and return the exceptions before September term, 1878, it is clear that as at that term a final judgment was entered for the plaintiff, with the knowledge of the other party, as he admits, and no continuance entered for any purpose, there was then a failure to sign and return the exceptions, and the petitioner should have filed his petition within twenty days after that term.

Petition dismissed.

CHARLES ROBERTS & another vs. BOSTON & LOWELL RAILROAD CORPORATION.

Suffolk. March 9. — April 1, 1874. COLT & ENDICOTT, JJ., absent.

An application for a jury to assess damages for land taken in Boston under the St. of 1869, c. 291, § 5, cannot be made to the Superior Court at a term later than that next after the estimate of the commissioners named in that statute is made known to the parties.

PETITION filed in the Superior Court October 16, 1872, for a jury to assess damages occasioned by the taking of the petitioners' land on Causeway Street, Boston, by the defendant by virtue of the St. of 1869, c. 291.

At the hearing in the Superior Court on agreed facts it appeared that the defendant petitioned the Supreme Judicial Court for Suffolk County, under § 5 of said act, to appoint a board of commissioners to estimate and adjudicate the damages for taking lands and properties by virtue of said act. On said petition, full notice having been given to all parties interested and the petitioners appearing, the Supreme Court appointed three disinterested persons a board of commissioners to estimate and adjudicate said damages. A hearing was had before the board of commissioners upon the adjudication of damages, at which the

petitioners were present and were heard. After a full hearing said commissioners estimated and adjudicated the petitioners' damages occasioned by the taking of their land and properties by the defendant, and made a report in writing of said adjudication to the Supreme Judicial Court for this county, which report was opened and filed in said court, October 17, 1871. This adjudication and estimate was known to the petitioners within one week of the time it was so opened and filed.

On these facts judgment was ordered for the defendant, and the petitioners appealed to this court.

H. W. Paine, for the petitioners.

J. G. Abbott, for the defendant.

WELLS, J. The only question presented for our decision, by this agreed statement, is whether the application for a jury to assess damages for land taken under the St. of 1869, c. 291, was made in the mode and within the time prescribed by law. The only point argued before us is that as to the limit of time. The statute, § 5, provides as follows :

“The laws of the Commonwealth relating to the taking of lands for railroad purposes and the location and construction of railroads, shall be applicable to, and govern the proceedings in the taking of the lands described in the preceding sections ; except that instead of the county commissioners, three disinterested persons shall be appointed by the Supreme Court as a board of commissioners, to adjudicate the damages for the taking of said lands and property, from whose decision an appeal to a jury shall lie in behalf of either party, as is provided in cases of lands taken for railroad purposes.”

By the Gen. Sts. c. 63, §§ 21 & 22, it is provided in cases of lands taken for railroad purposes, that the damages “shall upon the application of either party be estimated by the commissioners in the manner provided in laying out highways ;” and “Either party, if dissatisfied with the estimate made by the commissioners, may, at any time within one year after it is completed and returned, apply for a jury to assess the damages.”

This application is also to be made to the county commissioners, who thereupon issue their warrant for a jury to be summoned by the sheriff ; and the trial takes place in the county before the sheriff, or some person specially designated to preside.

But if the lands taken by a railroad corporation by virtue of its charter are within the city of Boston, it is provided by §§ 36 & 37, of the same chapter, that the board of aldermen shall "have all the power of commissioners in like cases;" except that "Either party, if dissatisfied with the estimate of damages thus made by the board of aldermen, may apply for a jury at the next term of the Superior Court for the county, after the estimate is made known to the parties."

The land in this case was within the city of Boston; the statute contemplated the taking of lands in the city of Boston only; the application for a jury was made within one year after the estimate of the commissioners was completed and returned, but not at the next term of the Superior Court for the county after the estimate was made known to the parties.

The petitioners rely upon the phraseology of the section of the statute above quoted, contending that as the commissioners appointed under it are to act "instead of the county commissioners," it must have been intended that those provisions of the General Statutes and only those which are applicable to proceedings before county commissioners, should govern the proceedings under this statute. If we were to adopt this construction so far as to give the petitioners the benefit of the provision of law allowing them to apply for a jury at any time within one year from the return of the estimate by the commissioners, it would not avail to support this application; because it was not made to the tribunal contemplated by the provisions which contain that limitation of time, nor to one corresponding thereto or acting instead thereof.

When this application was made and until the St. of 1873, c. 261, there was no general provision of law for a jury in cases of land taken for railroad purposes, by application to the Superior Court, except in cases of land taken within the city of Boston. And the right so to apply to the Superior Court for the county of Suffolk was expressly limited to the next term after the estimate was made known to the parties.

This application must fail therefore, whether the construction contended for be adopted or rejected; and the judgment of the Superior Court dismissing the same must be

Affirmed.

JOHN D. W. JOY vs. BOSTON PENNY SAVINGS BANK.

Suffolk. March 14. — April 4, 1874. COLT & ENDICOTT, JJ., absent.

If A. by virtue of a contract, not under seal, with B. builds a division wall, one half on the land of each, and B. agrees to pay one half the expense, A. acquires no interest in the land of B., and none passes to the grantee of A., which he can enforce against B. by a suit at law.

CONTRACT to recover one half the cost of a division wall used by the defendant.

In the Superior Court the following facts were agreed :

“ The plaintiff is the owner of the estate on Washington Street, in Boston, described in the deed of Amos A. Lawrence to him, dated April 11, 1866, and recorded with Suffolk deeds, lib. 875, folio 187. Lawrence derived his title to said estate from Gideon Currier, by deed, dated August 13, 1864, and recorded with Suffolk deeds, lib. 847, folio 63. The defendant corporation is the owner of the adjoining estate, which is described in the deed of Job A. Turner and others to it, dated July 8, 1867, and recorded with Suffolk deeds, lib. 904, folio 172. Turner and others acquired their title to the estate under the deed from Hiram Johnson, dated November 21, 1866, and recorded with Suffolk deeds, lib. 889, folio 241.

“ It is also agreed, if the evidence is admissible and competent against any objections and exceptions which the defendant could take thereto, that before Currier had acquired by deed his title to the land now owned by the plaintiff, but after he had bargained therefor and taken a bond for the conveyance thereof to him upon the performance by him of the conditions of the bond, Johnson signed and delivered to Currier, a paper writing, dated November 7, 1857, whereby Johnson, in consideration of one dollar paid by Currier, covenanted and agreed to and with Currier, his heirs and assigns, ‘that the said Currier may erect or cause to be erected one half the stone and brick wall which he is about to build on the dividing line between the estate belonging to said Hiram Johnson, . . . and estate of said Currier, . . . and that I, the said Hiram Johnson, will my heirs and assigns pay or cause to be paid to said Currier, his heirs or assigns, one half the cost of erecting said wall, whenever, and as soon as I, my heirs, or

assigns, shall use the same.' This instrument was not under seal, and it was not acknowledged, but it was recorded with Suffolk deeds, lib. 880, folio 58, on June 9, 1866. The deeds under which the plaintiff derived his title made no mention of the division wall. The deeds under which the defendant derived its title, described the estate as bounded by a line running through the middle of the brick partition wall, 'which wall was built by said Currier, one half on the granted land, and one half on his land according to an agreement recorded with Suffolk deeds, lib. 880, folio 58.' Currier erected a building on the land now owned by the plaintiff, placing one wall thereof, one half on this land and one half on the land now owned by the defendant, before he conveyed his estate to Lawrence as aforesaid. The defendant, after its purchase of its estate as aforesaid, erected a building thereon, and made use of the wall built by Currier partly on each of the two estates as aforesaid."

On the foregoing facts the Superior Court rendered judgment for the defendant, and the plaintiff appealed to this court.

J. P. Healy, for the plaintiff. 1. The plaintiff succeeded to all the rights of Currier under the contract with Johnson, and is entitled to recover one half of the value of the wall in question, if Currier could have recovered had no sale been made by him of the premises. *Maine v. Cumston*, 98 Mass. 317. There was no need of an assignment to him of these rights. The law is well settled that a deed carries all rights to the half of a wall on adjoining premises when the line runs through the centre. Joy acquired all rights in the wall by virtue of his deed, and the defendant by taking his deed assumed the obligations resting upon Johnson.

2. Did the defendant corporation assume the obligation of Johnson under that contract; that is, to pay for one half of the wall, when it should be used in the construction of a building on the corporation's land? To establish the affirmative of this proposition, it is not necessary that the aforesaid contract, signed by Johnson and recorded in the Registry of Deeds, should be construed to be a covenant running with the land, of which all purchasers under Johnson must take notice. It is sufficient, it is submitted, if the corporation has assumed by contract the obligation of Johnson. It is also submitted that the language in the

deed from Johnson to Turner and others, and in the deed from Turner and others to the defendant corporation — the language being the same in both deeds — is an assumption, first by Turner and others, and afterwards by the corporation, of Johnson's obligation. The reference to the record of the agreement must have the same effect as an insertion of the agreement in the deed. If the parties to these two conveyances did not intend, by this language, that Johnson's obligation should be assumed by the grantees, they could have no purpose in its use.

A. C. Clark, for the defendant.

WELLS, J. By his contract with Johnson, and subsequent erection of a wall upon the division line, Currier acquired no interest in the adjoining land, and retained no title in that part of the wall which extended beyond his own line. He could not hold it as realty, because he had nothing but a simple contract, which could have no greater force in law than as a license; nor as personalty, because, by the terms of the agreement under which he built the wall, it was not removable, but intended to become permanent and annexed to each lot as real property. The plaintiff, therefore, by acquiring Currier's interest in the land, acquired no interest in that part of the division wall which rested upon the adjoining lot. Even if the defendant, by reason of the clause in the deeds by which its title was derived referring to the contract, and by the use of the wall, might be held chargeable for the cost of the half so used, there is no privity of contract or estate which will enable the plaintiff to recover it in an action at law. The contract was merely a personal one with Currier. The right to enforce it would not pass with the land as an appurtenance, and there is nothing in Currier's deed to show an intent that it should pass; nor is such a contract assignable at law.

The case differs essentially from *Maine v. Cumston*, 98 Mass. 317, and *Standish v. Lawrence*, 111 Mass. 111. The plaintiff shows no right to recover, and the judgment for the defendant is

Affirmed.

JAMES H. McFARLAND vs. BOSTON & LOWELL RAILROAD CORPORATION.

Suffolk. March 10. — April 4, 1874. COLT & ENDICOTT, JJ., absent.

Plaintiff offered oral evidence of an executory contract, also two letters, the one written by himself, which he offered to show by oral evidence was intended to execute said contract; the other a reply written by the defendant to the first letter; the legal construction of the two letters taken together, apart from the oral evidence, made the plaintiff the defendant's agent, and did not execute the executory contract. *Held*, that the legal effect of the two letters could not be varied by oral evidence.

The question, "When did you get the title to that note?" is within the latitude allowable on cross-examination, and is not open to objection.

TORT in the nature of trover for conversion of certain merchandise. Trial in the Superior Court before *Pitman*, J., who by consent of the parties after verdict, made the following report to this court:

"The only question at issue was the title to the property, the defendant, upon receiving a bond of indemnity, having delivered the property to Reuben A. Adams, who claimed to own the same. The plaintiff introduced evidence tending to show that on April 3, 1868, he had two cases of other goods in the store of said Adams, who was a commission merchant in Boston; that Adams held an overdue note signed by N. B. Scott, of Norwich, Ct., payable to Adams or order for \$1062.50, and also another overdue note of Scott's payable to Adams, and an unpaid account; that some talk was had about trading the goods in the cases for the first named note, as it was supposed plaintiff could have a better chance of obtaining value for the note than Adams had; that thereupon it was agreed that Adams should give plaintiff twenty dollars to pay his expenses to Norwich, and that plaintiff upon an examination of Scott's affairs was to determine whether he would conclude the trade; that plaintiff before leaving scraped off his own name from the cases in Adams's store, and said to him, 'If I send for that note these goods are to be yours and the note mine,' and that Adams assented to this; that it was also understood that plaintiff was to aid Adams if he could, in obtaining payment of the other note and account; that plaintiff forthwith went to Norwich, made an arrangement with Scott, by which he agreed to give the plaintiff goods for the \$1062 note,

and also agreed to give goods for both notes if Adams would indorse on the other note the full amount of all the goods that he, Scott, had sent before to Adams on account of his indebtedness.

"That thereupon the plaintiff wrote Adams the following letter : 'Norwich, Apr. 4th. *Sir*, — I have seen Scott, and he seems willing to do what is right, but he wants to have these notes squared up so as to have no accounts with you. You had better endorse what you have had on these notes and send them to me and he will pay the balance in goods but he won't give me goods with receipted bill and you holding the notes against him. You turn over them notes to me and I guess I can get the goods without trouble. He expects to have some goods come Monday and Tuesday. His stock in the store looks slim. You had better send me those notes right down, because they are expecting a crash every day. If they hold off until the middle or last of next week they will be all right. Send by return mail. Jas. H. McFarland. I have been to the depot but could not find out much about it. I find the goods shipped to Thayer & Gill and in my name and one case to his brother in Lowell about the 15th of March weight 180 lbs. You can't tell who the goods are from when there is no shipping receipt. He has not marked and reshipped any goods at the depot. I overhauled their books. Scott seems willing to do what's right and when he sees those notes are all right he will fix all up, but you must not delay or you will lose all. J. H. McF.'

"That Adams wrote in reply the following letter, which the plaintiff received : 'Boston, April 4, 1868. Mr. McFarland, — Enclosed please find note which is not stamped, you can get a 75 cent stamp and cross it. I have neglected to do it. I made a mistake and stamped bill sale instead of notes, the story is old that you have written me, those promises have been made before and I have been fool enough to believe them, having so much confidence in Scott but it is played out and you think you can get pay for notes for that reason. 'I send you one of \$1062.50, but I shall hold the others, if he don't pay before Wednesday part or whole you had better come up and I will put it into a lawyer's hands for collection. I shall not humbug with him any longer he thinks because I have been easy he has a soft thing but I am ahead and he will find out so soon if he don't pay up don't allow any goods to go out store, fix up the matter, is there any goods

on hand except what is on shelf in cases or quantities. I have no confidence if he has goods coming in, and you can trade with him, do it, and get goods for this note. I shall not endorse this, if he will pay you, give it up to him, but he wont. Take no promises but if anything comes by express or freight to any amount attach it in depot or fix it as you dam please, give him up the note if he gives you the goods or endorse on said note the amount and this is your authority coming with said note. R. A. Adams. Endorse amount on back but hold note unless you get value.'

"That plaintiff and Scott at once went to work and selected from the goods in Scott's store goods to the amount of said note, which are the goods the subject of this suit, received a bill of sale of the same in his own name, and delivered to Scott the note received in Adams's letter.

"The plaintiff further testified that he wrote the letter to Adams in that form, because of his agreement to do what he could to enable Adams to secure payment of the other note which he held against Scott, and hence he wrote to Adams to send both notes, and to turn over both notes to him, as he thought Scott would be willing to let the plaintiff have goods for both of said notes; that he intended to send for the first note for himself, and to take the other and collect it for Adams. Upon cross-examination the plaintiff was asked, against the objection and exception of his counsel, 'When did you get the title to that note?' He replied, 'I suppose according to our trade, when I received it at Norwich.'

"The said Adams called by the defendant gave a different version of the transaction between himself and the plaintiff, and testified in substance that he employed the plaintiff to go to Norwich and see if he could trade his note with Scott for goods on his, Adams's account; that he paid money for plaintiff's expenses in advance, and told him if he got the goods that he would employ plaintiff to sell them for him at a fixed salary per week, and that all that plaintiff was to do was to be done as his agent.

"This was substantially the evidence upon the question at issue. The defendant claimed that upon the correspondence introduced by the plaintiff it was as matter of law entitled to a verdict. The plaintiff asked the court to rule 'that it was a

question of fact for the jury to find upon all of the evidence in the case whether the plaintiff was merely the agent of Adams to collect the note; that the court could not construe the letters alone and apart from the oral testimony, and that the question presented was for the determination of the jury on the whole evidence under proper instructions.' But the presiding justice being of opinion that whatever might be the finding of the jury as to the previous agreement between the parties in their talk, the ultimate authority which the plaintiff had was defined and limited by the letter in which the note was sent, and that the construction thereof was a matter of law, and that it did not pass property in the note to plaintiff, but did constitute him Adams's agent to collect, declined to submit the case to the jury as the plaintiff prayed, and thereupon directed a verdict for the defendant."

J. F. Pickering & D. F. Crane, for the plaintiff, contended that the case should have been submitted to the jury; that the evidence showed that the contract had been concluded before the letter of Adams was sent, and that Adams could not change the contract by his letter; that the question, "When did you get title to that note?" should have been excluded, as it asked him to give his opinion upon a question of law.

J. Nickerson, for the defendant.

MORTON, J. The goods which are the subject of this suit, were received by the plaintiff of one Scott in payment of a note signed by Scott and payable to Adams; and the only question at issue was, whether the note at that time belonged to the plaintiff, or was held by him as the agent of Adams for collection. The evidence shows that the note was sent to the plaintiff by Adams inclosed in a letter; and construing this letter in connection with the letter from the plaintiff, to which it was an answer, it is clear that it constituted the plaintiff the agent of Adams to collect the note for him. The two letters admit of no other construction. If there was a previous oral agreement, as testified to by the plaintiff, that Adams should sell him the note, it was an executory contract, and it was not executed. Adams did not send the note in execution of such agreement. The letters of the parties show that he sent it to the plaintiff as his agent. The plaintiff accepted it as agent. Having accepted the agency without objection, he cannot

afterwards repudiate it, and claim the goods as his own, upon the ground that there was a prior agreement that the defendant should sell him the note. We are of opinion that the presiding justice correctly ruled that the ultimate authority which the plaintiff had was defined by the letter in which the note was sent, and that it constituted him Adams's agent to collect the note, and therefore that, upon the evidence, the defendant was entitled to a verdict.

The question asked the plaintiff, "When did you get the title to that note?" was within the latitude allowable in cross-examination, and not open to objection. *Judgment on the verdict.*

COLUMBIAN BOOK COMPANY vs. J. A. DE GOLYER & others
& trustees.

Suffolk. March 18. — April 4, 1874. COLT & ENDICOTT, JJ., absent.

After receivers of an insurance company, established by the laws of this Commonwealth, have been appointed and an injunction issued, under the Gen. Sts. c. 58, § 6, neither the corporation nor the receivers can be charged by trustee process.

CONTRACT, for goods sold and delivered, commenced by trustee process. In the Superior Court the following facts were agreed :

"The writ was dated October 5, 1872, and returnable at January Term, 1873. The defendants were described in the writ as 'J. A. Golyer and E. S. Golyer, copartners, doing business under the name of the Union Publishing Company, in Chicago, State of Illinois.' The trustees were described in the writ as 'The Hide and Leather Insurance Company, a corporation duly established and having a usual place of business in said Boston, of which Chester I. Reed, John W. Cartwright, and Oliver H. Cole, are receivers, all having their usual place of business at said Boston.' Service was made upon the trustees October 7, 1872, and again December 2, 1872, but no other service of the writ has been made.

"The said Insurance Company has been insolvent since October, 1871, and the said Reed, Cartwright, and Cole, were appointed receivers under the Gen. Sts. c. 58, § 6, by the Supreme Judicial Court, on December 2, 1871, to take possession of its

115 67
150 315

property, and, thereupon, took such possession. J. A. De Golyer and E. S. De Golyer, of said Chicago, were creditors of said insurance company, having an allowed claim of \$1500 against it, upon which a dividend of thirty per cent. was paid to them February 5, 1872, by said receivers. No further dividend upon said claim was ordered or declared until June 21, 1873, when a dividend of ten per cent. upon all claims was allowed against said insurance company. The amount of said dividend due to said J. A. & E. S. De Golyer is \$150, and it has not been paid. The said Chester I. Reed, having died in August, 1873, James C. Davis was appointed one of the receivers of the said Company in his place. Answers were made in the cause by the trustees in accordance with this statement.

“On December 8, 1873, on motion of the plaintiffs, the writ was amended, 1st, by striking out the name of Chester I. Reed, one of the trustees when the suit was brought, and by inserting the name of James C. Davis, who had since been appointed in his place; and, 2d, ‘by amending the name of the defendants so that that they will read J. A. De Golyer and E. S. De Golyer.’ And, thereupon, notice was ordered to be given to the defendants by the publication of an order, to appear at January Term, 1874, and the said order was thereafter duly published. The defendants have not made any appearance and they have been defaulted.”

On the foregoing facts the Superior Court discharged the trustees, and the plaintiff appealed to this court.

G. W. Morse, for the plaintiff. 1. The company would be liable as trustee of its creditors before the appointment of receivers, even after the injunction against its continuing business. The appointment of receivers is within the discretion of this court; and the exercise of this discretion does not change the rights or relation of the parties. Gen. Sts. c. 68, §§ 35, 37. *Foster v. Essex Bank*, 16 Mass. 245. The receivers have power to “do all acts which might be done by such corporation if in being, that are necessary for the final settlement of the unfinished business of the corporation.” Gen. Sts. c. 68, § 37.

2. The corporation has such an existence after the injunction and decree of dissolution that judgment may legally be entered against it in a case where it is the principal defendant. Then why may it not be adjudged a trustee? *Hubbard v. Hamilton*

Bank, 7 Met. 340. The corporation is still debtor to the principal defendants, and the receivers are but agents appointed by the court to marshal the assets which belong to the creditors.

3. Even if the court should decide that the receivers and not the corporation are summoned as trustees in this case, they are not public officers within the principle that such officers cannot be charged as trustees. Gen. Sts. c. 142, § 24. *Wendell v. Pierce*, 13 N. H. 502. *Folger v. Columbian Ins. Co.* 99 Mass. 267. *Cutter v. Perkins*, 47 Maine, 557. Have the trustees goods, effects or credits of the defendants intrusted or deposited in their hands or possession? If so they should be held to respond to the final judgment, and the legislature, by its various enactments contained in the Gen. Sts. c. 142, §§ 21-25, evidently intended to include receivers of insolvent corporations as well as assignees, if they were not already amenable to the process. *Adams v. Barrett*, 2 N. H. 374.

J. C. Davis, for the trustees.

GRAY, C. J. We need not consider whether, by the description in this writ, the corporation, or the receivers of its property, or both, are alleged to be trustees of the principal defendants; because we are of opinion that, assuming both to be duly summoned, neither can be charged; not the corporation, because by the decree of this court, made before the suing out of this writ, all its property had been put into the hands of receivers, and the corporation put under injunction against continuing business, and it had therefore no lawful authority to pay its debts; not the receivers, because the property which they hold had been intrusted to and deposited with them, not by the act of the party, but by authority of the law, and the law allows no persons, so holding funds, to be charged by the trustee process, except executors and administrators, and assignees under the insolvent acts. Gen. Sts. c. 58, § 6; c. 142, §§ 21, 22, 23, 31. *Colby v. Coates*, 6 Cush. 558. *Thayer v. Tyler*, 5 Allen, 94.

In *Hubbard v. Hamilton Bank*, 7 Met. 340, the attachment was made before the filing of the bill upon which the receivers were appointed. And in *Folger v. Columbian Ins. Co.* 99 Mass. 267, the appointment of receivers was made in another state, and did not transfer to them the property of the corporation in this Commonwealth as against attachments made here by our own citizens.

If the plaintiffs in this case can, by any form of remedy, have the property of the corporation applied to the payment of the debt due to them from one of its creditors, it can only be by petition in equity in the cause in which the receivers were appointed. *Atlas Bank v. Nahant Bank*, 23 Pick. 480. *Hills v. Parker*, 111 Mass. *Trustees discharged.*

CATHERINE D. SMITH *vs.* JAMES W. COLCORD.

Suffolk. March 31. — April 4, 1874. AMES & DEVENS, JJ., absent.

The lien given by the Gen. Sts. c. 151, § 29, to boarding-house keepers, "on the baggage and effects brought to their houses, belonging to their guests or boarders, except mariners, for all proper charges due for fare and board," attaches as and when the fare and board are furnished.

If a guest of a boarding-house keeper pays board by the week, and by his contract nothing is due until the end of the week, the lien, given by the Gen. Sts. c. 151, § 29, nevertheless, in the mean time attaches.

TORT for an assault. Trial in the Superior Court before *Putnam, J.*, who, after a verdict for the defendant, allowed the following bill of exceptions :

"The plaintiff kept a boarding-house on Washington Street, Boston, and the defendant boarded with her. It appeared in evidence, from the plaintiff's own testimony, that the defendant paid his board by the week, and that a week's board would be due and payable on Saturday night, and not until that time ; and early in the morning of that day, the defendant undertook, against the will of the plaintiff, and without paying her anything for his board during that week, to move his baggage and effects from his room and from the house. The plaintiff closed the door of his room and stood against it to prevent him and his teamsters from moving out said things, telling him that she should not allow him to move out without his paying her. Whereupon the defendant took her by the shoulders and threw her down, and proceeded to move out his things. The testimony was conflicting as to the degree of the assault. The plaintiff testified that at the time of this removal the week's board was not due or payable. There was no evidence tending to show that the object of the defendant in thus removing was to evade payment of his board other than

that he attempted to move his goods, without paying the board for that week; but he testified that he was intending to change his boarding-place at the end of that week. The plaintiff's attorney asked the presiding judge to rule that under the provisions of the Gen. Sts. c. 151, § 29, the plaintiff had a lien on the baggage and effects of the defendant at that time for board up to the time of removal of the same, to wit, on said Saturday morning. But the judge declined so to rule, and instructed the jury that, as nothing was due or payable for his board for that week, until that night, the plaintiff had no lien on said goods and effects until it was due and payable, and she had no right to detain them for her lien, to which the plaintiff's attorney excepted. Other suitable instructions in reference to the assault were given, not excepted to, the only question being as to the construction of the statute aforesaid in reference to the lien."

J. H. Butler, for the plaintiff, cited *Perkins v. Boardman*, 14 Gray, 481; *Stickney v. Allen*, 10 Gray, 352; *Hollingsworth v. Dow*, 19 Pick. 228.

G. W. Morse, for the defendant. At common law a boarding-house keeper could not claim a lien on the personal property or baggage of a boarder for the price of board. Bac. Ab. Inns & Innkeepers, D. *Ewart v. Stark*, 8 Rich. 423. The lien then under which the plaintiff claimed to retain the defendant's baggage was wholly a creation of statute law. The contract for board could not be apportioned, and there was no lien until the board was due. *Bayley v. Merrill*, 10 Allen, 360.

MORTON, J. The statute provides that "boarding-house keepers shall have a lien on the baggage and effects brought to their houses belonging to their guests or boarders, except mariners, for all proper charges due for fare and board." Gen. Sts. c. 151, § 29. The design of this provision is to give the boarding-house keeper the security of a lien upon the baggage of the guest for the board furnished him. This lien attaches as and when the board is furnished. Otherwise a guest who had obtained credit upon the strength of the lien, might destroy the security of the boarding-house keeper by a sale or by removing the goods, at any time before the bill for board became payable by the contract: a result which is inconsistent with the nature of the lien, and which defeats the purposes of the statute. *Bayley v. Merrill*, 10 Allen, 360.

Exceptions sustained.

ELISHA A. PACKER & another vs. JACOB E. LOCKMAN & others.

Suffolk. March 12. — April 6, 1874. COLT & ENDICOTT, JJ., absent.

In an action of tort for the conversion of coal which the plaintiffs alleged they were induced to sell through the fraud and deceit of one of the defendants in representing to their agent that the coal was for C. F. C. & Co., who were responsible parties, which fraud was participated in by the other defendants, the plaintiffs must prove that they relied on and were in fact misled by the representations. For this purpose, and because they formed inseparable parts of the transaction, the orders from the agent to his principals to forward the coal, the bills of lading accompanying it when forwarded, the invoices sent in the usual course of business, and the transcripts thereof delivered by the agent to the defendant making the representations, are competent and admissible in evidence. The bills of lading and transcripts of invoices containing the name of C. F. C. & Co., and delivered to the defendants, are also competent to show knowledge on the part of the defendants that the plaintiffs supposed they were selling to C. F. C. & Co.

If evidence which is admissible for any purpose, is admitted, and it is incompetent upon a particular branch of the case, and no specific exception is taken or ruling asked for, the general exception to its admission will be overruled.

In an action by a seller to recover damages sustained by means of a sale induced by the fraud of the purchaser's agent, evidence that the purchaser afterwards sold the coal for less than the price at which the seller sold is admissible as tending to show knowledge on the purchaser's part of the fraud and participation in it.

TORT in the nature of trover brought by Elisha A. Packer and Daniel Packer, against Jacob E. Lockman, W. H. Love, H. E. Hayward and L. S. Boyer, the three last named being members of the firm of Love, Hayward & Co., for the conversion of two cargoes of coal, with a count in contract on an account annexed, both counts being for the same cause of action. Trial in the Superior Court before *Lord, J.*, who, after a verdict for the plaintiffs, allowed the following bill of exceptions :

“The plaintiffs introduced evidence tending to show that they were miners and shippers of coal in New York ; that S. O. Little, of Boston, was their agent to receive and transmit to them orders for coal, which were filled if approved by them, and to receive the consignee's notes therefor ; that the defendant, Lockman, who was a coal broker and buyer, in Boston, asked Little to ship to ‘Clark, of Waltham,’ (not giving Clark's first name or initials,) two cargoes of coal, to which Little assented, agreeing to sell at the market price, less ten per cent., to Lockman ; that Little then gave Lockman a memorandum of sale, a copy of which is in the mar-

gin marked A ; * that Little, to get this order filled by plaintiffs, sent them a letter, a copy of which is in the margin marked B ; † that on the next day Lockman requested of Little a change in the size of one cargo, from $\frac{3}{4}$ stove and $\frac{1}{2}$ egg, to $\frac{1}{2}$ stove and $\frac{3}{4}$ egg, whereupon he sent another letter to plaintiffs, a copy of which is in the margin marked C ; ‡ that plaintiffs, on receiving, and in compliance with said letters, shipped the coal upon bills of lading, copies of which are in the margin marked D §

* A.

AUGUST 20, 1872.

Sold to C. F. Clark, of Waltham, Wilkesbarre coal, through J. E. Lockman, Boston, about 250 tons broken.

About 250 tons stove and egg — $\frac{1}{2}$ egg and $\frac{3}{4}$ stove.

At \$3.85 for broken and egg, F. O. C.

At \$4.25 for stove.

Less 10 c. per ton comm. to J. E. Lockman.

S. O. LITTLE.

† B.

BOSTON, August 20, 1872.

E. A. PACKER & Co., New York : Ship to Fitchburg R. R., Boston, for Chas. F. Clark & Co., of Waltham, Mass.,

About 250 tons broken, \$3.75.

About 250 tons, $\frac{1}{2}$ egg, and $\frac{3}{4}$ stove, \$3.75, \$4.15.

Yours truly,

S. O. LITTLE.

‡ C.

BOSTON, August 21, 1872.

E. A. PACKER & Co., New York : We sent you an order yesterday, for Chas. F. Clark & Co., Waltham. The parties called to-day and wish $\frac{1}{2}$ stove and $\frac{3}{4}$ egg shipped, instead of $\frac{1}{2}$ egg and $\frac{3}{4}$ stove, as sent. So the order reads 250 tons broken.

250 tons $\frac{1}{2}$ stove and $\frac{3}{4}$ egg.

Yours truly,

S. O. LITTLE.

Per G. A. MORIARTY.

§ D.

No. 499. Shipped by E. A. Packer & Co., in good order, on board the good sch. called the Clara Sawyer, of Tremont, whereof — is master for this present voyage, now lying in the port of South Amboy, and bound for Waltham, Mass., via B. & F. R. R., Boston, two hundred and forty-one tons, of 2,240 lbs., Wilkesbarre coal, which I promise to deliver at the aforesaid port of Boston, in like good order, (the dangers of the sea only excepted,) unto Chas. F. Clark & Co., or their assigns, he or they paying freight for the same, at the rate of \$1.80 per ton, 3 cts. for bridge demurrage; 8 cts. per ton after three days from the day of reporting.

and E,* and sent said bills of lading, with invoices, copies of which are in the margin, marked F † and G, ‡ to Little, who gave the

In witness whereof, the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated at South Amboy, this 27th day of August, 1872.

241 tons in the hold.

241 egg.

241 total.

ADVANCED FOR

Trimming, \$16.87

Total, \$16.87

J. N. BRANSCOM.

* E.

No. 519. Shipped by E. A. Packer & Co., in good order, on board the good brig called the W. R. Sawyer, of Boston, whereof ——— is master for this present voyage, and now lying in the port of South Amboy, and bound for Waltham, via B. & F. R. R., Boston, two hundred and fifty-two (252) tons, of 2,240 lbs., Wilkesbarre coal, which I promise to deliver at the aforesaid port of Boston, in like good order, (the dangers of the sea only excepted,) unto Chas. F. Clark & Co., or their assigns, he or they paying freight for the same, at the rate of \$1.83 per ton, and 8 cts. per ton after three lay days from the day of reporting.

In witness whereof, the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at South Amboy, this 6th day of September, 1872.

About 7 tons on deck.

ADVANCED FOR

Trimming, \$32.76

Total, \$32.76

169 egg.

83 stove.

252 total.

J. E. SAWYER.

† F.

NEW YORK, August 27, 1872.

Chas. F. Clark & Co., bought of E. A. Packer & Co., W.-Barre coal, from Amboy, per schr. Clara Sawyer,

Broken, 241 tons, @ \$3.75, net \$903.75

Advanced 16.87

\$920.62

Insurance at 1% 9.04

\$929.66

‡ G.

NEW YORK, September 6, 1872.

C. F. Clark & Co., bought of E. A. Packer & Co., W.-Barre coal, from Amboy, per sch. W. R. Sawyer,

bills of lading, and transcript of the invoices, copies of which are in the margin, marked H * and I,† to Lockman. The said letters, bills of lading and invoices were read in evidence, the defendants objecting, there being no other evidence that defendants had knowledge of the contents of the letters than is herein related.

“ The plaintiffs also introduced evidence tending to show that Lockman, on receipt of the bills of lading, gave them, unindorsed,

| | |
|------------------------------------|------------|
| Egg, 169 tons, @ \$3.75 | \$633.75 |
| Stove, 83 tons, @ \$4.15 | 344.45 |
| Advanced | 32.76 |
| Insurance at 1% | 9.78 |
| | <hr/> |
| | \$1,020.74 |

* H.

Boston, August 27, 1872.

C. F. Clark & Co., Waltham, Mass., bought of E. A. Packer & Co., miners and shippers of coal, S. O. Little, agent, No. 22 Kilby Street. Shipment from South Amboy, per sch. Clara Sawyer, Wilkesbarre coal,

| | |
|--|----------|
| 241 tons broken, @ \$3.85 | \$927.85 |
| Advanced freight | 16.87 |
| Insurance, 1% | 9.04 |
| | <hr/> |
| | \$953.76 |
| Commission to J. E. Lockman | 24.10 |
| | <hr/> |
| | \$929.66 |
| Int. 3 mos. and 3 days, and stamps | 17.31 |
| | <hr/> |
| | \$946.97 |

Settled by note of F. F. Clark, of August 27, three months.

E. A. PACKER & Co.

By S. O. LITTLE.

† I.

Boston, September 6, 1872.

C. F. Clark & Co., Waltham, Mass., bought of E. A. Packer & Co., miners and shippers of coal, S. O. Little, agent, No. 22 Kilby Street. Shipment from South Amboy, per sch. W. R. Sawyer, Wilkesbarre coal,

| | |
|---|------------|
| 169 tons egg, @ \$3.85 | \$650.65 |
| 83 tons stove, @ 4.25 | 352.75 |
| Advance freight | 32.76 |
| Insurance 1% | 10.00 |
| | <hr/> |
| | \$1,046.16 |
| Com. to J. E. Lockman | 25.20 |
| | <hr/> |
| | \$1,020.96 |
| Int. 3 mos., 3 days, and stamps | 18.50 |
| | <hr/> |
| | \$1,039.46 |

to the defendants, Love, Hayward & Co., who received the coal on arrival in Boston, and sold it. Also, that in about two weeks after the arrival of the coal, Little requested of Lockman the consignee's notes for the coal; that Lockman, after some delay, represented that there was a discount of 35 cents per ton on the coal, which he had allowed, and then tendered a note of F. F. Clark, dated Aug. 27, 1872, for \$946.97, in settlement of the cargo of the Clara Sawyer, and asked the allowance of a discount of 35 cents a ton on the cargo of the W. R. Sawyer, as that which he had been obliged to allow; that Little referred the matter of the discount to F. T. Robinson, who had come to Boston on behalf of the plaintiffs to accelerate the delivery of the consignee's notes for the coal; that Little remarked to Lockman that C. F., and not F. F., were the initials of the consignee, and Little testified as follows: that Lockman told him (Little) that F. F. Clark was the man, instead of C. F. Clark. 'I knew there was one Clark in Waltham who was in business, and one who was not, and from our conversation—I can't recall what it was, now—I accepted the note of F. F. Clark, and receipted the bill, (as shown on the copy F, hereto annexed,) supposing he was the man in business in Waltham.' Also, that Lockman represented to said Robinson that he had been obliged to allow a discount of 35 cents a ton on the cargo of the W. R. Sawyer, and offered another note of F. F. Clark, dated September 6, 1872, for \$951.37, in settlement; that Robinson said he had exceeded his authority as a broker, and declined to receive the note; that he (Robinson) then informed the plaintiffs that Lockman offered Mr. Clark's note, of Waltham, for the price of the cargo, less a discount of 35 cents a ton, and, under instructions thereupon received from plaintiffs, received the note, gave a receipt for it, a copy of which is in the margin, marked K,* informing Lockman he would be held responsible for the balance.

* K.

Received from J. E. Lockman & Co., note dated Sept. 6th, at 3 mos., for nine hundred and fifty-one $\frac{17}{100}$ dollars (\$951.37), drawn by Frederick F. Clark, on account of cargo coal, per sch. W. R. Sawyer, leaving a balance of \$88.97 more or less.

E. A. PACKER & Co.

Per F. T. ROBINSON.

E. A. O. E.

OCTOBER 11, 1872.

The plaintiffs' counsel asked the witness (Robinson) what said instructions were which he received from the plaintiffs, to which the defendants objected, and the answer was admitted, as follows: that they did not propose to accept 35 cents per ton off. The notes were dishonored at maturity. The plaintiffs also offered evidence tending to show that F. F. Clark was not in business, and had been for a long time insolvent at the time of these transactions; that C. F. Clark was then in business as a coal dealer, in Waltham, in good credit, under the style of Chas. F. Clark & Co., and the only coal dealer named Clark there; and that he never requested Lockman to buy coal for him, and did not know of the transaction herein related; that defendants, Love, Hayward & Co., having an old note for \$1863.63, of F. F. Clark's, which they knew to be worthless, had asked Lockman if he would sell them some coal for it, whereupon Lockman said he would, and got the coal as related; that when Lockman gave the bills of lading to them, he requested them to get the note changed into two — one dated Aug. 27, 1872, for \$946.97, and one dated Sept. 6, 1872, for \$951.37 — whereupon they procured F. F. Clark to substitute the two notes first named for the one they held, and that it was the usage, known to Love, Hayward & Co., for purchasers of cargoes of coal to give their notes corresponding in dates with the bills of lading and amounts with the invoices thereof.

“The plaintiffs introduced evidence, the defendants objecting, tending to show that Love, Hayward & Co. sold the cargo of the W. R. Sawyer for \$3.75 a ton for the egg, and \$4.10 a ton for the stove, and that of the Clara Sawyer for \$3.42 a ton, that the coal was of good quality, and that the market value of egg and broken coal was the same.

“The defendants introduced evidence tending to show that Love, Hayward & Co. bought the coal of Lockman and paid partly in the notes of F. F. Clark, and the balance in money, and that Lockman bought the coal in his own name, and on his own account, for Love, Hayward & Co., of Little; that he asked Little if he would sell him the coal and take in payment the notes of F. F. Clark, of Waltham, on three months, unindorsed; that after some days Little said that he had made inquiries and would do so, whereupon he gave Little the order, and directed the coal

to be shipped to himself ; that Little said, owing to some difficulty which Lockman and the plaintiffs had had, he was^a afraid they would not ship to him, and asked as a favor that he might ship to C. F. Clark & Co., of Waltham, and that it should make no difference, and he thereupon consented, and that it was so shipped, and that when the coal arrived it was stopped at Boston in accordance with the understanding, and that he delivered it to Love, Hayward & Co., who had arranged with him to give F. F. Clark's notes for the coal, and that a discount of 25 cents a ton was allowed to the purchaser of the cargo of the Clara Sawyer, because it was egg size, which he did not want.

"The plaintiffs contended that the coal was procured by means of a fraudulent conspiracy between the defendants, and that question was submitted to the jury.

"To the admission of said letters, bills of lading, invoices, and evidence, admitted against their objections, the defendants excepted."

R. Lund, for the defendants. 1. The main questions that went to the jury were, whether Lockman gave Little the name of F. F. Clark, of Waltham, or only the name of Clark, without the initials, and the other discrepancies between the testimony of Little and Lockman. To support the testimony of Little, that the name of F. F. Clark was not given him by Lockman, the plaintiffs were allowed, against defendants' objection, to put in the letters, marked "B" and "C," from Little to the plaintiffs, of which the defendants had no knowledge at all ; said letters making mention of C. F. Clark & Co. of Waltham. This was the same as allowing the plaintiffs to use the declarations of their agent to support his testimony, which cannot be allowed. *Hunt v. Roylance*, 11 Cush. 117. If the testimony of Lockman as to what took place between himself and Little was correct, then there was no fraud practised by any one on Little. Little denied the statements of Lockman, as shown by the case, and introduced the letters and bills of lading to support his testimony. They were admitted generally, and went to the jury. The plaintiffs' counsel argued then, as under a general admission he had the right to do, that they supported the statements of Little on the stand, and the jury so considered them.

If the name of F. F. Clark was given to Little by Lockman,

and time given to examine his credit, and Little, after some days, reported to him that he had made inquiries and would sell on F. F. Clark's note, and did send forward the coal, there was no fraud on the part of the defendants, and if Little did not correctly inform the plaintiffs, their action should be against him and not against these defendants, or any of them.

2. It is not claimed that Love, Hayward & Co. ever directly had anything to do with the plaintiffs or their agent. The evidence, uncontradicted, was that they bought the coal of Lockman, upon his agreeing to take F. F. Clark's note, that when the coal arrived they settled and gave him the notes as far as they went, and the balance in money. That he was not acting as broker but as seller. But it is claimed that they entered into a conspiracy with Lockman to get rid of the notes. And for the purpose of showing such a conspiracy, the plaintiffs were allowed to show that they sold the egg coal for a less price than the stove coal, and that the market value of both kinds was the same, and this without showing what the market value was. This had no tendency to show such a conspiracy, and should have been excluded. A large part of it was coal not ordered and not wanted, and on that account they claimed and were allowed a discount. Their customers would not take it. But it prejudiced the jury. Besides, upon looking at the invoices hereto annexed, marked "G" and "I," it will be seen that the egg and stove coal were invoiced at different prices. The stove coal in each bill forty-five cents the highest, which is a larger difference than they made in selling the first lot by the W. R. Sawyer, which came according to the order they gave to Lockman.

T. L. Livermore, for the plaintiffs, cited *Spooner v. Holmes*, 102 Mass. 503; *Lewis v. Manly*, 2 Yeates, 200; *Jackson v. Anderson*, 4 Taunt. 24, 29; *Buffington v. Curtis*, 15 Mass. 528; *Allen v. Williams*, 12 Pick. 297; *Chandler v. Sprague*, 5 Met. 306; *Michigan State Bank v. Gardner*, 15 Gray, 362.

WELLS, J. The plaintiffs allege that they were induced to sell and deliver two cargoes of coal, supposing that they were making the sale to, and upon the credit of C. F. Clark & Co., of Waltham, who were responsible parties; that they were misled into this supposition by the deceit and fraud of the defendant Lockman, who thereby obtained control and possession of the coal, and de-

tised the sale as follows : ' June 9, 1869. Sale of city property. By order of the superintendent of public lands. This day at 4 o'clock, on the premises, will be sold for cash down the large two-story wooden building standing on the south corner of Dover Street Bridge and Harrison Avenue. It is about 15 by 170 feet long, to be removed in five days from day of sale. Also one two-story wooden building, No. 418 Harrison Avenue, to be removed immediately.' The evidence concerning the latter building was substantially similar to that herein stated concerning the former.

" Hatch was the auctioneer usually employed by the city for sales of buildings, and buildings so sold were sometimes subsequently removed as a whole, by license from the proper authority. The sale was held June 9, according to the advertisement, and the plaintiffs, having seen the latter, were present and heard Hatch state, as an inducement to purchase, that the building was suited for tenement purposes and could be removed for that end, and that a gentleman was present who would lease land in the neighborhood, on which to place the buildings, at a low rate.

" The buildings were bought by the plaintiffs, and the price paid ; it was received by the city June 16. After said sale the plaintiff, Woodward, at once made arrangements to have the long building cut crosswise into four parts, and both of the buildings moved on to land of his own on Harrison Avenue, within a half a mile, and applied for a license allowing him to remove them through Harrison Avenue to that end. He obtained such a license Saturday afternoon, but the next Monday morning, before he had acted on it, and within five days from the sale, the license to move was revoked, and the plaintiff was notified to remove the buildings within the said five days. No objection was made to the plaintiffs' tearing down and then removing the buildings. Harrison Avenue was sixty feet wide throughout the part over which the plaintiffs' buildings would have had to pass. The dimensions of the buildings were, respectively, 15 feet by 170 and about 30 by 40. Woodward thereupon notified the city that the plaintiffs intended, and they did intend, to move said buildings upon his said land, and to put them in order and repair, so as to use them as tenement houses, but did not succeed in obtaining a second license. About a fortnight after said five days had elapsed, the houses were sold a second time by the city, and were

taken down by the purchaser. It was agreed that any printed book purporting to be ordinances of the city of Boston may be referred to so far as applicable to the case.

"If in the opinion of the full court the plaintiffs can recover for said buildings or either of them on the counts in tort or in contract for breach of the contract of sale, this case is to stand for trial ; otherwise, judgment for the defendant."

O. W. Holmes, Jr. & E. J. Holmes, for the plaintiffs. The agents of the city sold two buildings in accordance with a vote requiring the plaintiffs to remove them within five days. The street through which they were to be removed was sixty feet wide. One building was fifteen and the other thirty feet wide. A license to remove them was granted, and the plaintiffs were about to do so when the license was revoked, and not renewed within the five days. The buildings were not removed, and the city sold them a second time, which is the conversion complained of. 1. Assuming, what does not appear, that notice was given at the sale that the removal would be required, the stipulation was not a condition. If this had been a contract to sell instead of an executed sale, it could hardly be maintained that the defendant's undertaking to deliver was dependent on the plaintiffs' agreement to remove within five days ; the latter term does not go to the root of the contract. But the property in the houses had vested in the plaintiffs and had been paid for ; and it takes stronger words to divest property than to excuse performance of an executory undertaking. If nothing had been said, the plaintiffs would have been bound to remove within a reasonable time ; but if they had not done so, the city would not have been authorized to convert their property to its own use. A stipulation fixing what should be deemed a reasonable time does not affect the other rights of the parties. The defendant must stand strictly on a condition defeating the plaintiffs' title, not on a mere right to rescind. Rescission requires that the rescinding party should put the other *in statu quo*. It will be observed that the money went into the city treasury after the time allowed for removal, and there has never been any offer to return it.

2. The plaintiffs bought the "buildings," not a mere congeries of planks. A contract to deliver a building would not have been satisfied by delivering the materials of one. *Barr v. Gibson*, 8 M.

& W. 390, 399, 400. *The Queen v. Manning*, L. R. 1 C. C. 338 341. The plaintiffs were to remove what they had bought within five days. If it were a condition that they should do so, still a condition is discharged if performance is made illegal. It was contemplated at the time, that a license to remove the building should be granted. And reasonably contemplated, for the dimensions of the buildings were such as not to interfere with the travel on Harrison Avenue. A license was issued, but was revoked before the plaintiffs had acted on it. That was made illegal which had been expected to be and had been legal. The exigencies which made the revocation of the license expedient were not perpetual. They had not existed a day before. They reasonably might be expected not to last beyond a limited time; for the width of the street shows that under ordinary circumstances the license might properly be granted. If words not sounding in defeasance are to be read as going to the foundation of the plaintiffs' title, the implied condition must at least be construed so as to allow them a reasonable time for a change of circumstances to render performance on their side possible, consistently with getting what they bargained for.

It is admitted that the city as a proprietor must not be confounded with the city as legislator or custodian of the public welfare. But the court will perceive that a different doctrine from that for which the plaintiffs contend would put them in the position of losing their purchase, because the vendor has made it impossible for them to remove what the vendor, as such, was bound to deliver.

J. P. Healy, City Solicitor, for the defendant.

MORTON, J. The contract upon which the rights of the parties depend is contained in the advertisement of sale, which is as follows: "June 9, 1869. Sale of city property. By order of the superintendent of public lands. This day at 4 o'clock, on the premises, will be sold for cash down the large two-story wooden building standing on the south corner of Dover Street Bridge and Harrison Avenue. It is about 15 by 170 feet long, to be removed in five days from day of sale. Also one two-story wooden building, No. 418 Harrison Avenue, to be removed immediately."

The auctioneer had no authority to sell upon any other terms than those stated in the advertisement, and it is not shown that

he did so. There is no proof that his statement at the sale, that the building was suited for tenement purposes and could be removed for that end, was intended or understood to vary the terms of the printed advertisement. It was a statement of his opinion, and cannot be construed as an implied guaranty that the proper authorities would grant a permit to remove the building through the public streets.

Regarding the advertisement, then, as expressing the contract of the parties, the reasonable construction of it is, that the first named building was sold to the plaintiffs upon the condition that they should remove it in five days from the day of sale. If this had been a sale by a private individual it would be entirely clear that the buyer took the risk of being able to remove it without tearing it down; that upon his failure to remove it, according to the condition of the sale, the seller might treat the contract as broken and resell it, and that no action could be maintained against him either for a conversion or for damages for a breach of the contract. The principle is the same in this case. The city of Boston was the seller, but like an individual proprietor it would be liable to the plaintiffs only upon the ground of an express or implied stipulation or guaranty that they should receive a permit to remove the building as a whole. There is no express stipulation of this character, and we see no principle upon which such a stipulation can be annexed to the contract by implication. By the ordinances of the city of Boston, which are presumed to be known to both parties, the committee on public lands, by whom this sale was made, have the care and management of the lands belonging to the city, so far as relates to the improvement, sale and disposal of the same, while the right to grant permission to remove buildings through the public streets is vested exclusively in the board of aldermen. Laws & Ordinances of 1869, 424, 628. The committee on public lands had no right to grant such permission to the plaintiffs; there is nothing in this case to show that it undertook to do so, or to stipulate as a part of the terms of sale, that the board of aldermen should do so, and we are of opinion that the law does not imply such a stipulation from the nature of the contract and the situation of the parties. In the sale of this building the city acted, in its capacity as a proprietor, in the management of property held for its profit and

advantage as a corporation, and as to it, has substantially the same rights and liabilities as a private individual. But in the maintenance and care of the public streets the board of aldermen act in a public capacity, in the discharge of duties imposed by the legislature for the public benefit. This distinction is well established. *Oliver v. Worcester*, 102 Mass. 489. No stipulation can be implied from a sale by the city of its private property, any more than in the case of a sale by an individual, that the public officers who by law have the charge of the streets shall grant a license to obstruct them.

The same considerations apply to the sale of the other building named in the advertisement.

It follows that as the plaintiffs cannot recover for either of said buildings for a breach of the contract of sale, there must be, according to the terms of the report,

Judgment for the defendant.



115 86
146 48

GEORGE W. LEONARD & wife vs. DAVID HUMPHREYS STORER.

Suffolk. March 12. — April 9, 1874. COLT & ENDICOTT, JJ., absent.

The owner of a building with a roof so constructed that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway, is not liable to a person injured by such a fall upon him, while travelling upon the highway with due care, if the entire building is at the time let to a tenant, who has covenanted with the owner "to make all needful and proper repairs both internal and external," it not appearing that the tenant might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precaution have prevented the accident.

TORT to recover for injuries sustained by the female plaintiff on account of snow and ice sliding from a building owned by the defendant upon her. In the Superior Court the following facts were agreed :

"That in the winter of 1869, the defendant was the owner of a building on the southerly side of Winter Street, in the city of Boston, and contiguous to said street; that the said building was covered by a slated, pitched roof, (the pitch of which is thirty-two degrees,) upon which snow and ice collected and slid into said street, in the winter season, to the same extent to which it col-

lected upon and slid from other pitched roofs, of said pitch, and there was no guard or protection upon the building to prevent it from so sliding ; that said Winter Street was a public highway in the city of Boston, and the female plaintiff was passing along on said street, as she lawfully might, and as she was so passing along and using due care, and without any fault of hers, the snow and ice slid from the roof of said building upon her, whereby she was injured ; that on the first day of May, 1857, the defendant leased the said building and premises to Jacob Fullerton, for the term of fifteen years, from that date, by a written lease, duly executed, by the terms of which the lessee took the entire building and agreed to 'make all needful and proper repairs, both external and internal, of the demised premises,' and the right was reserved to the lessor to 'enter or send agents into and upon the same to examine the condition thereof ;' that Fullerton took possession of the building under his lease, and was in possession thereof at the time of the accident ; that the roof of the building at the time of the accident was in the same condition as when the lease was executed, it not having been altered or repaired during the time."

On these facts the Superior Court ordered judgment for the defendant, and the plaintiffs appealed to this court.

R. Lund, for the plaintiffs. Upon the facts agreed in this case, either the defendant or the tenant is liable to the female plaintiff for her injuries in this form of action. *Shipley v. Fifty Associates*, 101 Mass. 251 ; 106 Mass. 194. The only question here to be determined is, whether upon the facts in the case the defendant, who is the owner of the building, is liable. Had the building been leased to different tenants, each one having a lease of different portions, all the questions would have been fully settled by the case above cited. But the defendant insists, that, as this was all leased to one tenant, the tenant had the full control of the entire building, and therefore the defendant is not liable. This might be so, if the accident had happened in consequence of any nuisance which the tenant had erected, or any change in the structure of the roof which he had made. But the roof is in the same condition as when the lease was made. The tenant has not reconstructed it, or in any way interfered with it, and by the terms of the lease he had no right to make any change, only to

make repairs, and then only to put it in as good condition as it was before. The lease provides what the tenant shall do, but does not provide for any change in the roof. The accident then did not happen by any neglect of duty on the tenant's part, but was occasioned by the shape or slope of the roof, and from the proximity of the building to the street. The owner alone being responsible for the shape or slope of the roof, is alone liable. *Shipley v. Fifty Associates, supra.* In this lease, the landlord reserved the right "at all seasonable times to enter or send agents, into and upon the same," (to wit, the building,) "to examine the condition thereof," therefore, "he was not excluded from going upon the roof, and so altering its construction, that at all seasons of the year it should not produce any inconvenience or danger to travellers on the highway below." Again, if it is said that the defendant had parted with his entire control of the roof of the building, he is guilty of negligence in putting it beyond his control, in an unsafe condition, without providing that the tenant should put it in safe condition, or at least give him permission to so do, which he did not do in this case.

J. P. Healy, for the defendant. The defendant had neither the duty nor the right to remove the snow from the roof, or to interfere in any way in the general management and care of the building. The plaintiffs therefore have no cause of action against him. Their remedy must be sought, if at all, against the tenant. *Kirby v. Boylston Market Association*, 14 Gray, 249, and cases cited. *Boston v. Worthington*, 10 Gray, 496.

AMES, J. It does not appear that the defendant had any connection with the injury complained of, except that he was the owner of the building in front of which it occurred. The whole of this building had been leased for a long term of years to a tenant who was in actual occupation at the time of the accident. By the terms of the lease, the tenant had bound himself to make certain specific alterations in the lower story of the building, and also to make at his own expense "all needful and proper repairs, both internal and external, of the demised premises." The lessee was the occupant of the entire estate, and, as between himself and the public, was bound to keep the building in such a state of repair that the adjoining highway should be safe for the use of travellers thereon. "It is the occupier who is *prima facie* liable

to third persons for damages arising from any defect." *Kirby v. Boylston Market Association*, 14 Gray, 249, and cases there cited. The control of the tenant included the roof of the building, as well as its interior, and it does not appear that he might not have cleared the roof of snow by the exercise of due care, or that he could not by proper precautions have prevented the accident. We cannot say upon this report that any neglect of duty, or any wrongful act, on the part of the defendant, was the cause of the injury. In *Shipley v. Fifty Associates*, 101 Mass. 251, and 106 Mass. 194, it appeared that the roof was not in the control of the various occupants of the building, but of the owners, who were therefore held responsible for its condition. As the judgment of the court below does not appear to have been erroneous, it is therefore *Affirmed.*



HANNAH BURNS & another vs. BEZER THAYER.

Suffolk. March 19. — April 9, 1874. AMES & DEVENS, JJ., absent.

The title of a purchaser from a mortgagee under a mortgage containing a power of sale is not defeated by the neglect of the mortgagee to make and file the affidavit required by the Gen. Sta. c. 140, § 42.

If the mortgagee is indirectly a purchaser at a sale made under a power contained in a mortgage, which does not give the mortgagee the right to purchase, the sale is not void, but only voidable, and if before proceedings are taken to set aside the sale, the nominal purchaser sells the land to a *bonâ fide* purchaser without notice, for an adequate consideration, such purchaser takes a good title.

B. made a mortgage of real estate to P. which contained a power of sale, but did not give P. the right to purchase at such sale. P. sold for breach of condition to D. for \$1200, the mortgage debt then being over \$1400. D. who was by an arrangement with P. a nominal purchaser sold to T. *Seem*, that if B. was entitled to redeem on the ground that T. was not a *bonâ fide* purchaser without notice, P. should have been joined as a defendant, as he apparently retained the original debt.

Laches are not imputable to an infant plaintiff.

BILL IN EQUITY brought by Hannah Burns and Elizabeth Burns, a minor, suing by her guardian the said Hannah, to redeem a mortgage of an estate in Chelsea, made by John Burns, the husband of the first named plaintiff, and the father of the other, to Edward Potter, June 16, 1855. The mortgage contained a power of sale, but there was no clause in it authorizing

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the mortgagee to purchase at any sale made under the power. The bill was filed January 22, 1868. The answer set up a sale of the premises by Potter, in pursuance of the power of sale contained in the mortgage, for a breach of the condition thereof, to Charles H. Dow, July 19, 1859, and a sale by Dow to the defendant; that in September, 1859, the defendant entered upon the premises without any notice of the title set up in the bill, and had expended large sums of money in repairing and erecting buildings on the premises. The answer also set up laches on the part of the plaintiffs.

The case was heard by *Ames, J.*, who made the following report:

“At the hearing of the cause before me, the question upon which the parties were at issue was as to the validity and effect of a sale of an estate in Chelsea, by the mortgagee, Edward Potter, for breach of condition, and by virtue of a power of sale contained in the mortgage deed.

“And in relation to that sale, I find that there was a breach of the condition of the mortgage, the note for \$1875, with six months' interest thereon, secured thereby, having become due on June 19, 1859, and remaining unpaid; that after the breach of the condition, Hannah Burns, one of the plaintiffs, with the assent of the mortgagee, Edward Potter, attempted to sell the premises at auction, but failed to get a bid for a larger amount than that due under the mortgage, and consequently gave up any further attempt to sell the premises; that subsequently the mortgagee gave notice of the time and place of sale in exact conformity to the terms of the power, which were as follows:

“‘But if default shall be made in the payment of the money above mentioned, or the interest that may grow due thereon, or of any part thereof, then it shall be lawful for the said grantee, his executors, administrators and assigns, to enter into and upon all and singular the premises hereby granted or intended to be granted, and to sell and dispose of the same and all benefit and equity of redemption of the said John Burns, the grantor, his heirs, executors, administrators or assigns therein, at public auction, such sale to be upon the premises hereby granted, first giving notice of the time and place of sale by publishing the same once a week in three successive weeks in the *Daily Advertiser*, a

newspaper printed in the County of Suffolk, in Boston. And in his or their own names, or as the attorney of the said John Burns, the grantor, for that purpose by these presents duly authorized, constituted and appointed to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance for the same in fee simple, and out of the money arising from such sale to retain said sum of thirteen hundred and seventy-five dollars, or the part thereof remaining unpaid, and also the interest then due on the same, together with the costs and charges of advertising and selling the same premises, rendering the surplus of the purchase money, if any there be, over and above said sum and interest as aforesaid, together with a true and particular account of said sale and charges, to the said John Burns, the grantor, his heirs, executors, administrators or assigns, which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said John Burns, the grantor, his heirs and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from or under him, them or any of them.'

" That on July 15, 1859, at the time advertised for the sale, the mortgagee entered upon the premises and there offered the same for sale at public auction by one Thayer, a licensed auctioneer ; that the mortgage debt still remaining unpaid, the premises were bid off to Charles H. Dow, for \$1200, he being the highest bidder therefor ; and thereupon the mortgagee executed and delivered a deed of the premises to him, which was duly recorded ; (which deed was dated July 19, 1859, acknowledged July 21, 1859, and recorded June 8, 1860 ;) that Hannah Burns, one of the plaintiffs, was present at the sale, and the sale was conducted in the ordinary way ; that subsequently, on the first day of September, 1859, said Dow executed and delivered a deed of the premises to the defendant Thayer, for \$1500, who paid \$100 in cash, and gave his five promissory notes for the balance of the purchase money to Edward Potter, four of said notes being for \$300 each, payable in one, two, three, and four years, respectively, and one for \$200, payable in five years from September 1, 1859, secured by mortgage on the same premises to Edward Potter ; that all of said notes were paid at maturity ; that there was no evidence of any previous dealings or acquaintance between the defendant and Potter, or the defendant and Dow ; and that at the time of

his purchase the defendant owned and resided with his family on the adjoining estate ; that the plaintiffs occupied the premises several weeks after the auction sale, and then left voluntarily and went to live in the neighborhood, where they resided until the filing of the bill ; that no affidavit of the sale was ever made or recorded by the mortgagee ; that after the defendant bought the property in 1859, he erected a valuable building, and made expensive improvements upon the premises. Hannah Burns, one of the plaintiffs, knew that the defendant had bought the land and was making these expenditures at or about the time when the same were made, but never made any claim to the estate until about the time of filing the bill.

“ Edward Potter testified that he attended the sale, and that Charles H. Dow was the highest bidder and the purchaser ; that he could not recollect the amount of the bid, nor whether it amounted to enough to pay the debt and expenses ; that he could not tell who asked Dow to attend the sale, nor whether he asked Dow to bid ; and that he could not tell whether Dow paid him any money on the occasion or not, nor could he tell whether Thayer, the defendant, gave the witness a mortgage for the whole of the purchase money or not, nor what the amount was ; that he acted under the advice of counsel, and followed his advice ; that he kept a record of the sale, but it was burned in the great fire in November, 1872, and that he had no doubt the transaction was correctly stated in the deeds.

“ Charles H. Dow testified that he had a slight recollection of having been at the sale, but although he did not recollect bidding for the property, he had no doubt that he was the purchaser. He remembered making the deed to the defendant ; thought that he may have gone there at the request of Potter, the mortgagee, and with an idea that there might be an opportunity to make something. He added that he had a very indistinct recollection of the transaction with Thayer, but supposed he got some consideration.

“ It was in evidence that Potter and Dow had frequent business transactions with each other. The plaintiff, Hannah Burns, was the widow of the mortgagor, and had by him three children, who survived him, but two of those children have since died. It appeared that she was an illiterate person, and that her daughter,

the co-plaintiff with her, was eighteen years of age, April 1, 1878 ; and they claimed at the hearing that they were ignorant of their rights and were not aware that they had any remedy, until about the time this suit was brought.

“ Upon the foregoing facts and evidence, I held that there was no sufficient evidence that Dow paid any money, or gave any security, or signed any contract or memorandum to the mortgagee, at or after the sale under the power ; and I therefore ordered and decreed that the plaintiffs were entitled to redeem the estate, allowing the defendant to charge for his outlays and expenses in making improvements thereon ; and that the case be sent to a master to state the account accordingly.”

From this order and decree the defendant appealed to the full court.

T. S. Dame, for the plaintiff.

R. Stone, Jr., for the defendant.

WELLS, J. The title of a purchaser from a mortgagee under a power of sale is not defeated by the neglect of the mortgagee to make and file the affidavit required by the Gen. Sts. c. 140, § 42. *Field v. Gooding*, 106 Mass. 310.

This report must be taken to establish the propositions that Dow was a nominal purchaser only ; and that the benefit of his purchase and resale to the defendant was secured to Potter, the mortgagee, by some arrangement or understanding between him and Dow. The plaintiff contends that this made void the whole proceeding of the sale under the power ; so that no title could pass by the conveyances, except the mortgage title of Potter. This bill is accordingly brought against the defendant alone, as assignee of the mortgage.

Such however is not the effect of an attempt, by one who is intrusted with a power of sale, to become indirectly a purchaser. The sale, if otherwise regular, is voidable only, at the election of the party whose interests are prejudiced thereby. It is not absolutely void. The title passes. The party injured may avoid and defeat it. But if, before he exercises that right, the estate has been conveyed to another, who has purchased in good faith, upon adequate consideration and without notice, such purchaser will hold the estate.

The purchase by the defendant in this case was made upon sufficient consideration. The report is silent upon the question of notice and good faith, so far as he is affected; and there are no facts stated, from which we can infer that there was any finding upon that point. Apparently the decree was based entirely upon the invalidity of the original sale and conveyance from Potter to Dow. That, without more, does not entitle the plaintiffs to a decree against this defendant.

There is another difficulty in the plaintiffs' case. The sale and conveyance did not purport to be of the mortgagee's interest. It was a sale of the land for \$1200; whereas the mortgage debt exceeded \$1400. That debt, except so far as it was satisfied by the proceeds of the sale, remained in the ownership of Potter. For the protection of the purchaser the conveyances may perhaps be treated as carrying the mortgagee's legal title in the land; even though set aside in their intended operation to carry the mortgagor's title and cut off his right to redeem. But the mortgage being incident to the debt, the creditor is a proper and necessary party to a bill to redeem. Upon the facts reported Potter would seem to be a necessary party to the proceedings in this case.

The minor plaintiff is not chargeable with laches.

Case must stand for further hearing.

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EDWARD G. NICKERSON & another *vs.* SAMUEL LOUD & others.

Suffolk. March 25. — April 9 1874. AMES & DEVENS, JJ., absent.

To induce a court of chancery to order a writing to be cancelled or surrendered, as constituting a cloud upon title, it must at least be an instrument which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to that of the party claiming relief.

A paper signed by A. and recorded in the registry of deeds, giving notice that certain real estate held by B. is claimed to be subject to a trust in favor of A. and others, and that A. will dispute any title that B. may attempt to make, does not constitute a cloud upon title.

BILL IN EQUITY against Samuel Loud, Albert B. Low, Henry N. Stone and Thomas F. Temple. The bill set forth that the

plaintiffs were on March 24, 1873, and long before and ever since, seised and possessed, as tenants in common, of a parcel of land, wharf and flats, with the buildings thereon, known as McKay's ship-yard, in East Boston; that they derived their title to the same by deed from Charles E. Brigham, under his deed from Donald McKay; that Samuel Loud, Albert B. Low and Henry N. Stone, combining, conspiring and confederating together with Thomas F. Temple, the register of deeds for the county of Suffolk, to injure, annoy and prejudice the plaintiffs in their rights and property in the estate aforesaid, on March 15, 1873, executed a paper, of which the following is a copy: "To all whom it may concern. The undersigned hereby give notice that they will dispute the validity of any title which Charles E. Brigham may attempt to give of McKay's ship-yard and wharf adjoining the estate of Paul Curtis on Border Street in East Boston, and being the same premises conveyed to said Brigham by Donald McKay by deed dated March 22, 1871, and recorded with Suffolk Deeds, lib. 1040, page 10. Henry N. Stone, Samuel Loud, Albert B. Low. Boston, March 15, 1873;" that having executed the same and delivered it to Temple, he, as said register, recorded the same in the registry of deeds for said county, with the deeds thereof, where the same is now remaining of record; that said defendants in further pursuance of said combination, confederacy and conspiracy, on March 24, 1873, made and executed another paper, of which the following is a copy: "To all whom it may concern. This is to give notice that, in behalf of myself and others, I claim that a certain piece of real estate, situate in East Boston on Border Street, and known as McKay's ship-yard and adjoining the yard of Paul Curtis's heirs, is subject to a trust in our favor. The said title to said property is now in Edward G. Nickerson or Isaac Pratt, Jr., and I shall dispute any title that he may attempt to give. Samuel Loud, Henry N. Stone. March 24, 1873;" that having executed the same, and delivered it to said Temple, he thereupon recorded the same in the registry of deeds for said county, with the deeds thereof, where the same now remains of record; that as soon as the plaintiffs were informed and knew that said papers had been recorded, they called upon the defendants, and required that the same should be withdrawn from said record, so that no cloud should be and remain upon

their title to the premises aforesaid by reason thereof; that the defendants refused and still refuse to comply with the request of the plaintiffs, but instead thereof placed upon the margin of the record of the first paper aforesaid the following memorandum: "Boston, March 27, 1873. We hereby waive all claim, right and interest or title we may have under the instrument here recorded. H. N. Stone, Samuel Loud, Albert B. Low. Witness, Charles W. Kimball;" and, upon the margin of the record of the second paper aforesaid, the following memorandum: "Boston, March 27, 1873. We hereby waive all claim, right and interest we may have under the instrument here recorded. Samuel Loud, Henry N. Stone. Witness, Charles W. Kimball." The bill then averred that the defendants had no right to execute said papers for the purpose of recording the same in the registry of deeds as aforesaid, and that Temple had no right to record the same, and did so in violation of his duty as register of deeds; that the memoranda placed in the margin of the record by the defendants do not remedy the wrong and injury suffered by the plaintiffs as aforesaid, but said record still remains, and is a cloud upon the title of the plaintiffs, whereby the plaintiffs have lost a sale of the said premises to parties who would have purchased the same of the plaintiffs at a valuable price, being afraid of the title by reason of the record aforesaid, and in consequence thereof refusing to complete the purchase and take a deed of the premises as they otherwise would have done; that the plaintiffs have been and are deprived of the opportunity to sell the same, and are compelled to hold the same to their great disadvantage and injury.

The prayer of the bill was that the defendants "be required to withdraw said papers and memoranda from the records of the registry aforesaid, and that said records be reformed and expurgated so that no cloud shall be and remain upon the title of the plaintiffs in the premises aforesaid; and that the defendants be decreed to pay to the plaintiffs all damages they may have suffered by reason of the premises; and for further relief."

To this bill the defendants demurred for want of equity; and *Morton, J.*, reserved the case for the consideration of the full court upon the bill and demurrer.

C. R. Train, for the plaintiffs. The only question submitted upon the bill and demurrer is, whether the acts complained of constitute a cloud upon the plaintiffs' title. The first paper put on record disputes the validity of the title of Brigham, who is the plaintiffs' grantor. The second paper recorded alleges that the estate is subject to a trust in favor of Loud, Stone and others, and although it might perhaps be claimed, that these parties have by their waiver in the margin of the record waived any claim of their own, yet they have made a claim for others which is not relieved by their waiver, as they do not remove the imputation that the estate is charged with a trust in favor of third parties. The papers recorded are placed on the public records of the county without right, and against law. The register of deeds has no authority to record such papers. The register is to record those instruments which the law requires to be recorded, and he is not to record anything else. He cannot be compelled and he is not at liberty to record anything else. Gen. Sts. c. 17, § 97. These papers thus placed on record are a perpetual cloud upon the plaintiffs' title. 1 Story's Eq. Juris. (11th ed.) § 700 *a*. *Martin v. Graves*, 5 Allen, 601. *Clouston v. Shearer*, 99 Mass. 209. *Sherman v. Fitch*, 98 Mass. 59. *Sullivan v. Finnegan*, 101 Mass. 447. The papers by the fact of their being recorded acquire an unusual importance; are *quasi* official; to some extent, are regarded as deeds. [WELLS, J. Is there any case where a deed between utter strangers is held to be a cloud upon the title?] I do not know that there is. Our claim is that the register had no right to put these papers on record and that they are a cloud on our title. [WELLS, J. If a deed between strangers would not be a cloud, how can an instrument not acknowledged, and therefore not entitled to be on record, be a cloud?]

E. H. Derby, for the defendants, was not called upon.

GRAY, C. J. In order to induce a court of chancery to order a writing to be cancelled or surrendered, as constituting a cloud upon title, it must at least be an instrument which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to the plaintiffs. The writings which the defendants in this case have caused to be recorded in the registry of deeds are mere assertions, which cannot under any circumstances

be evidence against the plaintiffs or in favor of the defendants. Such writings, whether recorded or unrecorded, do not constitute a cloud upon title, against which equity will grant relief. *Peirsoll v. Elliott*, 6 Pet. 95. If they were unlawfully recorded, and to the injury of the plaintiffs, their remedy, if any, is by action at law for damages. *Demurrer sustained and bill dismissed.*

GERARD C. TOBEY *vs.* PELEG MCFARLIN & others.

Suffolk. March 26. — April 9, 1874. AMES & DEVENS, JJ., absent.

A creditor of one member of a partnership brought a bill in equity under the Gen. Sta. c. 113, § 2, *cl.* 11, against all the members of the partnership, to reach and apply to the payment of the debt the amount that would be due his debtor on liquidation of the partnership. He afterwards sought to make certain debtors of the firm parties defendant. *Held*, that they had no interest in the suit, and could not be joined as defendants.

BILL IN EQUITY under the Gen. Sts. c. 113, § 2, *cl.* 11, against Peleg McFarlin, A. Tillson and Matthias Ellis.

The bill alleged that the plaintiff was a creditor of the defendant Ellis; that he and the other defendants were members of the firm of Matthias Ellis & Co.; that said firm had property including debts to a large amount due to it from certain insurance companies named; that after the liquidation and payment of all the debts of the firm and adjustment of the accounts between the partners there would be a large amount belonging to Ellis as his share of the profits of the firm; and that the interest of Ellis in the property of the firm could not be come at to be attached or taken on execution in a suit at law against said Ellis.

The defendants answered and the plaintiff moved for leave to amend his bill by making the several insurance companies named therein parties defendant. This motion was overruled by *Ames, J.*, and the plaintiff appealed; further proceedings were stayed, and the question was reported for the consideration of the full court.

G. C. Tobey, pro se. 1. The motion should have been allowed, and the insurance companies made parties to the bill. It may be granted as auxiliary to the principal relief sought. *Whittemore*

v. *Cowell*, 7 Allen, 446. The insurance companies may be viewed, perhaps, as materially interested in the purpose or object of the suit. If not indispensable parties, they may still with propriety be made parties to the record. Story's Eq. Pl. §§ 156, 221. The creditor of the insolvent partner has an equitable interest to be protected in the adjustment and settlement of the several policies; and, although the insurers are not directly liable to him in an action at law, yet they properly may be made parties to his bill in equity, and subjected to the decree of the court. *Scovill v. Kinsley*, 13 Gray, 5. *Holmes v. Woodworth*, 6 Gray, 324. Proceedings like the case at bar are regarded by the court as "in the nature of an equitable trustee process, by which a creditor may in one and the same suit establish his claim against his debtor, and also compel the appropriation of property in the hands of third persons to the payment of his debt." The inquiry into the two distinct issues involved may proceed independently of each other. The suit is of "the nature of an extension of the trustee process." *Sanger v. Bancroft*, 12 Gray, 365. *Crompton v. Anthony*, 13 Allen, 34. If his bill is sustainable, the plaintiff is entitled to join such parties thereto as may appear necessary for securing to him the full benefit of the aid which is invoked.

2. There is no statutory enactment, and, it is believed, no established finding or settled practice in this Commonwealth under which these partnership effects could have been attached in a suit at law against one of the partners alone. On the contrary, it is settled law that a creditor of an insolvent partner can take and sell on execution, at the most, only the interest of the debtor in the whole partnership effects and business; that is to say, his share of the surplus, after payment of all the partnership liabilities. The firm may be insolvent and have no surplus; the partner may be a debtor to the firm; the partnership stock belongs to the partnership, and no copartner has a distinct and separate property in any part of it. *Pierce v. Jackson*, 6 Mass. 242. *Rice v. Austin*, 17 Mass. 197. *Newman v. Bagley*, 16 Pick. 570. *Allen v. Wells*, 22 Pick. 450. *Trowbridge v. Cushman*, 24 Pick. 810. *Dyer v. Clark*, 5 Met. 562. *Pond v. Kimball*, 101 Mass. 105. *Rice v. McMartin*, 39 Conn. 578. So the nature of partnership property forbids the attachment or seizure of a copart-

ner's interest in any segregated or specified goods among the assets of a firm. "In such case a distinct moiety or other proportion, in certain specific articles of the partnership property, cannot be taken and sold. They cannot be appropriated in whole or in part as constituting any separate property of one partner. *Allen v. Wells*, 22 Pick. 450. *Reed v. Howard*, 2 Met. 36, 39. *Pond v. Kimball*, 101 Mass. 105, 106. *Gibson v. Stevens*, 7 N. H. 352. *Morrison v. Blodgett*, 8 N. H. 238, and cases cited. Parsons on Partnership, 353. At the most it can only be suggested that the officer might have attached the interest which the insolvent partner had in the whole partnership concern. But without right to take the partnership goods he cannot hold on to a mutable interest which is neither palpable nor ascertained nor certain nor susceptible of present appraisal. The officer cannot get an active, manual possession of such an interest, and how in the absence of enabling statutes can he come at, or hold, that of which he can get no custody?

The case of *Melville v. Brown*, 15 Mass. 82, is very briefly reported,* and the remarks of the court in that case, and in *Blanchard v. Coolidge*, 22 Pick. 151, touching this question, are indecisive and entirely *obiter*. In both cases the acts of the officer were tortious.

3. Some equitable form should be adopted whereby the petitioner may be protected by proceedings in which the persons who are to pay these large amounts, and the persons who are to receive and distribute them, may be amenable to the direction of the court. *Holmes v. Woodworth*, 6 Gray, 324. And this can be so administered as to avoid hardship to the solvent copartners. If the petitioner has rights, he has no power at law to vindicate them, and both parties must go to equity for the final accounting ;

* In the copy of 15 Mass. in the Law Library of the County of Berkshire is the following in the handwriting of Charles Sedgwick, son of Mr. Justice Sedgwick, and for a long time the clerk of the courts in that county : "The history of the report of *Melville v. Brown* is this. Judge Jackson said to Mr. Tyng, 'Why do you make such long reports? Why not state the points and the decision ; that is enough.' 'Please give me a specimen report, said Mr. Tyng.' Whereupon Judge Jackson instantaneously furnished the above, which is here inserted *totidem verbis*. This I had from Ch. J. Shaw.

" September, 1846.

C. S."

so that under any process equity is eventually and necessarily the resort. Again: an equity jurisdiction arises here by the operation of administering the equities as between the partners, without which the interest of the insolvent partner cannot be ascertained. Thus the equities of the creditor may, at least in a case where his debt is admitted, be worked out through their equities.

E. Avery & F. W. Palfrey, for the defendants, were not called upon.

MORTON, J. The question whether the plaintiff can in any aspect of the proofs maintain his bill, is not now before us. The only question presented is whether the order overruling the motion to amend was correct.

The object of the statute is to enable a creditor by a bill in equity to reach and apply to the payment of his debt any property of his debtor, which cannot be attached or taken on execution in a suit at law. But it does not enable a creditor of one partner in a firm to reach and apply the property of the firm or debts due to the firm. The property and debts of the firm are first to be applied to the payment of the creditors of the firm. It has therefore been held that a creditor of one partner cannot attach by trustee process a debt due to the firm. *Hawes v. Waltham*, 18 Pick. 451. *Foot v. Hunkins*, 14 Allen, 15.

The only property or interest of a partner which can be applied to the payment of his private debts is the balance due him upon the liquidation of the partnership debts, and the adjustment of the accounts of the partners. The plaintiff therefore in this case would not be entitled to a decree requiring the insurance companies named as the debtors of the firm to pay to him the amounts which they owe the firm. In other words he would not be entitled to any relief against them. Their whole duty is to pay their debts to the firm. They have no interest in the subject of this suit, and would not be affected by any decree which the plaintiff could obtain. They are therefore not proper parties to the suit.

Order refusing amendment affirmed.

COMMONWEALTH vs. MICHAEL SHEA.

Middlesex. March 31. — April 10, 1874. AMES & DEVENS, JJ., absent.

An indictment on the Gen. Sts. c. 87, §§ 6, 7, for keeping a tenement used for the illegal sale of intoxicating liquors, without having any license, appointment or authority, need not further set forth that said liquors were not such as it was lawful to keep and sell

On the trial of an indictment for the keeping of a tenement for the illegal sale of intoxicating liquors, the burden of proof is on the defendant to show that he acted under a license or appointment.

INDICTMENT on the Gen. Sts. c. 87, §§ 6, 7, charging that the defendant "did keep and maintain a certain common nuisance," to wit, a tenement in Framingham used for the illegal sale and illegal keeping of intoxicating liquors, without having any license, appointment or authority, first duly had according to law, to keep intoxicating liquors for sale;" and without having any license, &c., to sell intoxicating liquors.

At the trial in the Superior Court, before *Bacon, J.*, the defendant moved to quash the indictment for the reason that it did not set forth that the intoxicating liquors therein described were not ale, lager-bier, porter, or cider; and the judge overruled the motion.

The defendant requested the judge to rule that the burden of proof was upon the Commonwealth to show that the defendant acted without license or appointment, and the judge refused so to rule.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

C. F. Donnelly, for the defendant.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. The sufficiency of the indictment and correctness of the ruling upon the burden of proof have both been repeatedly affirmed. *Commonwealth v. Kennedy*, 108 Mass. 292. *Commonwealth v. Conneally*, 108 Mass. 480.

*Exceptions overruled.**

* A similar decision was made June 16, 1874, in the case of

COMMONWEALTH vs. MICHAEL HANLEY,
argued by the same counsel.

COMMONWEALTH vs. JOHN KELLEHER.

Middlesex. March 31. — April 10, 1874. AMES & DEVENS, JJ., absent.

Evidence that a police officer of the town of N. sometimes while on duty slept in the police station there; that he had a room in N. where he sometimes slept and also another room there at the house of his brother where he kept his clothes, and that he claimed to be an inhabitant of N., is sufficient to warrant the jury in finding that he was an inhabitant of that town, although he worked and boarded in the town of W. and was a police officer of that town.

INDICTMENT for an assault and battery upon Frank E. Hinds and resisting him in the discharge of his duty as a police officer of the town of Newton.

At the trial in the Superior Court, before *Bacon, J.*, the jury found the defendant guilty, and the following bill of exceptions was allowed :

“Hinds was called as a witness for the government, and on his direct examination testified that he resided in Newton, and produced a certificate signed by the selectmen of Newton appointing him a police officer without pay. On cross-examination he testified that he held a similar appointment for the town of Watertown; that at and about the time of the alleged assault he worked in Watertown; that he boarded in Watertown, and slept sometimes while on duty in the police station in Newton, and that he had another room in Newton in which he sometimes slept and also a room at the house of his brother in Newton in which he kept his clothes, and that he claimed to be an inhabitant of Newton. Upon this evidence the counsel for the defendant asked the court to rule as a matter of law that Hinds could not legally be a police officer of Newton. But the court declined so to rule, and instructed the jury that to be a police officer of Newton he must be an inhabitant of Newton, and left the question whether he was such inhabitant to the jury to determine, with instructions, to which no exception was taken, as to what constitutes an inhabitant of a town.” The defendant excepted to the above rulings.

J. Rutter, for the defendant, cited *Abington v. North Bridge water*, 23 Pick. 170.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. The evidence warranted the jury in finding that the domicile of Hinds was in Newton.

Exceptions overruled.

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185 140

THEODOSIA SCOTT vs. EDWARD S. RAND, JR., & another.

Suffolk. March 26. — April 13, 1874. AMES & DEVENS, JJ., absent.

A. reciting that his wife B. was under guardianship as an insane person, and that he was minded to set apart certain property, "the income to be paid to the guardian" of B. during the lifetime of A., so that in any event of fortune a comfortable support and maintenance will be secured to B. during the lifetime of A., conveyed certain property to C. in trust "to pay to the guardian" of B. for the time being a certain sum, during the life of A.; "the receipt of the said guardian to be a full acquittance to the said trustee for any payments." The indenture then provided for the disposition of the trust in case of the death of B. living A., and in case of the death of A. living B., and that if B., "her guardian for the time being, or any person authorized by her, or acting in her behalf," should commence legal proceedings against A. in relation to certain property, the income should be withheld, and if the proceedings continued for two years the trust should cease. B. was afterwards discharged from guardianship and declared sane, and C. conveyed the trust property to A. Held, that the trust continued notwithstanding the discharge from guardianship.

BILL IN EQUITY brought by Theodosia Scott, suing by her next friend, against Edward S. Rand, Jr., and Charles Scott, alleging :

That the plaintiff was the wife of the defendant Scott; that in 1862, she was adjudged by the Probate Court for the county of Middlesex to be an insane person; that in September, 1871 the plaintiff filed a petition in said Probate Court, praying to be discharged from guardianship, and that she was discharged from guardianship by an order of said court in January, 1872; that the defendant Scott took an appeal from said order, which appeal was waived May 7, 1872, and the decree of the Probate Court affirmed May 14, 1872.

The bill then set forth an indenture of trust signed and sealed by the defendants April 21, 1871, the material parts of which are as follows :

"Whereas Theodosia Scott, the wife of the said Charles Scott, has been adjudged an insane person, and is now as such under

the guardianship of William A. Herrick, of the said Boston, who succeeded Isaac Holt, of Cambridge, in the said trusts: and whereas, in time past, while the said Theodosia was under the guardianship of the said Holt, the said Charles Scott sold and conveyed certain parcels of real estate situated chiefly in Newton in said State of Massachusetts, in which parcels of land the dower and homestead rights of the said Theodosia were duly released by the said Holt, guardian, under order had by virtue of licenses from the Probate Court for the county of Middlesex and State of Massachusetts; and whereas the said Charles Scott has always provided liberally for the maintenance and support of his said wife, the said Theodosia, and is now minded and disposed to set apart certain property, the income thereof to be paid to the said guardian of the said Theodosia during the lifetime of him, the said Charles, so that in any event of fortune a comfortable support and maintenance will be secured to her the said Theodosia, during the lifetime of the said Charles: now therefore this indenture witnesseth, that in consideration of the premises and of one dollar to him paid by the said Edward S. Rand, Jr., the receipt whereof is hereby acknowledged, the said Charles Scott does hereby assign, transfer, set over and convey to the said Rand, and his heirs and assigns forever, the following securities and evidences of property, namely, (naming them.) To have and to hold the same to him, the said Rand, and his heirs and assigns forever; but in trust, nevertheless, to hold, manage and invest the same in productive real or personal estate, at his discretion, with full power to sell and convey any real estate of which the trust estate may at any time be composed, to receive the income and profits thereof, and after the payment of all taxes and expenses incurred in the management of said trust estate, to pay over to the guardian of the said Theodosia for the time being, the sum of one thousand dollars per annum, in equal quarterly payments, beginning on the first day of July, 1871, during the life of him the said Scott; the receipt of the said guardian to be a full acquittance to the said trustee for any payments; and the residue of the said net income of the said trust fund remaining after the payment of the said sum of one thousand dollars to said guardian as aforesaid, if any such there be, to account for and pay over to the said Charles Scott, or in such manner as he may

direct, at least once in each and every year during the continuance of this trust. And in further trust, upon the decease of the said Theodosia, living the said Charles, to transfer, pay over and convey the said trust fund, with any accumulated income, to him the said Charles, to hold to him and his heirs and assigns forever, free and discharged from all trusts. But if the said Charles shall decease during the lifetime of the said Theodosia, then in trust to transfer, pay over and convey the said trust estate in such manner, to such uses and purposes, and for such estates, as he the said Charles Scott shall by his last will and testament direct and appoint; and in default of such appointment, to transfer, pay over and convey the said principal or trust fund, with any accumulated income, to his heirs at law, free and discharged from all trusts. And the said Charles Scott hereby covenants and agrees to and with the said Rand and his successors in the said trust, that should the net income received from the said trust estate in any year fall below the said sum of one thousand dollars, he the said Scott will make up such deficiency to the said trustee; the intent of this provision being, that the said Theodosia shall in each and every year receive the full sum of one thousand dollars. But if the said Theodosia, her guardian for the time being, or any person authorized by her or acting in her behalf, shall at any time commence legal proceedings against the said Charles Scott, for or on account of the real estate heretofore sold by the said Charles, and in which the dower of the said Theodosia was released as aforesaid, then and in that event, the said trustee is to withhold all payments of income until such time as such proceedings shall have been wholly discontinued. And in the event of the said proceedings continuing more than two years, the said trustee shall pay over the whole of the said principal or trust fund, with all accumulated income, to the said Charles Scott, and this trust shall thereby be terminated. And the said Rand hereby accepts the said trust, and in consideration of the premises, covenants to and with the said Charles Scott, that he will faithfully discharge and perform the duties enjoined upon him by this indenture. It is hereby understood and agreed, that the said trustee shall not be held liable for any loss or depreciation of the said trust estate not occasioned by his fault, but only for wilful negligence and default."

The bill also alleged that on May 6, 1872, the defendant Rand, without right, and in violation of the terms and obligations of his trust as set forth in said indenture, paid, transferred and delivered over all of said trust property and funds to said Scott, and without notice to the plaintiff; and that the said Rand had ever since wholly neglected and refused to pay to the plaintiff the sum of one thousand dollars per annum, or any sum whatever.

The defendants demurred to the bill, and assigned the following grounds of demurrer :

1. That the plaintiff hath not in and by her said bill made or stated such a case as doth or ought to entitle her to any such relief as is thereby sought and prayed for from or against the defendants.

2. That, by the true legal construction of said indenture of trust, said trust terminated on the discharge of the said plaintiff from guardianship.

3. That said bill of complaint does not allege any demand made upon the defendant Rand, by any guardian of said Theodosia Scott, since the time when said bill alleges that said plaintiff was discharged from guardianship.

4. That it appears by said indenture that the defendant Rand only agreed to pay to the guardian of said plaintiff the income of said trust property in quarterly payments, after payment of all taxes and expenses incurred in the management of the trust fund, to the extent of one thousand dollars per annum; and that the bill does not allege that the income of the trust fund in any one year exceeded the taxes and the expense of the management of the trust fund.

5. That it appears by the indenture of trust that it was understood and agreed that the defendant Rand should not be held liable for any loss or depreciation of said trust estate not occasioned by his fault, but only for his wilful negligence and default; and that the said bill of complaint does not allege that there was any wilful negligence or default on the part of this defendant.

At the hearing before *Endicott, J.*, on the bill and demurrer, the demurrer was overruled, and the defendants appealed to the full court.

J. Lathrop, for the defendants. 1. The question is not one of intent, but whether by the terms of the trust, it was to continue

in case of the discharge of the plaintiff from guardianship. It appears by the bill, that at the time the indenture of trust was made, the complainant was under guardianship as an insane person. The property, the subject of the trust, belonged to her husband. He conveyed it to the defendant Rand, upon certain trusts, and Rand took it upon those trusts. Those trusts are specified in the indenture, and the court has no power to compel the trustee to do anything which he has not consented to do, or to consider him in default for not doing that which he has not agreed to do. The court cannot enforce a trust contrary to the expressed will of the creator, or to imply that if a certain state of facts had been thought of, a certain covenant would have been made. "It is a fundamental proposition that equitable estates are governed by the same rules as legal estates, otherwise inextricable confusion would ensue." Perry on Trusts, §§ 329, 357. When the legal estate is conveyed to a trustee, and a trust is declared as to a part only, nothing being said as to the rest, what remains undisposed of results to the original owner. In the same manner where the whole of an estate is conveyed for particular purposes, or on particular trusts only, which, by accident or otherwise, cannot take effect, a trust will result to the original owner. 1 Greenl. Cruise, 362 (395). See also *In re Ward's Trusts*, L. R. 7 Ch. 727; *Dodson v. Ball*, 60 Penn. State, 492; *Easterbrooks v. Tillinghast*, 5 Gray, 17.

2. As a question of intent, the operative part of the indenture conveys certain personal property to the trustee. He is to receive the income and profits, and, after payment of all taxes and expenses incurred in the management of the trust, "to pay over to the guardian of the said Theodosia for the time being the sum of one thousand dollars per annum, in equal quarterly payments, beginning upon the first day of July, 1871, during the life of him, the said Scott, the receipt of the said guardian to be a full acquittance to the said trustee for any payments," the residue, if any, to be paid to Charles Scott. The only covenant on the part of Rand is near the close of the indenture. "And the said Rand hereby accepts the said trust, and in consideration of the premises covenants to and with the said Charles Scott, that he will faithfully discharge and perform the duties imposed upon him by this indenture." He agrees therefore to pay to the guardian, not to

the plaintiff; the receipt of the guardian is to be his discharge, not the receipt of the plaintiff. The phrase "during the life of him, the said Scott," cannot be construed as enlarging the duration of the trust, or as imposing any liability upon the trustee to pay to Mrs. Scott. Then there is a provision for the termination of the trust by the death of Theodosia living Charles, and also for the termination by the death of Charles living Theodosia. It is true that there is no express provision that the trust shall terminate on the wife being discharged from guardianship, nor is there any provision that it should continue; but there is no need of any such provision, as the preceding clause only recognizes payment to the guardian; and if there is no one to whom the trust has directed payment, or to whom the trustee has agreed to pay, the trust fails. Then there is a clause whereby Charles Scott agrees that if the net income in any one year is less than one thousand dollars, he will supply the deficiency, but this cannot operate to prolong the trust. The language is, "The intent of this provision being that the said Theodosia shall in each and every year receive the full sum of one thousand dollars." This must mean every year during the continuance of the trust. The expression "each and every year" cannot make the term of the trust longer or shorter than it would otherwise be. Then there is a provision for terminating the trust in case of legal proceedings against Charles Scott in respect to the release of dower by the guardian. It is true that this mentions legal proceedings by the plaintiff, and it may be contended that no suit can be brought by an insane person, and hence that the deed contemplated the plaintiff becoming sane. But a suit may be brought by an insane person in his own name. Such a proceeding is not absolutely void. If the fact is called to the attention of the court, the suit may proceed by the appointment of a guardian *ad litem*, or a next friend. *Denny v. Denny*, 8 Allen, 311. The object of this was, doubtless, to prevent vexatious proceedings by the guardian, or any one else. There is nothing here that can add to or limit the duration of the trust.

At the time the indenture of trust was made, the parties stood in this relation. The husband, so long as the insanity of the wife continued, was liable to the guardian for such reasonable sums of money as he should expend in the support of the wife. When

the insanity should cease, this liability would cease, and the husband and wife would have the same respective rights and obligations as existed previously. It was on account of the insanity of the complainant, and on account of a guardian having been appointed, that the deed was made. This state of facts has ceased. Why, then, should the instrument be construed as giving to the wife one thousand dollars a year, when the creator of the trust has declared that the money should be paid to the guardian and the trustee has only covenanted to pay the money to him? To give the deed such a construction would be to impose obligations upon the creator of the trust and upon the trustee, which neither assented to.

3. The trust being an executed trust to be governed by the strict rules of property, the plaintiff has no rights here. She is nowhere named as the *cestui que trust*. To consider her as a *cestui que trust* would expose the indenture to the objection that a trust was engrafted upon a trust. *Rich v. Rogers*, 14 Gray, 174. The *cestui que trust* is the guardian. There is nothing in the trust deed to oblige the guardian to pay the money to the plaintiff. She is not a party to the deed, and there are no covenants on the part of the guardian. While the guardianship lasted, he was obliged, as guardian, to devote the money to the care and support of the plaintiff; but this resulted from the nature of his office. He was under no obligation to pay the money to her, but only to devote the money to her care and support. The trustee, by accepting the trust, and agreeing that he would faithfully perform the duties imposed upon him, did not agree to perform any other duties than those which the instrument creating the trust imposed upon him. There can be no breach on the part of the trustee in not paying money to the plaintiff which he has not agreed to pay. His only covenant is to pay to the guardian. The guardian is discharged and there is no successor appointed. There is no one to whom he can pay. The trust is then at an end, unless the trustee is bound to hold the fund, letting it accumulate until the death of the defendant Scott, and then to pay it to such persons as he, by his last will and testament, shall appoint, or to his heirs, in default of appointment. But the purpose of the trust having failed, there is a resulting trust in favor of the creator of it. The fact that the legal estate is fully in the trustee can

make no difference. A limitation to a trustee, his heirs and assigns, conveys to him no greater estate than the proper execution of the trust requires. Perry on Trusts, § 312.

A. E. Pillsbury, for the plaintiff, was not called upon.

COLT, J. It is contended in support of the demurrer that the trust created by the indenture signed by the defendants, so far as it relates to the plaintiff, terminated with her release from guardianship. The terms of the trust must be ascertained by applying to this instrument the usual rules of interpretation, and we are of opinion that the plaintiff is entitled to the benefit of the provision in her behalf, without reference to the continuance of the guardianship under which she had been placed.

The indenture expressly provides that the trust shall terminate upon the death of Mrs. Scott during the life of her husband, or upon the death of Scott during the life of his wife, or upon the continuance for two years of legal proceedings against Scott, instituted by the plaintiff, "her guardian for the time being, or any person authorized by her or acting in her behalf," on account of certain real estate sold by him in which the wife's homestead and right of dower had been released by a former guardian. No other termination is provided for, and no intention to control these provisions can be implied from the clause requiring the trustee to pay to the guardian of the plaintiff for the time being, the income secured to her, and making the guardian's receipt a full acquittance to the trustee for such payment. The clause has reference to the fact that the plaintiff was then under guardianship as an insane person, and to a present incapacity which made it necessary that all payments should be made to her guardian. All the other provisions and recitals are consistent with this interpretation. It is declared to be the intention to secure to the plaintiff in any event of fortune a comfortable support and maintenance during the lifetime of the husband. Full directions are given as to the disposition of the fund upon the death of either, or in the event of the litigation named. The clause in reference to such litigation plainly implies that the plaintiff, although released from guardianship, shall continue to enjoy the benefits of the trust unless legal proceedings have already been commenced by her guardian, or are afterwards commenced by her. The principal causes of demurrer are thus disposed of.

As it appears by the allegation in the bill that the trustee has wrongfully paid over the entire fund to Scott, it is unnecessary to allege a balance of income remaining in his hands after payment of taxes and expenses incurred in the management of the fund.

It is not necessary to allege that the conduct of the trustee amounted to "wilful negligence or default," where the act charged appears to have been intentional, and to have been in violation of the terms of the trust. *Demurrer overruled.*



PROVIDENT INSTITUTION FOR SAVINGS vs. GEORGE WHITE, administrator, & others.

Suffolk. March 19. — April 16, 1874. — AMES & DEVENS, JJ., absent.

A bill of interpleader not filed by the nominal plaintiff but by his attorney of record, at the expense and for the benefit of one of two persons claiming a fund in the hands of the plaintiff, after the other person had recovered judgment against the plaintiff in an action at law, in which the same attorney had pleaded the right of the first, cannot be maintained.

Under the twenty-seventh rule in chancery in bills of interpleader, or in the nature of interpleader, no solicitor or counsel for the plaintiff shall appear or be heard or act for or in behalf of any or either of the defendants.

BILL OF INTERPLEADER by the Provident Institution for Savings against George White, administrator of Margaret Sullivan, Michael Sullivan and Thomas Sullivan, filed June 27, 1872. On the same day an injunction issued to Thomas Sullivan, until further order, enjoining him from prosecuting a certain suit at law against the plaintiff, and "from collecting or enforcing any judgment or execution that may have been rendered or issued thereon." Judgment in this suit at law had been recovered by him in the Superior Court before said injunction issued, to wit, on June 22, and execution issued thereon June 26. At the hearing before Wells, J., the bill was dismissed, with costs to Thomas Sullivan; the plaintiff appealed, and the case was reported as follows for revision by the full court:

"The bill sets forth, that one Margaret Sullivan, sister of said Thomas and Michael, deposited money with the plaintiff from

time to time in her lifetime, and died about February 1, 1870 ; that said deposits, with interest, amounted to \$440.05 on January 17, 1872, which the plaintiff now holds, with interest subsequently accrued. That said Margaret, in her lifetime, fearing that said deposit might be attached in some threatened suit against her, went to the bank with her brother Michael, and stated to the officers of the bank that she desired to transfer the same to him ; that upon being asked his name, said Michael gave the name of Thomas ; thereupon the following order was drawn, signed by her and handed to the officers of the bank : ‘ Boston, June 26, 1869. To the Treasurer of the Provident Institution for Savings, in the town of Boston. Sir, — Please to pay to Thomas Sullivan all moneys that have been and may be deposited, together with the interest that has and may become due, on account of Book No. 43,611. Margaret ^{her} X Sullivan. Witness _{mark} to signature, Wm. Gerry.’

“ A memorandum of the same was made on the books of the bank, and a transfer of said account to the name of Thomas Sullivan. That said Thomas, after the death of said Margaret, demanded payment of said fund to him, and, in default thereof, sued the plaintiff on said order, and on a trial obtained a verdict and judgment thereon as aforesaid. That said Michael claimed said fund on the ground that the money deposited by Margaret belonged to him ; that she deposited the same for their joint benefit ; and also that the said order and transfer to said Thomas were really made to Michael under the name of Thomas. That said White claimed said fund as belonging to the estate of Margaret, and that the same should be paid to him as administrator thereof ; that he needs the same to pay the debts and expenses of administration on her estate ; and claimed that said order was made by her to said Thomas or Michael merely as trustee for her own benefit, and as a colorable transaction to cover up said money and secure the same from attachment. And plaintiff, being in doubt to which of said claimants said money belonged, prayed that they may be ordered to answer severally on oath ; and that said Thomas be enjoined and restrained from enforcing his said execution against the plaintiff. The defendants severally answered on oath.

“ At the hearing the attorney of record for the plaintiff appeared as counsel for the defendants White and Michael Sullivan, having acted as such in preparing and filing their answers. He then stated, before any witnesses were called on either side, that he was the counsel for said White and Michael Sullivan; that he appeared as attorney of record for the present plaintiff, in said suit of Thomas Sullivan against the present plaintiff, in the Superior Court, and filed an answer setting up two grounds of defence, to wit, first, that said deposits belonged to said Michael, and not to said Thomas, and that said Margaret assigned them, and intended to assign them, to Michael, who gave the name of Thomas, and the assignment was in fact to Michael by the name of Thomas; secondly, that said deposits belonged to the estate of said Margaret, and that the said savings bank could not lawfully pay the same, except to her representatives. That as counsel for said bank, White and Michael Sullivan, he offered to prove in the Superior Court the facts above referred to; but the presiding judge ruled that such defence could not be set up, and that the only remedy was in equity; and directed a verdict for the plaintiff, the said Thomas; and the same was rendered April 12, 1872. That the judge then ordered the case to stand ‘continued *nisi* for exceptions,’ to enable said White and Michael Sullivan to bring a bill in equity or to file exceptions; and that no exceptions or bill in equity being filed before the end of the term, the entry ‘con. *nisi* for exceptions’ was stricken off, and judgment rendered June 22, 1872. Said counsel further offered to show that the complainant in this case believed that there was a substantial claim to this fund by these parties, and desired to have the court pass upon the same; but that as they would have, if they paid the execution from the Superior Court, a good legal defence against all parties, they did not feel justified in using the funds of the bank to pay the expenses of this process; and it was agreed that, as the fund was so small, for the purpose of saving expense, the same counsel should prepare the papers and present them to the court, and should assume all the expenses; that there was no collusion whatever, but merely a purpose at the smallest expense to give to the parties an opportunity to be heard on the merits of the case in accordance with the ruling of the Superior Court; that the bill was prepared and sworn to May 29, but that

he was delayed from time to time in obtaining a hearing for an injunction."

L. M. Child, for the plaintiff.

N. C. Berry, for Thomas Sullivan.

GRAY, C. J. It appears, by the statement made in support of this bill at the hearing before a single justice, that it was not filed by the plaintiff corporation for its protection, but by the attorney, at the expense and for the benefit of one of the two persons claiming the fund, after the other had recovered judgment in an action at law brought by him against this plaintiff, in defence of which the same attorney had pleaded the right of the first. To maintain a bill of interpleader under such circumstances would contravene the general principles of equity, as well as the twenty-seventh rule in chancery of this court.

Decree affirmed, with costs.



ROSE G. FORBES vs. JOHN F. TUCKERMAN & others.

Suffolk. March 26. — April 16, 1874. ENDICOTT, J., did not sit.
AMES & DEVENS, JJ., absent.

A husband need not be made a party to a bill in equity brought by his wife under the Gen. Sta. c. 108, § 3, concerning her separate property.

Where an appeal is taken to this court from a decree overruling a demurrer, it is in the discretion of the justice making the decree to order the defendant to answer pending such appeal.

BILL IN EQUITY by Rose G. Forbes, wife of Robert Bennett Forbes, against John F. Tuckerman, Robert B. Forbes, Jr., James Murray Forbes, and Edith Forbes Perkins, wife of Charles Elliot Perkins, setting forth the conveyance by the plaintiff and her husband to the defendant Tuckerman of certain property in trust to pay the income to the plaintiff during life, and upon her decease to convey the property to such persons as she should appoint by her will, and, in default of appointment, to such persons as should be entitled to receive the same, had the said Robert Bennett Forbes died seised thereof intestate; that the defendant Tuckerman refused to pay over the income to the plaintiff, and that the other defendants were the only children of Robert Ben-

nett Forbes, and would be his only heirs and next of kin if he were deceased intestate. Prayer for an account, and that the defendant Tuckerman should be decreed to pay what should be found to be due from him on such account.

The defendant Tuckerman demurred, on the ground that Robert Bennett Forbes should have been made a party to the suit, and on other grounds waived at the argument. At the hearing, before *Devens, J.*, the demurrer was overruled, and the defendant Tuckerman ordered to answer within thirty days. He appealed to the full court.

W. P. Walley, for the defendant Tuckerman. 1. The husband should have been made a party to the suit. The Rev. Sts. c. 77, § 4, authorized the court, in certain cases, to allow the wife to prosecute any suit in law or equity as if she were unmarried. The St. of 1845, c. 208, § 5, gave a wife, in relation to her separate estate, the same remedies at law and in equity as if she were unmarried. This was repealed by the Gen. Sts. c. 182. While it was in force *Conant v. Warren*, 6 Gray, 562, was decided. The Gen. Sts. c. 108, § 32, follow the language of the Rev. Sts., and authorize the court in certain cases to allow a married woman to sue and be sued in law or equity as if she were sole; but § 3 of the same chapter does not follow the language of the St. of 1845, but only provides that the wife in relation to her separate property may sue and be sued as if she were sole. If in § 3 the words "sue and be sued" without the words "at law or in equity" authorize the bringing of a suit in equity as well as an action at law, the additional words "at law and in equity," in § 32 of the same chapter, have no force. The words "sue and be sued" in § 3 should be held to apply only to actions at law. Again, in relation to her separate estate a wife must sue at law alone. *Hennessey v. White*, 2 Allen, 48. She may join her husband in equity. *Burns v. Lynde*, 6 Allen, 305. But "may sue alone" cannot mean one thing at law and another in equity. These cases, then, can only be reconciled by putting the second decision on the ground that the words "may sue alone" apply only to actions at law; if so, Mrs. Forbes could not bring this suit in equity alone.

2. The defendant should not have been ordered to answer pending the appeal to this court from the decree overruling the

demurrer. The Gen. Sts. c. 113, § 8, provide that an appeal from a final decree shall stay all proceedings under such decree; § 10, that an appeal from an interlocutory decree shall not suspend the execution of the decree nor transfer to the full court the entire cause. Under this statute a decree overruling a demurrer is a final decree. Originally, a decree allowing or overruling a demurrer was the end of the suit; the plaintiff could not amend or the defendant answer unless by leave of court; afterwards the practice came to be to allow the bill to be amended or an answer filed, as of course; now the same is allowed under rule of court. But the decree overruling a demurrer, though now not in fact a final decree under the rules, is a final decree as opposed to an interlocutory decree under the statutes. The court cannot by rules change the statutes. *Trim v. Baker*, 1 Sim. & Stu. 469. *Smith v. Barnes*, Dick. 67. *Watkins v. Bush*, Dick. 701. *Corningsby v. Jekyll*, 2 P. Wms. 300. *Baker v. Mellish*, 11 Ves. 68. *Tyler v. Bell*, 2 Myl. & C. 89. *Schneider v. Lizardi*, 9 Beav. 461. *Attorney General v. Tudor Ice Co.* 104 Mass. 239. If the decree determines all the questions in issue and does not adjourn any matter whatever for further consideration, it is a final decree. 1 Seton on Decrees, 1, 2. 1 Dan. Ch. Pract. (5th Eng. ed.) 850, 855. Goldsmith's Proceedings in Eq. 401, 402, 508. The sections relating to appeals in the Gen. Sts. c. 113, are taken mainly from the St. of 1859, c. 237. It is submitted that by the words "interlocutory decrees" in the Gen. Sts. c. 113, § 10, the legislature meant interlocutory decrees, as defined in the St. of 1859, c. 237, § 4, namely, those "granting or refusing an injunction, or appointing or refusing to appoint a receiver." The Gen. Sts. c. 113, § 10, further provide that an appeal from an interlocutory decree shall not transfer to the full court the entire cause; at the time of the passage of this act, an appeal from a decree overruling a demurrer did transfer to the full court the entire cause. It seems, therefore, that the legislature did not consider such a decree interlocutory. An appeal from a decree overruling a demurrer has, by the uniform practice of the court, operated as a stay of all further proceedings in the suit until the appeal was determined. The court have, by this practice, construed the statute. A different practice will result in great inconvenience.

W. S. Gardner & C. E. Stratton, for the plaintiff, were not called upon.

GRAY, C. J. The reasons upon which the English courts of chancery have required the husband to be made a party to a suit by the wife in relation to her separate property, are because he may have an interest in the property himself, and because he is the lawful protector of her interests. Story Eq. Pl. § 63. Neither reason is applicable to this case.

The suit is brought by the wife for income payable to her by the terms of the indenture of trust under which the appellant holds the property. The demurrer, so far as it was based on the husband's interest in the property, or on his having been a party to the indenture, was waived at the argument. And the making him a party to the bill, merely because he is the plaintiff's husband, has been dispensed with by our statutes.

The earliest statutes which enlarged the wife's powers over her property expressly enabled her to commence, prosecute and defend suits in equity as well as at law. Rev. Sts. c. 77, § 4; reenacted in Gen. Sts. c. 108, § 32. St. 1845, c. 208, § 5. Under those statutes, it is indisputable that her husband need not have been made a party, unless he had an interest in the property. *Conant v. Warren*, 6 Gray, 562. The later statutes, making her independence in regard to property more complete, and authorizing her, in general terms, "to sue and be sued in all matters relating to her property in the same manner as if she were sole," cannot by any reasonable construction be taken to give her a less extensive power to assert and defend her rights in court; but at law oblige, and in equity permit her to sue alone, when no interest of her husband is involved. Sts. 1855, c. 304, § 4; 1857, c. 249, § 3. Gen. Sts. c. 108, § 3. *Hennessey v. White*, 2 Allen, 48. *Burns v. Lynde*, 6 Allen, 305. The demurrer was therefore rightly overruled.

The appellant further contends that the order overruling the demurrer was a final decree, and that he could not therefore be required to answer over pending his appeal from that order. But this position is founded on a misapprehension of the statute which regulates proceedings in chancery.

By that statute, cases in equity, and motions and other applications therein, whether interlocutory or final, are to be heard and determined in the first instance by one justice; from all his decrees any party aggrieved may appeal to the full court; if the

decree appealed from is a final decree, all proceedings under it are stayed until the determination of the appeal, but the justice who made it may pass such orders as are needful for the protection of the rights of the parties meanwhile, subject to be modified or annulled by the full court on motion; if the decree appealed from is interlocutory, the appeal does not suspend its execution, or transfer the rest of the case to the full court; all interlocutory orders not appealed from are open to revision on appeal from the final decree, so far as the latter is erroneously affected thereby; and if the justice making any interlocutory decree or order is of opinion that it so affects the merits of the controversy that the matter ought to be determined by the full court before further proceedings are had, he may report the question for that purpose and stay further proceedings. Gen. Sts. c. 113, §§ 6-12. In short, the final decree of a single justice is not, if appealed from, to be carried into execution until affirmed by the full court; but an appeal from any interlocutory order is not to delay the progress of the cause before one justice, except at his discretion; and when an objection is interposed, which in his opinion has no merits, it is his duty to proceed to a final determination.

No decree is a final one, which leaves anything open to be decided by the court, and does not determine the whole case. Even an order allowing or sustaining a demurrer is not a final decree, unless, in terms or effect, it dismisses the bill and puts the case out of court. *De Armas v. United States*, 6 How. 103. *Merchants' Bank v. Stevenson*, 7 Allen, 489. *McElwain v. Willis*, 3 Paige, 505. *Baker v. Mellish*, 11 Ves. 68. When a demurrer is overruled, a final decree for the plaintiff is not entered of course, but the defendant, upon proper application, where there is no rule of court upon the subject, may have leave to answer. *Trim v. Baker*, Turn. & Russ. 253. 1 Dan. Ch. Pract. c. 14, § 6, & Amer. note. By the twelfth rule in chancery of this court, if a demurrer is overruled, the defendant shall proceed to answer the bill, and if he fails to do so within a certain time, the plaintiff may enter an order that the bill, or so much thereof as is covered by the demurrer, be taken for confessed, and the matter thereof may be decreed accordingly, unless good cause appear to the contrary. 104 Mass. 570. A similar rule, copied from an earlier rule of the Supreme Court of the United States, has been in force

and constantly practised upon in this Commonwealth ever since 1840; 7 Wheat. x; 24 Pick. 415; 14 Gray, 357; and must be deemed to have been in the contemplation of the legislature when they framed the General Statutes.

Indeed the counsel for the appellant relies upon this rule so far as to claim the right to answer over after the overruling of his demurrer by the full court; and frankly maintains that an order overruling a demurrer is not such a final decree as to terminate the whole controversy or preclude him from making a full defence to the suit upon its merits, and yet is a final decree in such a sense as to exhaust the power of a single justice over the cause until the appeal from that order is determined. But it is well settled by the highest authorities that even when an order overruling a demurrer is followed by an order taking the bill for confessed, and referring the cause to a master for an account according to the prayer of the bill, neither is a final decree in any sense, but a mere interlocutory order in favor of the plaintiff, and on the return of the master's report the final decree may be the other way. *Smith v. Eyles*, 2 Atk. 385. *Bank of United States v. White*, 8 Pet. 262. *Perkins v. Fourniquet*, 6 How. 206, and 16 How. 82. *Pulliam v. Christian*, 6 How. 209. *Beebe v. Russell*, 19 How. 283. *Gerrish v. Black*, 109 Mass. 474.

The necessary conclusion is, that it was within the discretion of the justice who overruled the demurrer, to order the appellant to answer notwithstanding his appeal, and that such discretion was wisely exercised in this case.

Order affirmed.

THOMAS W. COX & another *vs.* TIMOTHY W. HOXIE & another.

Suffolk. March 25, 26. — April 17, 1874. AMES & DEVENS, JJ., absent.

B. gave a mortgage to H. as security for a loan and future advances agreed in writing to be made on the performance of certain conditions. B. then sold the equity of redemption to A. "subject to my mortgage to H. to be assumed and paid by the grantee;" afterwards he assigned the agreement to C., who notified H. to hold the mortgage and note undischarged as security for him. After that A. assigned the equity of redemption "subject to a mortgage:" the plaintiffs claiming under A.'s assignee asked to redeem the mortgage on payment of the loan secured by the mortgage, without showing that H. was discharged from all

Liability under the agreement to make future advances. At the time when the bill was filed no advances had been made, and the condition on which they were payable had not been performed. *Held*, that the plaintiff must pay the full amount of the note in order to redeem, and that the mortgagee would hold the balance over and above the amount advanced by him in trust for the assignee of the agreement.

BILL IN EQUITY by Thomas W. Cox and Judah H. Cox, to enjoin Timothy W. Hoxie from selling an estate situated on the corner of Fort Avenue and Highland Park, Boston, under a power of sale contained in a mortgage given by William Bowe to Hoxie. After the filing of the bill Stephen M. Allen was made a party defendant.

The case was reserved for the consideration of the full court by *Morton, J.*, on the bill, answers, and agreed facts, from which it appeared that :

Allen conveyed to Bowe the estate in question November 25, 1870, taking back a mortgage for forty-six hundred dollars ; Hoxie afterwards agreed to lend Bowe four thousand dollars upon the security of the estate, and Allen at the request of Bowe discharged his mortgage, receiving from Hoxie twenty-five hundred and sixty dollars, and Hoxie also signed the following agreement :

“ A memorandum made this 15th day of March, 1871, witnesseth, William Bowe, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, has this day given Timothy W. Hoxie, of said Boston, his promissory note for \$4000, payable in three years from date, with interest at the rate of seven and one half per cent per annum, payable semi-annually, and secured by mortgage of same date, upon a certain lot of land situated on Highland Park and Fort Avenue, in that part of said Boston formerly called Roxbury, reference to which mortgage, on record in the Suffolk Registry of Deeds, is hereby made for a more particular description of said lot ; upon which said note and mortgage the said Hoxie has paid to the said Bowe the sum of twenty-five hundred and sixty dollars, leaving a balance to be paid by said Hoxie to the said Bowe of \$1440, when the dwelling house now in the process of erection on said lot is entirely completed and ready for occupation, and said lot is permanently fenced and graded. The said Bowe covenants and agrees with said Hoxie to prosecute said work to its completion without unnecessary de-

lay, and not to demand said balance until the same is completed. And the said Hoxie covenants and agrees with the said Bowe to pay said balance to him, on demand, upon satisfactory evidence being furnished to him that said work is completed as aforesaid, and that no liens of mechanics or material used for the erection of said building exist, said Bowe delivering up to said Hoxie this agreement."

On March 24, 1871, Bowe conveyed the estate to Anderson, who had previously contracted with Bowe to build and complete the house. The conveyance from Bowe to Anderson was "subject to my mortgage to T. W. Hoxie, for four thousand dollars, to be assumed and paid by the grantee;" Anderson gave Bowe a mortgage of the estate dated June 15, 1871, the conveyance being "subject to a mortgage of four thousand dollars." On June 16, 1871, Bowe assigned this mortgage to Enoch H. Wakefield, and Wakefield, in execution of the power of sale contained in said mortgage, conveyed the estate to the plaintiffs by deed dated October 16, 1872. On May 24, 1871, Bowe assigned Hoxie's agreement to Allen, who notified Hoxie to hold the mortgage and note undischarged as security for the payment to him of the fourteen hundred and forty dollars yet to be advanced. On March 13, 1873, the interest became due on the mortgage to Hoxie, and as it was not paid, he advertised the estate for sale, in pursuance of the power of sale contained in said mortgage; the plaintiffs tendered Hoxie twenty-five hundred and sixty dollars, with one hundred and seventy-five dollars as interest, and twenty-five dollars for the expenses of the advertisement, and twenty dollars for an insurance policy which had been taken out by Hoxie; the tender was made upon the express condition that it should be received in full satisfaction of the mortgage; no tender was made of indemnity against the obligation given by Hoxie to Bowe, nor was there an offer to surrender it. The house was not completed at the time the bill was filed.

A. E. Pillsbury, for the plaintiffs. 1. The terms of Bowe's deed to Anderson probably bound the latter to payment of the full amount of \$4000; although it has been held otherwise. *Mason v. Barnard*, 36 Mo. 384. But the obligation is personal and does not run with the estate nor bind the plaintiffs. *Strong v. Converse*, 8 Allen, 557. *Drury v. Tremont Improvement Co.* 13

Allen, 108. *Garnsey v. Rogers*, 47 N. Y. 233. *King v. Whitely*, 1 Hoff. Ch. 477. *Johnson v. Monell*, 13 Iowa, 300.

2. The mere recital in an instrument of conveyance that the granted premises are "subject to a mortgage for" a certain amount, binds neither the grantee nor the estate to payment of the whole amount unless the whole is equitably due. *Farnum v. Metcalf*, 8 Cush. 46. *Russell v. Kinney*, 1 Sandf. Ch. 34. *Miller v. Lockwood*, 32 N. Y. 293, and cases cited. *Mills v. Watson*, 1 Sweeny, 374. *Griffin v. New Jersey Oil Co.* 3 Stockt. 49. *Col-lins v. Carlile*, 13 Ill. 254. *Robinson v. Cromelein*, 15 Mich. 316. *Bradford v. Forbes*, 9 Allen, 365.

D. Thaxter, for the defendant Hoxie, and *N. Morae*, for the defendant Allen, were not called upon.

COLT, J. The only question here raised relates to the amount which the plaintiffs must pay to redeem a mortgage to secure a note for \$4000 given by Bowe to Hoxie, under which the defendants claim.

The case is heard upon the bill, answer and agreed statement of facts. It appears that the mortgage and note were originally given to secure Hoxie for an advance of \$2560, and an agreement to advance the balance upon certain conditions, given in writing to Bowe the mortgagor. Bowe conveyed his equity to Anderson by deed containing these words, "subject to my mortgage to Hoxie for \$4000, to be assumed and paid by the grantee," and then while the title was in Anderson, assigned his agreement with Hoxie for a future advance to the other defendant Allen. The plaintiffs claim their right to redeem by a mesne conveyance from Anderson in which the land is described as subject to a mortgage of \$4000.

At the time of filing this bill no further advances had been made, but there is nothing to show that the conditions of Hoxie's agreement to advance might not have been waived by him, or could not have been complied with by Bowe, or by some one in his behalf. In either case, if the advances were made, Hoxie would be entitled to hold the mortgage as security for its full amount as against those who show no higher equity than the plaintiffs disclose. Hoxie's liability under the agreement was not terminated by the sale of the equity; it was still outstanding in the hands of Bowe's assignee, the defendant Allen. There is no

lay, and not to demand said balance in cash. And the said Hoxie covenants and agrees to pay said balance to him, on demand, when being furnished to him that said work has been completed and that no liens of mechanics or subcontractors on said building exist, said Bowe and Hoxie agree to the foregoing agreement."

On March 24, 1871, Bowe, who had previously contracted the house. The conveyance subject to my mortgage to T. W. to be assumed and paid by a mortgage of the estate being "subject to a mortgage." June 16, 1871, Bowe assigned field, and Wakefield, in said mortgage, conveyed dated October 16, 1871. Hoxie's agreement to a mortgage and note undischarged of the fourteen hundred. On March 13, 1873, the Hoxie, and as it was not in pursuance of the power plaintiffs tendered Hoxie with one hundred and fifty dollars for the expenses for an insurance policy the tender was made and received in full satisfaction of indemnity against the loss was there an offer to sell at the bill was

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I possessed, or to which I shall be entitled at the time of my decease, I give, devise and bequeath to be equally divided among those persons who shall be my legal heirs at the time of my decease, excepting my son John H. Hubbell; and this exception is made only for the reason that at my decease he will pass into the possession of his father's estate, which will be sufficient for all his wants.

And in the distribution of the said residue among my heirs, I desire and direct that the children of my sisters Mrs. Anne Smith and Mrs. Caroline Sanger shall share the same equally; that is, that it be divided among them numerically or *per capita*, and not *per stirpes*, and that the offspring of any deceased child of theirs only take by right of representation, or the share that the parent of such offspring would take if living."

The testatrix left at her decease as her heirs at law her only surviving sister, Caroline Sanger; Cornelia Baird and Gerrit H. Smith, the children of her deceased sister Anne Smith, and John H. Hubbell, (called in the said will her son, meaning her stepson,) the only child of her deceased sister Jane Hubbell, who being expressly excluded from any share in the said rest and residue, was not made a party to this suit. At the decease of the testatrix there were living seven children of Caroline Sanger; namely, Anna L. Paddock, Mary J. Harding, Mary W. Swinscoe, Caroline Campbell, Joseph P. Sanger, Henry P. Sanger and Fanny Davis. No change in the legal heirs or next of kin of the deceased took place between the date of the will, November 2, 1872, and her decease, September 10, 1873.

Caroline Sanger submitted her rights under the will to the decision of the court. Cornelia Baird and Gerrit H. Smith contended in their answers that the intention of the testatrix was to give the residue to those persons who should turn out to be her legal heirs at her decease by the statute of distributions, excluding her nephew John; and that they were the said Caroline San-

and the said Caroline Baird and Gerrit H. Smith, and that the residue should be divided into three equal parts between the said Caroline Sanger, Cornelia Baird and Gerrit H. Smith; but the division was not to be made into three equal parts, to the persons who were her legal heirs, (excluding John,) but to be made between them in the proportions provided

by the statute of distributions ; namely, into two equal parts ; one to the said Caroline Sanger, the other to the said Cornelia Baird and Gerrit H. Smith.

Anna L. Paddock and others, children of Caroline Sanger, contended that the testatrix by the forty-second article of her said will, intended that the residue of her estate therein disposed of should be equally divided between the children of her surviving sister Caroline Sanger, and of her deceased sister Anne Smith, each being entitled to and taking one ninth part.

R. H. Dana, Jr., for Gerrit H. Smith and Cornelia Baird, was stopped by the court.

H. W. Paine, for the children of Mrs. Sanger. If the words "legal heirs" are to be taken in their strictly legal sense, it is manifest that the two clauses of the forty-second article are repugnant. The children of Mrs. Sanger were not the legal heirs of the testatrix at the time of her decease. They were not "entitled by descent and right of blood to her lands, tenements and hereditaments," as their mother was then living ; but they are clearly distributees (to the exclusion of their mother) under the latter clause. It is difficult, if not impossible, to give effect to all the language of this article of the will, unless we suppose the testatrix to use the phrase "legal heirs" in its popular sense as synonymous with legatees. For unless she intended the children of her sisters to be the recipients of her bounty, the concluding clause of this article is utterly unmeaning. In common parlance, the heir is one who takes by will, as well as one who takes by descent. It is often said that A. has made or proposes to make B. his heir. The word is used in its civil law sense, to indicate the person who succeeds to an estate either by devise or inheritance.

When a testator shows by the context of his will that he intends by the term "heir," to denote an individual who is not heir-general, his intention of course must prevail. Thus if a testator says, I make A. B. my heir, or, I give black acre to my heir male which is my brother A. B., this it seems is a good devise to A. B., though he is not heir-general. 2 Jarman on Wills, 19. See *Rose v. Rose*, 17 Ves. 347, where "my heir under this will," was held to point to the residuary legatee. The testatrix seems to have supposed that to carry out her intention it was necessary

to define the phrase "legal heirs." In § 25½ she gives her jewelry, bronzes and other articles of vertu to two of her nieces, "in trust and confidence that they shall make an impartial distribution of the same among my legal heirs, as defined in this will, equally, or as nearly so as they can." The attempt to define the phrase is found, if at all, in the 42d article. The testatrix had in her mind the objects of her bounty as a class, — her nephews and nieces, and studiously excluding her nephew, John H. Hubbell, she makes so many of them her legal heirs or legatees as shall be living at the time of her decease, and provides that the offspring of any deceased child shall take the share the deceased parent would take if living. This construction of the words "legal heirs" will harmonize the seemingly repugnant clauses of § 42. Having in her mind her nephew, John H. Hubbell, as one of the class of persons who are to be her "legal heirs," or legatees, to wit, her nephews and nieces, she is careful to exclude him. It may be contended that, as her sister Caroline might die before her or survive her, the testatrix meant to provide for either event; that she meant, if Caroline survived her, the residue should be divided into three equal parts, and that Caroline should have one, and each of the two children of Mrs. Smith should have one; that if Caroline died before her, the residue should be divided into nine equal parts, of which the children of Mrs. Smith should have two, and the children of Caroline seven, and that none but legal heirs should share in the residue. But it is not easy to discover any reason why in the one event the children of Mrs. Smith were to take two thirds, and in the other, were to take only two ninths. And "heirs" in the clause which directs an equal distribution among the children of the two sisters are manifestly the same persons "who shall be her legal heirs at the time of her decease." If the object of the two clauses was to provide for either event, none but legal heirs taking, that object was effectually secured by the first clause, and the latter clause was entirely superfluous and unmeaning. That the word legal heirs was not used in its strict technical meaning is shown by the fact that she contemplated that the children of a deceased nephew or niece should take, whereas such children could not be heirs if there were nephews and nieces living.

COLT, J. The legatees under the residuary clause of Mrs. Hubbell's will are those persons who were her heirs at law at the time of her decease.

The first paragraph in that clause looks to the time of her death, and clearly declares that her heirs at law at that time shall, with the exception named, take as legatees. Standing by itself it is complete and decisive as to the persons who are to take. In this respect it is the prominent and controlling provision. The second and remaining paragraph of that clause appears to be subordinate to it and not intended to change the distribution contemplated. The purpose of the latter is to regulate the proportions in which certain persons shall take in the event of their becoming entitled to the estate under the first paragraph, and directs a departure from the proportions established by the statute if the contingency should arise. It must yield to the leading provision so far as it is repugnant to-it.

A devise to heirs designates not only the persons who are to take, but also the manner and proportions in which they take. Where there are no words to control, the law presumes the intention of the testator to be that they shall take as heirs would by the rules of descent. This rule has been many times recognized by this court. It is only necessary to cite a recent case, *Bassett v. Granger*, 100 Mass. 348.

In the case at bar it does not sufficiently appear from the terms of the will that it was the intention to use the words "my legal heirs" in any other than a strict legal sense, and the rule must be held to apply, in determining who are to take.

The general rule must also apply in determining the proportions in which the heirs shall take. The expressions which are said to require a different division in this case are not, in our opinion, sufficiently clear and decisive to vary its application. Mrs. Sanger, the surviving sister of the testatrix, therefore takes one half, and the children of the deceased sister the other half of the residue.

Decree accordingly.

SAMUEL R. BEARCE & another vs. GEORGE W. BOWKER.

Suffolk. November 14, 1873. ENDICOTT & DEVENS, JJ., absent.

March 13.—May 5, 1874. COLT & ENDICOTT, JJ., absent.

If trial by jury is waived pursuant to the Gen. Sts. c. 129, § 66, the court should render a judgment and not a verdict.

The Superior Court has no authority to report to this court any case which is heard by that court without a jury.

A. agreed to furnish B. with lumber, and without any authority from B. ordered the lumber of C., representing himself as B.'s agent. C. sent the lumber to B. with a bill in which C. was named as seller, and B. as buyer. B. retained the lumber and did not notify C. that he was buying the lumber of A. *Held*, in an action by C. against B. for the price of the lumber, with a count in tort for the conversion, that B. was liable.

CONTRACT for goods sold and delivered with a count in tort for the conversion of the same goods. Trial in the Superior Court without a jury, before *Rockwell, J.*, who, by consent of parties, reported the case to this court, stating that he "made a verdict for the plaintiffs" for a certain amount, and giving the grounds of his finding and his rulings.

C. W. Turner, for the plaintiffs.

A. Russ, for the defendant.

GRAY, C. J. This report is quite irregular. The statutes provide that when trial by jury is waived, "the cause shall thereupon be heard and determined by the court, and judgment entered as in the case of verdict by a jury." Gen. Sts. c. 129, § 66. The finding or determination of a court can only be expressed by an order or judgment. None but a jury can render a verdict. In the present case, the learned judge before whom the trial was had, according to his own statement, "made a verdict," but entered no judgment, and reported the case to this court. Questions of law, arising in a civil action, may be brought by report from the Superior Court to this court, either "after verdict," or, by consent of parties, "before verdict." Gen. Sts. c. 115, § 6. St. 1869, c. 438. But when the parties have agreed to waive the only mode of trial upon which a verdict can be rendered, the Superior Court has no authority to send the case up by report, but should finally dispose of the case so far as that court is concerned, leaving any party aggrieved to seek his remedy by bill of

exceptions, or, if the facts have been agreed in a case stated by the parties and thus made part of the record, by appeal. Gen. Sts. c. 115, § 7; c. 129, § 66; c. 114, § 10. *Lincoln v. Parsons*, 1 Allen, 388. *Commonwealth v. Gloucester*, 110 Mass. 491. *Furlong v. Leary*, 8 Cush. 409. The consent of parties cannot enable this court to take jurisdiction of a question brought before it in a manner which the law does not authorize.

*Report dismissed.**

Judgment was then given in the Superior Court for the plaintiffs, on the following agreed facts, and the defendant appealed to this court:

“The plaintiffs, residents of Maine, are engaged in the business of sawing and selling lumber at Lewiston, Maine, and the defendant is a builder in Boston. The defendant had a contract to build a store in Boston. He had known Walter S. Tribou, of Boston, as a dealer in lumber, and had dealt with him as such, and had often purchased lumber of him, but had no knowledge of the plaintiffs. In August, 1871, the defendant made a contract with said Tribou to furnish him with the lumber for the said building. At that time, Tribou was furnishing the defendant with lumber for other jobs, and was indebted to the defendant. Tribou agreed with the defendant to furnish him with the lumber required for said store at twenty-one dollars per M., delivered at the store. This was at the rate of twenty dollars per M., delivered at the depot in Boston, the price being one dollar for hauling from depot to store, and twenty dollars was the market rate and

* A similar decision was made in Middlesex, January, 1874, in the case of *JAMES HOGAN & another vs. WILLIAM H. WARD & others*.

The case was heard in the Superior Court on a motion to accept the award of referees to whom the case had been submitted. *Wilkinson, J.*, denied the motion, and reported the case at length for the consideration of this court.

GRAY, C. J. This question is not properly before this court. It could only be brought here by appeal or exceptions after a final decision in the Superior Court. The authority of that court to send up cases by report is limited to those which are to be, or have been, tried by a jury. Gen. Sts. c. 114, § 10; c. 115, §§ 6, 7; St. 1869, c. 438. *Bearce v. Bowker*, ante, 129.

Report dismissed.

G. W. Norris, for the plaintiffs.

L. H. Wakefield, for the defendants.

price of such lumber at Boston at said time. The defendant made this bargain with Tribou as a lumber merchant, and made the purchase of him the same as he had previously bought of him, and as he bought of other lumber dealers. Said Tribou then, without any authority or knowledge of the defendant, applied to the plaintiffs at Lewiston, and contracted with them to furnish said lumber at twenty dollars and fifty cents per M., delivered at depot in Boston. Tribou represented that he was buying the lumber for the defendant, and directed the plaintiffs to charge it to the defendant, and to draw upon the defendant at sight for it, upon the delivery of the lumber according to a schedule then furnished. The plaintiffs, knowing the defendant by reputation as a builder in good standing, and ascertaining his credit to be good, entered the schedule upon their order-book, under the defendant's name, and proceeded to furnish and forward the lumber according to the schedule, sending the same to Boston, directed to the defendant, by car-loads, from Sept. 5, to Sept. 26, 1871, until the whole was sent, and charged the same in their books to the defendant, as it was sent, and forwarded bills of each car-load to the defendant, made out to the defendant as each car was sent. The whole amount sent under said schedule was received and used by the defendant, he paying the freight on the same; but the defendant has never paid the plaintiffs for any part of said lumber. On the receipt of the first of said bills by the defendant, he called on Tribou, and asked him what it meant, stating that he did not know the plaintiffs, and never bought any lumber of them, and should pay no attention to their bill. To which said Tribou replied that it was all right, and he would fix it all right. No further attention was paid to it by the defendant until he received a letter from the plaintiffs that they were about to draw upon him for the amount of the lumber, when he again called on Tribou, and told him he had received a draft, but should give no attention to it; to which Tribou made the same reply as before. The plaintiffs gave Tribou no credit for any part of the lumber."

A. Russ, for the defendant, cited *Hills v. Snell*, 104 Mass. 178; *Vincent v. Cornell*, 13 Pick. 294.

C. W. Turner, for the plaintiffs.

AMES, J. Upon the case as presented, it appears that the plaintiffs forwarded the lumber to the defendant as the purchaser,

charging him with the price, and expecting to look to him alone for the payment. They made no sale to Tribou, and he had neither title, possession, right of possession, nor any of the ordinary *indicia* of ownership. They merely took the order from him, without intrusting him with any control or duty in reference to the subject matter. He had no authority to sell the property as his own, or to make use of it in the payment of his own debts. Having no title or appearance of title himself, he could give none to the defendant. So far as the defendant claims to hold the property by virtue of a sale from Tribou, he holds in violation of the plaintiffs' right, and they have a right to consider such holding as an unlawful conversion, and to maintain an action accordingly. *Stanley v. Gaylord*, 1 Cush. 536. *Riley v. Boston Water Power Co.* 11 Cush. 11. *Chapman v. Cole*, 12 Gray, 141. *Gilmore v. Newton*, 9 Allen, 171.

It appears also that whenever any of the lumber was forwarded, it was accompanied with a bill, in which the defendant was charged as the purchaser directly from the plaintiffs. If his purpose was to purchase of Tribou, and not of the plaintiffs, he should then have notified them accordingly, and refused to receive the lumber on any other terms. Instead of so doing, however, he received and appropriated the lumber, with notice that the plaintiffs intended to rely upon him for payment, and without giving them any reason to suppose that he objected to their view of the case. He on his part appears to have relied upon Tribou's assurance that he would "fix it all right," — an expression which apparently means that Tribou would pay the bill himself or in some other mode indemnify the defendant. By remaining silent till the whole quantity had come to his hands, the defendant impliedly ratified the purchase which Tribou had made on his behalf. In either aspect of the case, we think plaintiffs are entitled to prevail.

Judgment for the plaintiffs affirmed.

COMMONWEALTH vs. JOHN DOWDICAN'S BAIL.

Suffolk. March 3, 1874. WELLS & ENDICOTT, JJ., absent.

March 31. — May 19, 1874. AMES & DEVENS, JJ., absent.

If trial by jury is waived, the case cannot be reported by the Superior Court to this court under the Gen. Sta. c. 115, § 6, or the St. of 1869, c. 438.

An order, that an indictment be laid on file, is not equivalent to a final judgment, or to a *nolle prosequi*, or discontinuance.

An order laying an indictment on file, on the payment of costs, does not entitle the defendant to be finally discharged.

When an indictment is laid on file, and the judge making the order indorses thereon that a certain statute has been repealed, and it appears that the case is not brought under said statute, the indictment may be brought forward and proceedings had upon it.

On an indictment for an assault and battery, an acknowledgment of satisfaction by the party injured does not entitle the defendant to be discharged under the Gen. Sta. c. 171, § 28.

When an indictment has been laid on file, the Superior Court has authority to take up the case and order a new recognizance.

When a defendant is called and does not appear, the court is not required to decide in his absence a motion in arrest of judgment.

A default of a defendant is a breach of a recognizance given by him, and fixes the liability of his bail.

CONTRACT on four recognizances against Charles A. Peterson and William Child, bail of John Dowdican. The questions of law presented in each case being similar, they are reported together. Trial in the Superior Court, without a jury, before *Putnam, J.*, on agreed facts in substance as follows :

The original action in which the first recognizance was given, was a complaint against John Dowdican, for maintaining a liquor nuisance. In this case, the following order was made April 24, 1868 : " Chapter 86 of General Statutes having been repealed, this case is now laid on file." The case was accordingly laid on file at that date without costs. The complaint in this case was not under the Gen. Sta. c. 86, but under c. 87, which has never been repealed.

The original action in which the second recognizance was given, was an indictment against said Dowdican, for being a common seller of intoxicating liquor. This case was laid on file June 5, 1867, and the costs were paid.

The original action in which the third recognizance was given, was an indictment against said Dowdican, for maintaining a liquor

nuisance. This also was laid on file June 5, 1867, and the costs were paid.

In the orders laying the second and third cases on file, *Voss*, J., certified that he was satisfied of the truth of the defendant's affidavit, that the times covered by the indictments in said third and fourth cases had been also covered by another indictment on which the defendant had been found guilty and sentenced.

The proceeding in which the fourth recognizance was given, was an indictment for assault and battery. In April, 1868, the party injured filed an acknowledgment of satisfaction for all damages, and the costs were paid January 20, 1869; and in March, 1869, the case was laid on file.

An indictment was found at January term, 1873, against said Dowdican, for unlawfully receiving stolen goods, upon which he was found guilty.

At April term, 1873, each of the first four cases was brought forward by order of the court on motion of the district attorney, and the defendant ordered to enter into a recognizance, and failing to do so was committed.

On May 12, 1873, Dowdican, and the said Peterson and Child, appeared in the Superior Court, and recognized in each of said four suits, the former as principal, and the two latter as sureties. It further appeared that at April term, 1873, Dowdican's attorney had filed a motion in arrest of judgment, which had not been passed upon, and that on May 28, 1873, said attorney being in court, demanded a decision upon said motion, but none was given. The district attorney thereupon requested the presence of the defendant in court for the purpose of moving for sentence; and the defendant was ordered to be called, and not appearing was defaulted.

On these facts the presiding judge, at the request of the parties, reported the case to this court.

C. R. Train, Attorney General, for the Commonwealth.

G. W. Searle, for the defendants.

GRAY, C. J. The questions of law presented by the record in this action are not properly before us. The Superior Court has been authorized by the legislature to send up questions of law to this court in the form of a report, only in cases in which a verdict has been, or, if the trial should be completed, would be, rendered.

When the case is submitted to the Superior Court on a waiver of a jury trial, on the award of an arbitrator, or on an agreed statement of facts, that court is required to hear and determine it; and the jurisdiction of this court is purely appellate, after a decision below, and not advisory, by way of instructions to that court in advance how to perform the duty which the law has imposed upon it. Gen. Sts. c. 114, § 10; c. 115, §§ 6, 7. St. 1869, c. 438. *Lincoln v. Parsons*, 1 Allen, 388. *Bearce v. Bowker*, ante, 129. *Hogan v. Ward*, ante, 130 note.

In some cases in the books, this rule, not having been insisted on by either party, has been overlooked by the court. But the number of cases irregularly transmitted to this court without any decision below has lately increased so much, to the serious embarrassment of the performance of the appropriate duties of this court as a court of error, as to demand a strict and vigilant adherence to the statutes by which the jurisdiction of both courts is defined.

Report dismissed.

The case being submitted to the Superior Court on the above facts, *Putnam, J.*, ordered judgment for the Commonwealth, and the defendants appealed.

G. W. Searle, for the defendants, contended that the effect of an order to lay an indictment on file was the same as a sentence, final judgment, or *nolle prosequi*; that the circumstances that the orders, laying the three last indictments on file, also ordered the payment of costs, necessarily ended the case; and that under the Gen. Sts. c. 171, § 28, where the party injured filed an acknowledgment of satisfaction, an order that upon payment of costs the indictment be laid on file, was equivalent to an order that all further proceedings be stayed, and the defendant discharged from the indictment; that the entry by the judge, "Chapter 86 of General Statutes having been repealed, this case is now laid on file," was conclusive on the Commonwealth as to the case having been brought under said chapter, and that the certificate of *Vose, J.*, was a finding, that the prisoner had already suffered sentence for the same offences charged in said second and third indictments, and that the order to lay on file was a final order and decree which could not be altered after the end of the term in which it was made; and to this last point cited *Commonwealth v.*

Weymouth, 2 Allen, 144 ; *Jobe v. The State*, 28 Ga. 235 ; *Van Dyke v. The State*, 22 Ala. 57 ; *Brush v. Robbins*, 3 McLean, 486 ; *Rex v. Fletcher*, Russ. & Ry. 58 ; *The People v. Duffy*, 5 Barb. 205 ; *Rex v. Hunter*, 1 Wils. 163.

C. R. Train, Attorney General, (*W. G. Colburn*, Assistant Attorney General, with him,) for the Commonwealth.

GRAY, C. J. It has long been a common practice in this Commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file ; and this practice has been recognized by statute. Sts. 1865, c. 223 ; 1869, c. 415, § 60. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court ; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein. Neither the order laying the indictment on file, nor the payment of costs, therefore, in any of the four cases, entitled the defendant to be finally discharged.

The erroneous reason assigned for that order in the first case had no greater effect. The indictment was founded on c. 87 of the Gen. Sts., which has never been repealed. *Commonwealth v. Carpenter*, 100 Mass. 204. *Commonwealth v. Bennett*, 108 Mass. 30.

In the case of the indictment for an assault, the acknowledgment of satisfaction by the party injured did not entitle the defendant to be discharged. The provision of the Gen. Sts. c. 171, § 28, is that "the court may, on payment of the costs accrued, order all further proceedings to be stayed, and discharge the defendant from the indictment." It is within the discretion of the court, and not within the power of any private person, to determine whether it is consistent with the ends of justice to suspend or terminate the prosecution.

All the cases being still pending, the Superior Court was authorized to bring them forward and order new recognizances. The new recognizances were therefore lawfully taken. *Basset v. United States*, 9 Wallace, 38.

The principal defendant not having appeared when called in each case, but having been defaulted, the court was not required to decide in his absence the questions raised by the motions in arrest of judgment. *Commonwealth v. Andrews*, 97 Mass. 543. *Anon.* 81 Maine, 592. The default was a breach of the recognizances, and fixed the liability of the bail.

Judgments for the Commonwealth.

COMMONWEALTH vs. GEORGE A. AYERS.

Suffolk. June 16, 1874. COLT & ENDICOTT, JJ., absent.

A plea of guilty to a complaint for keeping a certain tenement open on the Lord's day, within the time covered by an indictment for keeping the same tenement for the illegal sale and illegal keeping of intoxicating liquors, is on the trial of such indictment, competent evidence to show that the defendant kept the tenement within the time charged.

COMPLAINT under the Gen. Sts. c. 87, §§ 6, 7, charging that the defendant did on July 30, 1873, and on divers other days between that day, and January 30, 1874, keep and maintain a certain tenement in Boston, "used for the illegal sale and illegal keeping of intoxicating liquors," whereby the same was a common nuisance. Trial in the Superior Court, before *Wilkinson, J.*, who allowed the following bill of exceptions :

"At the trial, to prove that the defendant kept the tenement mentioned in the complaint, the Commonwealth offered in evidence the record of the Municipal Court for the city of Boston, for criminal business, showing that on January 19, 1874, the defendant was complained of for keeping a shop numbered two, Bowdoin Square, Boston, open for business on the Lord's day, being the same tenement named in the present complaint, and that to this complaint the defendant pleaded guilty, and paid his fine. The defendant objected to the admission of this evidence, but the court admitted it, and the defendant excepted."

Annexed to the bill of exceptions was a copy of the judgment of the Municipal Court for the city of Boston, which recited that on January 10, 1874, George A. Ayers was brought before the court by virtue of a warrant issued January 9, 1874, to answer to a complaint, setting forth that the said Ayers, January 4, 1874, that day being the Lord's day, and between the midnight preceding and the midnight succeeding the same day, at Boston, did keep open his shop, there situate and numbered two, in Bowdoin Square, for the purpose of doing business therein, and that to this complaint he pleaded guilty.

S. J. Thomas, for the defendant, moved to recommit the case to the Superior Court, on the ground that the papers showed that a mistake had been made either in the record of the complaint or in the bill of exceptions; and produced a certificate of the clerk of the Municipal Court, that there was no complaint against the defendant in that court, dated January 19, 1874.

THE COURT, without passing upon the point, directed the bill of exceptions to be argued; and it was argued by *Thomas*, for the defendant.

C. R. Train, Attorney General, was not called upon.

BY THE COURT. The complaint charges the defendant with keeping and maintaining a nuisance on July 30, 1873, and on divers other days and times between that day and January 30, 1874. One of the essential points to be proved is the keeping of the shop. An admission that the defendant kept the shop open on any day during this time is competent evidence against him. A plea of guilty to a complaint charging him with keeping it open is such an admission in the most solemn form. The only question here is as to the time to which the admission relates. The bill of exceptions states that it is January 19. If it were January 9 or 10, as stated in the copy of the complaint sent up with the bill of exceptions, it could make no difference.

Motion to recommit and exceptions overruled.

COMMONWEALTH vs. JOHN S. BELLOWS.

Suffolk. June 15.—16, 1874. COLT & ENDICOTT, JJ., absent.

Copies of the record of a Municipal Court furnished on appeal to the Superior Court need not be under seal.

COMPLAINT to the Municipal Court of the city of Boston, charging the defendant with an unlawful sale of intoxicating liquors.

At the trial in the Superior Court, before *Wilkinson*, J., and before the jury were empanelled, the defendant moved to dismiss the complaint, because it appeared from the copies that the judgment in the court below, and the complaint, were not under the seal of that court, and also because the copy of the judgment, and of the complaint, were not certified to be true copies, under the seal of the court. This motion was overruled. After verdict the defendant moved in arrest of judgment, for the causes stated in his motion to dismiss. This motion in arrest was also overruled. The defendant excepted.

G. Sennott, for the defendant.

W. G. Colburn, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

BY THE COURT. It was admitted at the argument that the original complaint and judgment need not have a seal; and it is well settled that the attestation required none. *Commonwealth v. Downing*, 4 Gray, 29. *Commonwealth v. Cavey*, 97 Mass. 541.

COMMONWEALTH vs. GEORGE F. BELOU.

Suffolk. June 15.—16, 1874. COLT & ENDICOTT, JJ., absent

Copies of the record of a Municipal Court furnished on appeal to the Superior Court, are sufficiently attested by the addition of the word clerk to the signature of the clerk of such municipal court.

On a complaint charging that the defendant was a common seller of spirituous and intoxicating liquors without having any license, appointment or authority therefor, the burden of proof is on the defendant under the St. of 1864, c. 121, to show that he had such license, appointment or authority, although he is not the proprietor of the tenement described in the complaint.

COMPLAINT to the Municipal Court of the city of Boston, averring that the defendant was, on certain days named, without then having any license, appointment or authority therefor, a common seller of spirituous and intoxicating liquors. In the Superior Court on appeal and before the trial the defendant filed a motion which was overruled, to quash the complaint, for the reason, "that the copy of the record of judgment sent up on appeal from the Municipal Court was not duly authenticated, as the clerk of said Municipal Court had not certified to said copy by adding the title of his office thereto." The copy of the record purported to be of a judgment of the said Municipal Court, and the certificate was signed "Alfred Williams, clerk."

At the trial in the Superior Court, before *Wilkinson, J.*, the defendant requested the court to instruct the jury, "that the burden was upon the government to prove that the defendant acted without license, appointment or authority, as it appeared in evidence that the defendant was not the proprietor of the tenement or place described in the complaint as having been maintained by the defendant." The court refused to give the instruction asked for, and the defendant excepted.

C. F. Donnelly, for the defendant.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. The attestation of a copy of the record of the Municipal Court is in the usual form, and clearly shows that the clerk was the clerk of the same court, without a fuller addition to his signature.

The burden of proving any license, appointment or authority, under which the defendant justified, was upon him, whether he was the proprietor of the place or a mere servant or agent. St. 1864, c. 121.

Exceptions overruled.

COMMONWEALTH vs. GEORGE L. MITCHELL

Suffolk. June 15. — 16, 1874. COLT & ENDICOTT, JJ., absent.

An indictment under the Gen. Sts. c. 87, §§ 6, 7, charging the maintaining of a common nuisance on a day certain, and for six months next preceding said day, is supported by proof that the defendant maintained the nuisance during any part of the time covered by the indictment.

INDICTMENT under the Gen. Sts. c. 87, §§ 6, 7, charging the defendant with keeping a common nuisance, to wit, a tenement in the city of Boston, used for the illegal sale and illegal keeping for sale of intoxicating liquors, on the sixth day of January, 1874, and for six months next preceding said sixth day of January.

At the trial in the Superior Court, before *Wilkinson, J.*, the government offered evidence tending to show that the defendant was in the tenement on October 17, 1873, and on January 3, 1874, but there was no evidence that the defendant kept said place subsequent to January 3, 1874, nor that he sold any intoxicating liquors subsequent to October 17, 1873, although liquors were found there. The defendant requested the court to rule that the jury should return a verdict of not guilty, unless they should find, on the evidence, that the defendant kept the place on the sixth day of January, 1874, as charged in the indictment. The presiding judge refused so to rule, and instructed the jury that they should convict if they found that the defendant maintained the tenement for the purpose named in the indictment, during any part of the time covered by the indictment. The jury returned a verdict of guilty, and the defendant excepted.

C. S. Lincoln, for the defendant.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

BY THE COURT. Proof that the defendant kept and maintained the tenement for the illegal sale of intoxicating liquors, during any part of the time named in the indictment, warranted a conviction. The instructions given were correct. *Commonwealth v. Wood*, 4 Gray, 11. *Wells v. Commonwealth*, 12 Gray, 826. *Commonwealth v. Higgins*, 16 Gray, 19. *Commonwealth v. Gallagher*, 1 Allen, 592. *Commonwealth v. Cogan*, 107 Mass. 212.

Exceptions overruled.

COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS,
Rodney Brown, claimant.

Suffolk. June 15. — 16, 1874. COLT & ENDICOTT, JJ., absent.

A proceeding under the St. of 1869, c. 415, for the forfeiture of intoxicating liquors illegally kept and intended for sale, is of a criminal nature, and the allegations of the complaint must be proved beyond a reasonable doubt.

COMPLAINT under the St. of 1869, c. 415, § 44, alleging that certain intoxicating liquors were kept by the claimant in a building in Boston, with an intent to sell the same in violation of law; and praying for a decree of forfeiture thereof.

At the trial in the Superior Court, before *Allen, J.*, the counsel for the claimant contended that the intent to sell in violation of law must be proved beyond a reasonable doubt; but the presiding judge instructed the jury, that such was not the rule in cases of this kind, "and that the rule in civil cases must be applied; and that if as reasonable men the jury believed, upon a fair preponderance of the evidence, that the liquors were kept by the claimant with intent to sell the same, in violation of law, they should so find by their verdict."

The jury found that the liquors were so kept, and the claimant excepted.

A. Russ, for the claimant.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth. The question here presented has not been directly decided in this Commonwealth. There is a *dictum* in *Commonwealth v. Intoxicating Liquors*, 105 Mass. 595, which expresses the opinion that the rule of evidence is the same as in ordinary criminal cases; but the point was not directly in issue in that case, and no ruling upon this point was given or refused in the court below. The proceeding is primarily a process *in rem* in which the Commonwealth, on the ground that the liquors, by their sale, are or are about to become a statutory nuisance, confiscates and destroys them. This is not done as a punishment for the crime of selling or intending to sell. That is another and distinct offence, for which there is an appropriate penalty, and the owner of the liquors is not exempt from that punishment by reason of any

seizure and confiscation of the property. If we consider the forfeiture as a punishment for the crime of keeping with intent to sell, we impose two distinct penalties, reached by two distinct processes, for the same offence.

A forfeiture of property, under a proceeding against it specifically, differs essentially from a forfeiture in a proceeding against the owner directly. The latter is a fine, as a punishment or partial punishment, for an offence. The former is the exercise of a right of protection to society by the destruction of a thing liable to be dangerous to life, health or morals. Similar provisions exist for the forfeiture and destruction of obscene books; Gen. Sts. c. 165, § 16; St. 1862, c. 168; and of diseased or unwholesome provisions and drugs. Gen. Sts. c. 166, §§ 3, 5. *Barnicoat v. Gunpowder*, Thach. Crim. Cas. 596. *Trueman v. Gunpowder*, Ib. 14. 1 Bishop, Crim. Law, (5th ed.) §§ 821-829, 944. Generally where goods are forfeited by proceedings *in rem* the rules of law applicable to civil suits apply. Gen. Sts. c. 158, §§ 5, 6, 12, 15, 16. *Barnicoat v. Gunpowder*, 1 Met. 225.

This is a statutory and not a common law forfeiture, which was a consequence of a judgment of conviction against a person. *The Palmyra*, 12 Wheat. 1, 13, 15. The provision in the statute is that the liquor shall be forfeited, and not that the claimant or supposed owner shall forfeit the liquor. St. 1869, c. 415, § 51. In bastardy complaints, which seem to partake more of the nature of criminal actions than seizure cases, the charge is proved by a preponderance of the evidence. *Richardson v. Burleigh*, 3 Allen, 479. *Young v. Makepeace*, 103 Mass. 50.

GRAY, C. J. A proceeding under the St. of 1869, c. 415, for the forfeiture of intoxicating liquors illegally kept and intended for sale, is of a criminal nature. The statute requires that both in the complaint on oath by which the proceeding is commenced, and in the search warrant issued thereon, the place to be searched, the liquors to be seized, and the person by whom they are owned or kept and intended for sale, shall be particularly designated, and "the offence fully, plainly and substantially described." §§ 44, 46. *Commonwealth v. Intoxicating Liquors*, 13 Allen, 52. Notice is to issue to the person complained against as the keeper of the liquors seized, and to all other persons claiming any interest therein, to appear and answer the complaint and show

cause why the liquors should not be forfeited; and "time and opportunity for trial and defence shall be given to persons interested." §§ 48, 49, 50. If the person complained against, or any other person claiming an interest in the liquors appears, "he shall be admitted as a party on the trial;" and whether there is any such appearance or not, the liquors are to be adjudged forfeited only upon satisfactory proof that they were owned or kept by the person alleged in the complaint, for the purpose of being sold in violation of law. § 51. *Commonwealth v. Intoxicating Liquors*, 113 Mass. . If no person appears as a claimant, or judgment is rendered in favor of all who so appear, "the cost of the proceedings shall be paid as in other criminal cases;" if any person appearing fails to sustain his claim, judgment is to be rendered and execution issued against him for costs, and, in case of non-payment thereof, he is to be committed to jail, and not discharged until he has paid the same and the costs of commitment, or been imprisoned thirty days. § 54. From the judgment of a justice of the peace or police court, the person complained against, as well as any claimant whose claim is not allowed, has "the same right of appeal, and to the same court, as if he had been convicted of a crime," first entering into a recognizance to the Commonwealth to prosecute his appeal and "to abide the sentence" of the court appealed to. § 55. *Commonwealth v. Intoxicating Liquors*, 13 Allen, 561.

It is upon the ground that these proceedings are in the nature of a criminal prosecution, that they have been held by this court not to be within the statute making the Commonwealth liable to costs "in civil suits and proceedings;" *Commonwealth v. Intoxicating Liquors*, 14 Gray, 375; and to be within the statute which allows the Commonwealth a right to peremptorily challenge jurors "in all criminal cases." *Commonwealth v. Intoxicating Liquors*, 107 Mass. 216.

The distinction between proceedings of this character, prosecuted exclusively on behalf of the Commonwealth, and those commenced in the name of an individual and carried on for his own benefit, as in *Barnacoat v. Gunpowder*, 1 Met. 225, and under the Gen. Sts. c. 153, was pointed out in *Commonwealth v. Intoxicating Liquors*, 14 Gray, 375, and in *Attorney General v. Justices of Municipal Court*, 103 Mass. 456, 467.

It was therefore rightly said in *Commonwealth v. Intoxicating Liquors*, 105 Mass. 595, that "the intent to sell contrary to law, in which the whole criminality of the keeping consists, must be proved beyond reasonable doubt, according to the ordinary rule of criminal cases, before a decree of forfeiture can be had." The jury in the present case having been instructed otherwise, the
Claimant's exceptions must be sustained.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,
Thomas McCormick, claimant.

Suffolk. March 31. — June 18, 1874. AMES & DEVENS, JJ., absent.

A complaint on the St. of 1869, c. 415, § 44, averred that intoxicating liquor was kept in a certain three-story brick building with basement, situate, &c., and prayed for a warrant to search "said three-story brick building with basement and all sheds and outbuildings belonging to said building." The warrant issued on this complaint directed the entry and search of the three-story brick building and all outhouses and sheds belonging to said building. *Held*, that the warrant was void.

COMPLAINT to the Police Court of Somerville on the St. of 1869, c. 415, § 44. Trial in the Superior Court, on appeal, before *Bacon, J.*, to whose rulings the claimant alleged exceptions, the substance of which is stated in the opinion of the court.

C. F. Donnelly, for the claimant.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

WELLS, J. The complaint on the St. of 1869, c. 415, § 44, alleges reason to believe and belief that certain intoxicating liquors are kept and deposited by Thomas McCormick "in a certain three-story brick building with basement, situate," &c.; and prays for a warrant to search "said three-story brick building with basement and all sheds and outbuildings belonging to said building." The warrant recites the complaint and directs the officer to enter "the three-story brick building and all outhouses and sheds belonging to said building herein above described," and make search. The St. of 1869, c. 415, § 44, authorizes the magistrate to issue a warrant "to search the premises in which it is alleged such liquor is deposited." In *Commonwealth v. Intoxi-*

ating Liquors, 109 Mass. 371, and *Same v. Same*, 109 Mass. 373, it was held that a warrant which authorizes the search of any building or part of a building not included in the description of the premises in which the liquor is alleged to be deposited, is wholly void. This case comes within the principle of those decisions.

Exceptions sustained.

COMMONWEALTH vs. PATRICK BARRY.

Middlesex. March 31. — June 18, 1874. **AMES & DEVENS, JJ.,** absent.

Where the contents of several writings taken together form the record sent up on appeal from a police court to the Superior Court, a certificate affixed to the end of such record is a sufficient certificate of each of the writings contained therein. The signature of the clerk of a police court, followed by the word "clerk," is a sufficient attestation of a record sent up on appeal to the Superior Court.

Where a bill of exceptions to a ruling under which the defendant was convicted of keeping intoxicating liquors with intent to sell the same, states that the liquors were kept by the defendant's wife, who did business on her own account, having filed a proper certificate and taken out a United States license as a retail liquor dealer, and that he lived in the house with her and does not state that she kept said liquors in a tenement apart from her husband's house, it will be assumed that she kept them in such house.

If a married woman keeps in the house of her husband intoxicating liquors with intent to sell the same in violation of law, the husband will be liable for such illegal keeping, if he have knowledge of the fact and of her intent, and does not use reasonable means to prevent her carrying out such intent, notwithstanding she is doing business on her own account, having filed a certificate under the St. of 1862, c. 198, and has a United States license as a retail liquor dealer.

COMPLAINT to the Somerville Police Court for keeping intoxicating liquors with intent to sell the same in violation of law.

At the trial in the Superior Court, on appeal, before *Bacon, J.*, the defendant was found guilty, and a bill of exceptions, in substance as follows, was allowed :

The defendant before trial filed a motion to quash the complaint, on the ground that there was no duly certified and proper copy of the record of the Police Court in and before the court. The record sent up with the case on appeal consisted of copies of the complaint, warrant, and of the record of the Police Court; at the end of the record was annexed the following certificate: "A true

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| 115 | 146 |
| 153 | 371 |
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copy of Record — Attest, my hand and the seal of said Police Court. Lebbeus Stetson, Clerk.” The motion was overruled.

Evidence was offered in behalf of the defendant tending to show that his wife carried on the business of a retail liquor dealer at the time the defendant was charged with the offence in question and at the place in which he was alleged to have kept the said liquor with intent to sell. A married woman's certificate under the St. of 1862, c. 198, showing that the wife proposed to carry on business on her own account at the place in question appeared to have been duly filed some months before the date of the alleged offence, and it appeared that she had had a United States license as a retail liquor dealer for some months previously in her name. There was no evidence offered except the fact that the defendant lived in the same house with his wife tending to show that he knew of any sales, or authorized any sales, of liquor or that he had any control over the liquor in question; but the court ruled that the defendant was liable to be convicted if the jury found that the wife kept the liquor in the presence of the husband with intent to sell the same, and that the husband had knowledge of that fact and of her intent, and did not use reasonable means to prevent her. The defendant testified that he forbade his wife and that he never saw her make any sales. To the above rulings the defendant alleged exceptions.

C. S. Lincoln, for the defendant.

W. G. Colburn, Assistant Attorney General, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

MORTON, J. The motion to quash was properly overruled. The ground in support of it which the defendant now insists upon, that “neither the complaint nor warrant is duly certified and attested,” cannot be sustained. The attestation by the clerk of the Police Court, at the end of the record, is a sufficient attestation of all the proceedings. *Commonwealth v. Ford*, 14 Gray, 399. *Commonwealth v. Cavey*, 97 Mass. 541. The objection that the recognizance taken in the Police Court was not transmitted to the clerk of the Superior Court does not appear to be sustained by the facts. The bill of exceptions does not show that it was not duly transmitted. But if it was not, it is difficult to see how this would affect the jurisdiction of the Superior Court.

The only remaining question is as to the ruling of the presiding judge that "the defendant was liable to be convicted if the jury found the wife kept the liquor in the presence of the husband with intent to sell the same and the husband had knowledge of that fact and of her intent and did not use reasonable means to prevent her." The evidence on behalf of the government is not reported, and therefore the bill of exceptions does not fully show the state of facts proved at the trial to which the instruction was applicable. It does not show, by any direct statement, whether the place where the liquors were kept for sale was the house of the defendant or some other tenement. But the burden is upon the excepting party to present all the facts which support his exceptions, and we cannot assume that the place was a tenement separate and distinct from the defendant's house, in the absence of any statement in the bill of exceptions from which that fact can fairly be inferred. On the contrary we must assume that the instructions were given in view of the fact that the place where the wife of the defendant carried on the business of a retail liquor dealer was the house of the defendant.

Upon this aspect of the case we are of opinion that the instructions were correct.

The statutes which give to a married woman the right to carry on any trade or business on her sole and separate account, do not deprive a husband of his common law right to regulate and control his own household. He has the power to prevent his wife from using his house for an illegal business or purpose. If he permits her to use it for the illegal business of keeping intoxicating liquors for the purpose of sale, he becomes a participator in the misdemeanor, and is liable to an indictment or complaint for it. And the fact that she was carrying on the business on her own account, and has filed a certificate to that effect under the statute, does not release him from this liability. *Commonwealth v. Wood*, 97 Mass. 225.

Exceptions overruled.

COMMONWEALTH vs. JOHN KENNEY.

Middlesex. March 31. — June 20, 1874. AMES & DEVENS, JJ., absent

On the issue whether the defendant had reasonable cause to believe that certain intoxicating liquor conveyed by him to a house was intended to be sold in violation of law, evidence is admissible, in the absence of any evidence of a change in the use of the building, that four months before the act of the defendant the house was used as a place for the sale of intoxicating liquors; and that at the time when the defendant conveyed said liquors he had in his wagon another jug of liquor marked with the name of a person shown to be a seller of intoxicating liquors.

COMPLAINT to the Charlestown Police Court under the St. of 1869, c. 415, § 39, averring that the defendant on August 9, 1873, did carry intoxicating liquor to a certain house in Charlestown, "having reasonable cause to believe that the same had been sold and was intended for sale" in violation of law.

At the trial in the Superior Court, on appeal, before *Bacon, J.*, evidence was offered, and admitted against the objection of the defendant, that the premises described in the complaint had been used as a place for the sale of liquor about four months before the time of this complaint; and that at that time a seizure of liquors had been made on said premises; evidence was also admitted, against the objection of the defendant, that at the time when the defendant delivered the liquor at the house mentioned in the complaint, he had in his wagon a jug of liquor marked "Cassidy," and that Cassidy was the name of a man who kept a liquor shop and bar room. The jury returned a verdict of guilty, and the defendant excepted.

I. S. Morse, for the defendant.

C. R. Train, Attorney General, *vs.* *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

COLT, J. The whole evidence upon which this verdict was rendered is not reported. We cannot see that the evidence objected to was not admissible in the discretion of the presiding judge, as having a tendency, not too remote, to prove one or more of the propositions necessary to the defendant's guilt.

A description of the premises as they were some few months before, with no evidence of change, would have a tendency to show that they were used for the same purpose.

The fact unexplained that the defendant was conveying at the same time in the same wagon other jugs of liquor to other persons engaged in its unlawful sale, would as one circumstance tend to prove that the defendant had reasonable cause to believe that the liquor transported by him was intended for sale contrary to law. *Commonwealth v. Commeskey*, 18 Allen, 585. *Briggs v. Rafferty*, 14 Gray, 525. *Exceptions overruled.*

COMMONWEALTH vs. JAMES J. McGRATH & another.

Suffolk. June 15. — 22, 1874. COLT & AMES, JJ., absent.

A misrecital of a verdict in a motion contained in a bill of exceptions, will not affect the verdict as shown by the record.

On an indictment for a felonious assault with the malicious intent to maim and disfigure, a verdict that "each defendant is guilty of an assault without the intent as alleged in the indictment," operates as a conviction of a simple assault.

On an indictment for a felonious assault on A. with the malicious intent to maim and disfigure A. by putting out and destroying the eye of A., if the defendant is found guilty of an assault without the intent as alleged in the indictment, he may be adjudged guilty of a simple assault under the Gen. Sts. c. 172, § 16.

INDICTMENT charging that James J. McGrath and Frank Judge "upon one Robert M. Morrison, feloniously an assault did make with the malicious intent the said Morrison then and there to maim and disfigure, by putting out and destroying the eye of said Morrison."

At the trial in the Superior Court, before *Wilkinson, J.*, the jury returned a verdict as appeared by the record as follows: "Each defendant is guilty of an assault without the intent as alleged in the indictment." The defendants then moved that they be discharged, on the ground that "when a verdict, as in this case, finds them 'guilty of an assault without intent,' it is tantamount to an acquittal." This motion was overruled and the defendants excepted. The bill of exceptions was certified by the presiding judge to be conformable to the truth and was allowed. Afterwards during the same term the defendant moved in arrest of judgment, and assigned as one of the grounds, "that a verdict, as in this case, in these words, and in form as follows: 'Each guilty of an assault without intent' is, in fact, a verdict of not

guilty." This motion was also overruled, and the defendants appealed.

D. F. Crane & H. P. Haynes, for the defendants, contended, 1. That the allowance of the bill of exceptions, certified to be conformable to the truth, was conclusive of the fact that the verdict was in words and form as set out in the bill of exceptions; and that the difference of the record as certified by the clerk was to be treated as an interpolation.

2. That the verdict in law amounted to an acquittal, because on the indictment the defendants could be convicted "only of feloniously putting out and destroying the eye of Morrison, with the malicious intent to maim and disfigure."

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

GRAY, C. J. This indictment duly charges an assault with intent to maim. The verdict, as recorded, shows a good conviction of a simple assault only, and is not affected by the misrecital of it in the defendants' motion. The defendants having been convicted of part of the offence charged, and that part being of itself an offence substantially alleged in the indictment, they are liable to be sentenced accordingly. Gen. Sts. c. 172, § 16.*

Exceptions overruled.

COMMONWEALTH vs. JOHN MAHONEY.

Suffolk. June 19. — 22, 1874. COLT & AMES, JJ., absent.

A defendant who pleads guilty to a complaint in the Municipal Court, and appeals to the Superior Court, is not entitled to a trial by jury, and unless the plea is withdrawn by special leave of court, or a motion is interposed in arrest of judgment for legal defects apparent on the record, the government is entitled to have sentence passed.

* "When a person indicted for a felony is on trial acquitted by the verdict of part of the offence charged, and convicted of the residue, such verdict may be received and recorded by the court, and thereupon the person indicted shall be adjudged guilty of the offence, if any, which appears to the court to be substantially charged by the residue of the indictment, and shall be sentenced and punished accordingly."

COMPLAINT on the St. of 1869, c. 415, §§ 31, 36, to the Municipal Court of the city of Boston averring that the defendant, on January 20, 1874, kept intoxicating liquors with intent to sell the same. The defendant pleaded guilty in the Municipal Court and was sentenced, but appealed.

In the Superior Court the district attorney moved for sentence; the defendant objected and claimed a trial by jury. The objection was overruled by *Wilkinson, J.*, and the defendant excepted.

A. O. Brewster, for the defendant.

C. R. Train, Attorney General, & *W. G. Colburn*, Assistant Attorney General, for the Commonwealth.

GRAY, C. J. A defendant in a criminal case, who has once pleaded to the charge against him, has no right to withdraw his plea, but is confined to the issues of law or fact thereby raised or left open, unless the court in which the case is pending sees fit to exercise the discretion of allowing him to withdraw it and plead anew. If he appeals from a judgment against him in the court in which his plea is first made, the appeal indeed vacates the judgment, but it does not multiply his grounds of defence or enlarge the issue once joined between the Commonwealth and himself. The same defences are open to him in the appellate court as in the court below, and no other. *Commonwealth v. Blake*, 12 Allen, 188. If he pleads guilty upon his first arraignment, and his plea is received by the court and recorded, it is an admission of all facts well charged in the indictment or complaint, and a waiver of his right of trial by jury thereon, and, unless withdrawn by special leave of court, or a motion is interposed in arrest of judgment for legal defects apparent on the record, leaves nothing to be done but to pass sentence. Gen. Sts. c. 158, § 5. *Commonwealth v. Winton*, 108 Mass. 485.

Exceptions overruled.

**COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,
Boston Beer Company, claimant.**

Suffolk. March 31. — June 30, 1874. AMES & DEVENS, JJ., absent.

The St. of 1869, c. 415, relating to the manufacturing for sale and the sale of intoxicating liquors, including malt liquors, is in the nature of a police regulation of a particular kind of property, and applies to the property of corporations as well as to the property of individuals; and does not impair the obligation of the contract contained in the charter of a corporation, although the corporation was created, before the passage of said statute, under a charter which authorized it to manufacture malt liquors, and the legislature had no power to alter, modify, or repeal said charter.

COMPLAINT to the Municipal Court of the city of Boston, on the St. of 1869, c. 415, § 44, against certain intoxicating liquors, alleged to have been deposited by Patrick O'Connell in a certain vehicle, and being conveyed by him to some unknown person, the said unknown person intending to sell the same in violation of law.

The Boston Beer Company appeared and claimed an interest in certain of the liquors seized under said complaint.

At the trial in the Superior Court, before *Aldrich, J.*, it was agreed by the parties that the Boston Beer Company was incorporated under the St. of 1827, c. 32, "For the purpose of manufacturing malt liquors in the city of Boston," and that its charter gave it all the powers and privileges and made it subject to all the duties and requirements of the St. of 1808, c. 65, passed March 3, 1809; that this last named act was repealed by the St. of 1829, c. 58, § 16; that the liquors claimed by the Boston Beer Company were malt liquors, and were manufactured and owned by the said corporation, and were being transported by O'Connell as its agent, to its place of business for the purpose of sale.

The claimant asked the court to instruct the jury: 1. "That by the repeal of the St. of 1808, c. 65, the legislature relinquished the power reserved in this statute, to repeal and alter the grant made by its charter to the company; that this relinquishment of the power of repeal or alteration was a final extinguishment of the power, and could not be resumed. 2. That the St. of 1869, c. 415, and the acts in addition thereto, prohibiting the manufac-

ture and sale and the transporting for sale of intoxicating liquors, impair the obligation of the contract contained in the charter of said company, and are in violation of the Constitution of the United States, and not therefore binding on said company. 3. That the said company could lawfully manufacture, own and transport said ale, and the vessels containing the same, for the purpose of being sold by it at its place of business in Boston; and that therefore the seizure of said ale and vessels was wrongfully made, and that they should be returned to said claimant."

The presiding judge declined to give such instructions, but instructed the jury, that as it was agreed and admitted that the said company was the manufacturer and owner of the ale at the time of said seizure, and was then transporting the same by its agent, O'Connell, for the purpose of sale in this Commonwealth, contrary to the provisions of the St. of 1869, it was lawfully seized, and was liable to forfeiture.

The jury found that the ale described in the complaint, and seized upon the warrant, was at the time of the making of the complaint deposited and kept by O'Connell, as agent of the claimant, in the vehicle named in the complaint, for the purpose of being sold in this Commonwealth, contrary to the provisions of the St. of 1869, c. 415.

The claimant excepted to the foregoing rulings and instructions.

F. O. Prince, for the claimant. The prohibitory legislation in the St. of 1869, which impairs the powers of this corporation, is not a lawful exercise of the police powers of the State, as police regulations must not be in conflict with any of the provisions of the charter; they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise. *Cooley's Const. Limitations*, 577-579, and cases cited. *State v. Hawthorne*, 9 Mo. 385. *Commonwealth v. Alger*, 7 Cush. 53. *Adams v. Hackett*, 7 Foster, 289. A license to sell may be annulled, because a license is not a contract, and bears no resemblance to an act of incorporation. *Calder v. Kurby*, 5 Gray, 597. *Commonwealth v. Brennan*, 103 Mass. 70.

W. G. Colburn, Assistant Attorney General, (*C. R. Train*, Attorney General with him,) for the Commonwealth.

ENDICOTT, J. The claimant in this case contends that, having been created a corporation for the purpose of manufacturing malt

liquors under a charter, which the legislature has no power to alter, modify or repeal, it has the right to sell the products of its manufacture, notwithstanding the provisions of the St. of 1869, c. 415, relating to the manufacture and sale of intoxicating liquors. We do not think this position is tenable.

By its charter the claimant is a private manufacturing corporation, with the same power as a natural person to do that which its charter authorizes; and by implication with the same power as an individual to deal with and sell its property so manufactured. But the authority of the legislature over the property or the use of the property of a corporation is not lost because no power is reserved to repeal or amend its charter. Any laws the sovereign power may find it necessary or salutary to enact, regulating, controlling, restricting or prohibiting the sale of a particular kind of property for the general benefit, apply as well to the property of corporations, like the claimant, as to individuals. Such laws are in the nature of police regulations, and individuals and corporations are alike subject to them. Indeed all property is held subject to such restriction, and it is immaterial that the restriction is imposed after the property is acquired or becomes valuable, or after the charter is granted, or before it became necessary in the judgment of the legislature to pass a law on the subject. Every such law limits, restrains, impairs, and in some cases destroys the uses, which were previously enjoyed, of the property so made the subject of legislation, but the extent to which it may do so does not affect the validity of such laws, or their equal application to all owners of such property. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and cannot be said to impair any right, or the obligation of any contract, or to do any injury in the proper and legal sense of these terms. *Commonwealth v. Alger*, 7 Cush. 85, 86. *Thorpe v. Rutland & Burlington Railroad*, 27 Vt. 140. *People v. Hawley*, 3 Mich. 330. *Brick Presbyterian Church v. New York*, 5 Cowen, 538. *Vanderbilt v. Adams*, 7 Cowen, 349. *Coates v. New York*, 7 Cowen, 585, 604, 606.

The St. of 1869, c. 415, does not therefore impair the obligation of the contract contained in the charter of the claimant, so far as it relates to the sale of malt liquors, but is binding on the claimant to the same extent as upon individuals.

As it was assumed in the argument for the Commonwealth that the legislature had no constitutional power to change this charter, we have not considered that question. .

The rulings in the court below were correct, and the entry must be
Exceptions overruled.

CHARLES R. BROWN & another vs. PAUL D. WALLIS.

Suffolk. March 4. — June 16, 1874. WELLS & ENDICOTT, JJ., absent.

Replevin will not lie by the assignee of a tenant against the landlord for an unre-
moved trade fixture.

A counting-room put into a store by a tenant, which is made of a framework of three
sides fastened to the floor by nails and to the brick wall of the building in which
it stands, is a trade fixture.

REPLEVIN of certain fixtures and chattels, which were at the
time they were replevied in a store numbered 49 Lincoln Street,
Boston.

Trial in the Superior Court, before *Devens*, J., who allowed a
bill of exceptions in substance as follows :

On October 1, 1870, the defendant, who was the owner of
the store in question, made a written lease of it to one William
J. Cain, who entered under the lease, and placed in the store
the fixtures and other chattels replevied. On March 13, 1871,
while continuing to occupy the store under the lease, he executed
and delivered a bill of sale to Granville Wilder of "all the per-
sonal property of every description now in the store numbered 49
on Lincoln Street, consisting of one bar, bar, gas and other fix-
tures, furniture, tools, implements, lot of glass ware, ale pump,
stock of cigars and other goods, and various other articles too
numerous to mention, meaning and intending to convey all the
personal property hereby, now in said store and office connected
therewith." Wilder the same day made and executed to Cain a
mortgage of "all the store, bar, gas and other fixtures this day
conveyed to me by said Cain, situated in store and office numbered
49 on Lincoln Street." Cain on March 29, 1871, assigned this
mortgage and all his right, title and interest "in the goods and

property therein described" to the plaintiffs, to whom also Wilder, by a transfer on the back of the mortgage, dated January 22, 1872, conveyed his right, title and interest "in and to the within described mortgaged property."

At the time of Wilder's release the defendant was in possession of the premises and held the keys, having taken possession from Wilder on or about the 16th of the same month. At the trial the witness Cain, who was called by the plaintiffs, and who originally placed the fixtures in the store and built the counting-room therein, testified that said counting-room was used as his office, that his books of account were kept there, and that the usual office business of such a store was transacted in said counting-room, and there was no other evidence upon this point.

The counting-room or office was a structure eight or nine feet square, six or seven feet in height, not reaching within several feet of the ceiling, and consisted of a framework, sheathed and panelled, both outside and inside, and made double, and was fastened to the floor by nails, and to the brick wall against which it stood, and which formed the fourth side, by nails in cleats, which cleats were themselves nailed into the joints of the brick. A crowbar was used by the plaintiffs' agents in removing this structure, under the replevin writ, and the three sides or sections were entirely separated from each other by such removal. There were two doors in the structure, and windows in two or three sides, and it was proved that there was no other place in the store called, or known, as a counting-room or an office.

After the evidence was all in, the defendant asked the court to instruct the jury that the counting-room was not included in the bill of sale or in any of the subsequent written instruments. The presiding judge stated that he should so rule, and the plaintiffs excepted thereto. The parties thereupon agreed that a verdict should be taken for the plaintiffs with nominal damages as to all the replevied property except the counting-room, and for the defendant as to said counting-room. The bill of exceptions stated the sole question reserved to be whether the counting-room is included in the bill of sale and in the subsequent written instruments.

C. F. Donnelly, for the plaintiffs.

H. D. Hyde & M. F. Dickinson, Jr., for the defendant.

COLT, J. The sheriff was required by the plaintiffs' writ to replevy certain personal property and fixtures therein named, one item of which is described as "one counting-room;" in the possession of the defendant.

This property was originally placed in the defendant's store by the tenant under a written lease from the defendant. The tenant transferred his title to all of it as it is claimed by bill of sale to a third person under whom the plaintiffs claim title.

At the time of the service of the writ the case finds that this counting-room, so called, was securely fastened to the floor and wall against which it stood, so as to require the use of a crowbar and to be necessarily separated into three pieces before it could be removed and taken possession of by the sheriff.

Under a ruling of the court that the counting-room was not included in the bill of sale or any of the subsequent writings under which title was claimed by the plaintiffs, the parties agreed to a verdict for the plaintiffs as to all the property replevied except that, and for the defendant as to that.

It is unnecessary to consider whether the right construction was given to the language used in the writings in question or not. For it is plain upon the facts in this case that whatever may be the plaintiffs' remedy, replevin will not lie for an unremoved fixture of this description. Taking the most favorable view claimed by the plaintiffs, this room or office was a trade fixture placed in the defendant's store and removable by the tenant during the time of his lease. So long as it remained annexed to the real estate it was part of the freehold. The landlord is not liable in trover for its conversion, and replevin can be maintained only for the taking of a personal chattel, not for an injury to that which is affixed to the inheritance. 1 Chit. Pl. (5th Eng. ed.) 167, When the writ was sued out, it was part of the realty. *Guthrie v. Jones*, 108 Mass. 191. *Niblet v. Smith*, 4 T. R. 504. *Cresson v. Stout*, 17 Johns. 116. *Exceptions overruled.*

MICHAEL COLLINS vs. A. G. DELAPORTE & another.

Suffolk. March 6.—June 16, 1874. WELLS & ENDICOTT, JJ., absent.

A. agreed to manufacture and deliver to B. a quantity of lumber at a certain time, and B. agreed to buy of A. the lumber at said time; each side of the executory contract was contained in a separate instrument, written at the same time, but each complete in itself and neither making any reference to the other. Held, that the two instruments were to be construed together as one contract containing mutual and dependent promises.

Where A. has agreed to deliver a certain quantity of lumber to B. at a time certain, and at said time tenders a less quantity than that agreed upon, and B. refuses absolutely to receive the lumber, not because the tender is not sufficient, but for other reasons, such tender is not equivalent to performance on the part of A., and the refusal will not excuse further performance of his contract on the part of A. so as to enable him to recover against B. on his contract to buy said lumber.

On a suit for breach of contract to buy lumber, admitting that the plaintiff was entitled to recover some damages, evidence that the lumber tendered was not of the quality agreed upon, is material and competent in reduction of damages.

CONTRACT, alleging an agreement on the part of the plaintiff to sell certain lumber to the defendants, and an agreement on their part to purchase the same, delivery of the lumber to the defendants and a refusal by them to receive the same. There was also a count for goods sold and delivered. The plaintiff subsequently filed an amended declaration alleging a contract as before, part performance on his part, and an abandonment of the contract by the defendants before the expiration of the time fixed by the contract for delivery.

At the trial in the Superior Court, before Putnam, J., without a jury, judgment was entered for the plaintiff, and the following bill of exceptions was allowed:

“In 1872 the plaintiff entered into the following written contracts with the defendants, who were copartners, for the sale and purchase of lumber:

“‘Boston, April 4, 1872. We, Delaporte & Blumberg, agree to take of M. Collins 8 thousand four inch, 20 thousand two inch, and the balance 1 inch chestnut at the price of twenty-seven dollars per thousand, delivered in Worcester on the cars. It is understood that all the lumber be straight edge and sound in every way, and delivered about the end of August or September. Delaporte & Blumberg.’”

“ ‘Boston, April 4, 1872. I, M. Collins, agree to deliver to Delaporte & Blumberg, 8 thousand 4 inch, 20 thousand 2 inch, balance of 1 inch chestnut, all straight edge and sound every way, at the price of twenty-seven dollars per thousand, delivered in Worcester on the cars, about end of August or September. M. Collins.’

“ One of the defendants went to see the lumber several days before said contracts were made, and said it would suit him, but it was not found that the number of feet which there was in the lot was agreed upon, except so far as said written contracts may show. A few days after the contracts were made, the plaintiff received the following letter from the defendants, containing further directions as to the sawing of the lumber : ‘ Mr. M. Collins : Dear Sir, — You will please saw the chestnut lumber as follows : 8,000 ft. 4 in. thick wide plank ; 20,000 ft. 2 in. thick ; 8,000 ft. 1½ in. thick ; 10,000 ft. 1½ in. thick ; and the balance 1 in. thick. Please give us the above widths instead of the order you had before.’

“ The plaintiff proceeded to saw the lumber, and about the last of August or first of September, when he had sawed a part of it, came to Boston, called at the defendants’ place of business, and saw Blumberg, one of the defendants, told him the lumber was all ready and showed him the following figures as what he had sawed, viz. : 1,088 feet of 1-inch, 7,846 feet of 2-inch, and 4,618 feet of 4-inch. Blumberg told him that they were then out of business and did not want the lumber, and should not take it. The plaintiff then told him that he should commence legal proceedings against him, and went home, and completed the sawing of the lumber as stated below, and subsequently sold fifty-eight hundred and twenty feet of it, at an average price of about \$27 per thousand, and now has the balance of the lumber on hand, subject to the defendants’ order. Prior to the sale of the fifty-eight hundred and twenty feet, he had no communication with the defendants, other than has been stated. The whole number of feet in the lot which was actually sawed was 27,914 feet ; 1,301 feet of 1-inch, 20,813 feet of 2-inch, and 5,800 of 4-inch.

“ The defendants’ counsel offered to show that of said 27,914 feet, not more than one half was sound, at the time of the interview in Boston, about September 1, and not more than one half

of it was sawed so as to be straight-edged, and that this fact was unknown to them at the time of the interview. This testimony was held to be immaterial, and was not admitted, as there was no claim that the lumber was rejected on that ground.

“ Upon these facts the court found that the defendants had declined to receive the lumber without legal right, and the plaintiff might, without any further tender of the lumber after the sawing was completed, recover what was a fair value of the lumber he had left, after the sale of the 5,820 feet; and found that the amount of said lumber was 22,094 feet, a fair value of which was \$27 per 1,000 feet, according to the contract price; and found accordingly for the plaintiff in the sum of \$626.46, which includes interest.”

The defendants excepted to the above rulings.

A. Churchill, for the defendants.

L. M. Child, for the plaintiff, cited *Newcomb v. Brackett*, 16 Mass. 161; *Parker v. Perkins*, 8 Cush. 318; *Danube & Black Sea Railway v. Xenos*, 11 C. B. (N. S.) 151; *Thayer v. Wadsworth*, 19 Pick. 349; *Gerrish v. Norris*, 9 Cush. 167; *Commonwealth v. Dracut*, 8 Gray, 455; *Cort v. Ambergate Railway*, 17 Q. B. 126.

COLT, J. The plaintiff, in his first count, claims the agreed price of a quantity of lumber, which he says he delivered to the defendants and they refused to take. He adds a second count upon an account annexed for the price of the same lumber, and an amended declaration contains a count upon a written contract, with an allegation which, favorably interpreted, states the plaintiff's offer to deliver the lumber contracted for and the refusal of the defendants to receive it.

It is not important to fix, if we could, the precise ground upon which the plaintiff at the trial sought to recover the contract price of all the lumber, because, upon any theory of his right, there must be a new trial.

The written contracts of the parties made at the same time are to be construed together as one contract containing mutual and dependent promises. Neither can enforce the agreement of the other without performance or readiness and an offer to perform on his part. The plaintiff, by his form of action, was required to prove full performance on his part. He sues, not for the breach

of an executory contract, but on a completed contract on his part to deliver, and on the part of the defendants to accept and pay for the lumber named. The agreement required him to manufacture and deliver the same in Worcester of specified dimensions and quality.

When the contract was made the lumber was in the log. The plaintiff sawed a part of it, and upon his offer to deliver that part, was told by the defendants that they had gone out of business and did not want and would not take the lumber. The plaintiff treated this as an absolute refusal and a renunciation of the contract, but went on and finished the sawing.

The ordinary rule of damages for refusal to perform an executory contract for the future delivery of property when the title, from the nature of the property or the terms of the contract, is not changed until delivery, is the difference between the price agreed to be paid and the value of it, and not the full price of the goods. A party to an executory contract may stop its performance by an explicit order, and will subject himself only to such damages as will compensate the other party for being deprived of its benefits. *Danforth v. Walker*, 37 Vt. 239. *Allen v. Jarvis*, 20 Conn. 38. *Laird v. Pim*, 7 M. & W. 474. *Cort v. Ambergate Railway*, 17 Q. B. 127. The plaintiff, upon the defendants' refusal, had the right then to treat the contract as broken. He seems to have proceeded to some extent on this ground, for no tender was afterwards made or notice given to the defendants of an intention on his part to complete it. If, upon the facts stated, he had the right to go on and finish sawing and sue for goods bargained and sold, of which we express no opinion, yet it is impossible in any aspect to support the exclusion of the evidence offered to show that the lumber sawed was of a quality inferior to the requirements of the contract. If not admissible upon the question of the defendants' ability and readiness to perform, it was material and competent as affecting the damages. The plaintiff was allowed to recover for unsound and defective lumber the price of sound lumber. This is equally wrong, whether the plaintiff is entitled to recover as for goods sold and delivered, or is confined to the damages which necessarily followed the defendants' abandonment of the contract.

Exceptions sustained.

WILLIAM SOMERS & others vs. GEORGE B. THAYER.

Suffolk. March 4. — June 17, 1874. WELLS & ENDICOTT, JJ., absent.

The acceptance of an order for the payment of money on the completion of a house building by the drawer for the acceptor, and directing the same to be charged to the drawer "on account of contract," which contract it is admitted is a contract by the drawer to build and complete a house for the acceptor, is not absolute but conditional on the completion of the house according to the contract.

CONTRACT by the members of the firm of William Somers & Co., against the defendant as acceptor of the following order signed by Noah G. Harriman: "Boston, October 18, 1871, \$296.00. Mr. George B. Thayer, please pay Wm. Somers & Co., or order, the sum of two hundred and ninety-six dollars on the completion of the house now building at Randolph by me for you, and charge the same to me on account of contract."

In the Superior Court, *Putnam, J.*, ordered judgment for the plaintiffs on the following agreed facts, and the defendant appealed to this court:

"The order declared on was drawn by Harriman on the day of its date, and presented to the defendant at the same time, when the defendant, at the request of Harriman, wrote across the face of it the word "accepted," and signed his name below. At and before the date of the order Harriman owed the plaintiffs the amount of said order. At the time said order was drawn and the defendant wrote on it as above stated, Harriman had made a contract, referred to in said order, with the defendant to build and complete for the defendant a house in Randolph, according to certain terms and specifications mentioned in said contract. Harriman never performed said contract, nor completed the house, but failed, neglected and refused so to do, without any excuse on his part, and without any fault on the part of defendant; but the defendant, on account of such failure, was damaged some \$800, which said Harriman still owes defendant. A large amount of work was done on the house by the defendant after said failure, and the house was occupied by Seth A. Thayer as a residence a short time before this action was brought, and has been occupied by him ever since.

"There was nothing due from the defendant to Harriman, but he had been overpaid when said order was drawn by Harriman and signed as above by the defendant, but Harriman was at that time at work upon the house towards the performance of said contract, and there was never anything due Harriman from the defendant after said order was signed as above by the defendant. There was no consideration for defendant's accepting said order unless there be one upon the above facts."

M. Williams, Jr., for the plaintiffs.

A. T. Sinclair, for the defendant.

AMES, J. The terms of the order accepted by the defendant bring this case within the decision in *Newhall v. Clark*, 3 Cush. 376. The order refers to the contract subsisting between Harriman and the defendant. It is made payable on the completion of the house which Harriman was then building in Randolph, for the defendant, and it directs that when paid it is to be charged to Harriman on account of that contract. The order looks to the future; to work to be done and to materials to be supplied by the drawer for the use and benefit of the acceptor according to contract. The acceptance was an agreement to the request expressed in the order, and as that was contingent, the acceptance was an undertaking on the same contingency. Nothing was to be paid until the building should be finished. The direction to charge the payment to Harriman on account of that contract, and the terms of the order generally, are in their legal effect equivalent to a designation of a time of payment, and also of the fund out of which the payment was to be made, both of which were to depend upon the completion of the house by Harriman, according to his contract. As he has not fulfilled his contract, the time of payment never arrived, and the fund which was expected to accrue, and from which payment was to be made, never existed. The defendant therefore is not liable on his acceptance.

In *Cook v. Wolfendale*, 105 Mass. 401, which is relied upon by the plaintiffs, the acceptance was given in consideration of lumber furnished to the contractor to be used in building the house for the acceptor. And the terms of the order contained no reference to the building contract, but merely fixed the time of payment as the time when the building should be "ready for occupancy."

Judgment for defendant.

WILLIAM SOMERS & others vs. JOHN KELIHER.

Suffolk. March 18. — June 17, 1874. COLT & ENDICOTT, JJ., absent.

Money to become due for labor and materials furnished under an entire contract for building a house, is "future earnings" within the meaning of the St. of 1865, c. 43, § 2, which declares an unrecorded assignment of future earnings invalid against a trustee process.

If a person makes a contract to furnish labor and materials in building a house, and by the terms of the contract he is to be paid when the house is completed, an assignment by him of the money payable under the contract, if made before he is entitled to receive the money, is an assignment of future earnings.

SCIRE FACIAS by the members of the firm of William Somers & Co., upon a judgment recovered by them against the defendant in a trustee process, in which he was summoned as trustee of John Shaughnessy.

At the trial in the Superior Court, before *Putnam, J.*, without a jury, the defendant admitted that the sum of \$1000 was due from him to Shaughnessy, and the issue was as to the right of John Lally to this sum. The following facts appeared in evidence: Shaughnessy (by a contract dated July 1, 1871) agreed with the defendant "to furnish all the materials and do all the carpenter work" on a house building by the defendant on his land, the work to be done in a manner satisfactory to the defendant. The sum of twenty-four hundred dollars was agreed to be paid for the materials and labor, in instalments according to the progress of the work, the last instalment of fourteen hundred dollars being payable in thirty days after the work should be fully completed to the acceptance of the defendant.

On October 18, 1871, Shaughnessy assigned to Lally the balance of the money, viz., fourteen hundred dollars, to become due him from the defendant, under the foregoing agreement, and authorized the defendant to pay it to Lally when due according to the terms of the said agreement. This assignment was never recorded in the office of the city clerk of Boston, in which city Shaughnessy resided when the assignment was made. At the time of the assignment, all the payments under the agreement had been made except the last, and this was not then due.

Shaughnessy continued work under the contract until November 9, but did not complete the work and contract to the satisfac-

tion of said Keliher ; and it was never so completed, the amount admitted and found to be due being \$400 less than the contract price. The trustee process in the original action was served November 25, 1871.

Upon this evidence the court ruled that the assignment to Lally was of future earnings, and that, not being recorded, it was invalid, and ordered judgment for the plaintiffs in the sum of \$1000, and the claimant excepted.

A. A. Ranney & W. E. L. Dillaway, for the claimant. 1. If the money due and payable under the contract was earnings, it was, at the time of assignment, in part actually due, and not accruing due in the future. The postponing of the time of payment to thirty days after the completion of the work, has no effect in determining whether the money due is future earnings. The money is due and earned when the work is done, although payable at a time subsequent. Although the assignment was indorsed on the contract, it was not made until four months after the contract ; and the work at that time was nearly completed. The money payable according to the contract was earned from day to day *pro tanto*, and at the time of the assignment of the contract, the sum earned was more than the amount for which the trustee is charged.

2. The money payable under this contract is not "earnings," in the sense of the word as used in the St. of 1865, c. 43, § 2. It includes more than mere expenditures for materials. It includes the wages of workmen and of apprentices, and also the contract prices of the various sub-contractors on the job. Neither is the contract price or the compensation for the performance of the work measured by the time of its continuance.

The case of *Knowlton v. Cooley*, 102 Mass. 233, turned upon the fact that the order of the claimant was given before the wages were earned, and before the work was begun. In the case of *Jenks v. Dyer*, 102 Mass. 235, the credit furnished the defendant by the claimant, as the consideration for his order, was furnished after the order had been given, and the labor performed by the defendant for the trustee had not at that time been begun. In the present case the money was actually earned at the time of the assignment, and the consideration for it had also been paid.

M. Williams, Jr., for the plaintiffs.

AMES, J. It was decided in *Jenks v. Dyer*, 102 Mass. 235, that the word "earnings," as used in the St. of 1865, c. 43, § 2, has a more extensive signification than the word "wages." The statute applies to the compensation for services; a term which involves more than the mere labor of the person by whom they are rendered, and may include expenditures as well as labor. What the principal defendant in the original suit undertook to do under his contract was, not to sell certain lumber and other building materials to Keliber, and to perform certain labor upon them, but to render the specific service of building a house for him, furnishing all the labor and materials therefor, at an agreed price for the entire service. By rendering that service, he would earn, and become entitled to, certain periodical payments. But the final payment, which is the only one involved in this suit, he cannot be said to have earned and become entitled to by the terms of the contract, until he should have completed his contract. As he had not done so at the date of the assignment, the earnings which he undertook to assign came within the description of future earnings. The assignment not having been recorded, it is invalid against the trustee process.

Exceptions overruled.

BRADLEY C. WHITCHER & another vs. JAMES R. McLAUGHLIN.

Suffolk. March 5.—June 17, 1874. WELLS & ENDICOTT, JJ., absent.

Where evidence is admitted which is competent when connected with other evidence, an exception to such admission cannot be sustained, unless the bill of exceptions shows affirmatively that such other evidence was not introduced, or that the evidence admitted was improperly used for a purpose for which it was not competent. It is the province of a judge who presides at a trial, to pass upon all preliminary matters which are necessary to be shown in order that a record entry may be properly admissible as evidence; and if he admit such record entry, it is presumed that he found as facts all such preliminary matters; and such finding is conclusive, unless he saves the question on report or it is brought up on a bill of exceptions which contains a statement of the evidence.

Where the judge presiding at a trial admits as evidence a family record of births, the first part of which, including the name of the person whose age is sought to be established, is a copy of a former record; it must be presumed that the judge found as a fact that the original record was lost, and the copy, properly substantiated, is admissible as secondary evidence.

An entry contained in a church record of baptisms of the birth of a child, though of itself it be not competent evidence to prove the date of the birth, is admissible to prove the date of the baptism, and this, if connected with other evidence tending to show the age at baptism, is admissible to show the date of the birth.

CONTRACT on an account annexed, by Bradley C. Whiteher and Leonard A. Saville, against James R. McLaughlin, who appeared by his guardian, Ann McLaughlin. The answer set up the defence of infancy.

At the trial in the Superior Court, before *Lord, J.*, the jury found for the defendant, and the following bill of exceptions was allowed :

“ The defendant, among other things, offered in evidence the baptismal records of St. Patrick’s Parish, in the city of Boston. (late Roxbury), in which was inserted the following entry : ‘ 1852, October 3, James, born the 2d inst., son of Lawrence McLaughlin and Ann, his wife ; sponsors, John and Ann Tobin. (Signed) Thomas Lynch.’ It was shown, by the present priest of the parish, that Father Lynch died about three years ago ; that said book was found in his house after his death by the witness, and has ever since been in his possession ; that by the canons of the church, the priest is the proper officer to have the custody of it ; that the witness succeeded Father Lynch as priest of the parish, and has continued the record ; that Father Lynch was priest of the parish for thirty-five years ; that the witness does not know his handwriting. He further testified in answer to questions by the presiding judge, that baptism is a sacrament in the Catholic Church, and that the priest is required by the canons of the church to record all baptisms ; that there is no particular rule fixing the time within which infants of confirmed catholics shall be baptized ; but it is generally supposed that children will be baptized within nine or eleven days under pain of sin. The book was admitted in evidence against the objection of the plaintiffs. The defendant also offered in evidence a volume entitled ‘ The Life of the Virgin Mary,’ containing a record of births and deaths, &c., purporting to be a record of the births and deaths in the family of Lawrence McLaughlin, the father of the defendant, James R.

“ Lawrence McLaughlin testified that he kept a record of the births of his children on the fly-leaf of his wife’s manual until

about 1858, when, upon having the above volume presented to him, he copied said original record into the book offered, and after that time continued to enter births and deaths therein. He further testified that he made said entries in said first book just according to the truth, the same day the children were born; that they were correctly copied, and that said book is lost. The book was admitted in evidence against the objection of plaintiffs.

"The plaintiffs excepted to the admission of the above evidence."

A. Cottrell, for the plaintiffs, cited, to the point that the baptismal record was not evidence of the age of the defendant: *Burghart v. Angerstein*, 6 C. & P. 690; *Rex v. Clapham*, 4 C. & P. 29; *The King v. North Petherton*, 5 B. & C. 508; *Clark v. Trinity Church*, 5 Watts & S. 266; *Childress v. Cutter*, 16 Mo. 24.

W. F. Slocum, for the defendant.

COLT, J. Under the plea of infancy, the issue was whether the defendant was of age at the time of the promise declared on. To prove that he was not, the defendant was permitted to put in the entry of his baptism contemporaneously made by a Roman Catholic priest since deceased in a book which appeared to be a church record of baptisms, and which was produced from the proper custody. In *Kennedy v. Doyle*, 10 Allen, 161, this was held competent evidence for the purpose of proving the date of the baptism. It was treated as an entry made by a third person in the discharge of an official duty.

The plaintiffs contend that it was not admissible to prove the time of the defendant's birth. But assuming this to be so, the exception cannot be maintained, unless it affirmatively appears that the evidence was improperly used for that purpose. The date of the baptism, with the aid of other evidence tending to fix the defendant's age at that time, would become material, and the entry was competent to prove that date. We must presume that such evidence was in the case. The bill of exceptions indeed shows that the entry was offered in evidence "among other things." If the entry was admissible for any purpose, the plaintiff has no ground of exception, unless the judge refused at the trial to limit its effect and permitted it to be used for a purpose for which it was not competent. In the absence of anything

showing the contrary, it must be presumed that the proper limitation was given. A general objection to its admissibility will not be sustained; and where evidence is admitted which is competent when connected with other evidence, it is held to be no ground of exception unless it appears from the bill of exceptions that such other evidence was not introduced. *Liverpool Wharf v. Prescott*, 4 Allen, 22. *Burghardt v. Van Deusen*, 4 Allen, 374, 377. *Merritt v. Morse*, 108 Mass. 270. *Earle v. Earle*, 11 Allen, 1.

The preliminary facts which must have been shown to make the record entry evidence at all, such as that the book was regularly kept by the proper official, was in his handwriting, and came from the proper custody, it was the province of the judge who presided at the trial to pass upon; and his decision is conclusive, unless he saves the question on report, or it is brought up on exceptions which state the evidence upon which his finding is made. *Gorton v. Hadsell*, 9 Cush. 508. There is no attempt to revise his findings in this respect. And it does not appear that the record was erroneously admitted.

As to the second exception, the court must have found as fact that the original family record was lost; secondary evidence of its contents was therefore admissible. The copy produced with evidence of its accuracy was competent secondary evidence. *Holmes v. Marden*, 12 Pick. 169. *Exceptions overruled.*

HENRY JONES vs. NATHANIEL P. KEEN & others.

Suffolk. March 25, 26, 1873.—June 17, 1874. COLT & DEVENS, JJ.,
absent.

An objection to a bill in equity that the plaintiff has a plain, adequate and complete remedy at law will be deemed to be waived if taken for the first time in an answer filed by a defendant after he has appeared without objection to the jurisdiction, at a hearing appointing a receiver and ordering the sale of property, and also at a hearing before a master.

A mortgage on a vessel is postponed to the lien given to material men by the Gen. Sts. c. 151, § 12.

The compensation of a receiver appointed to complete, launch, and sell a vessel and pay the proceeds into court, is not to be determined by a fixed commission on the amount of money passing through his hands; but should be such an amount as would be reasonable for the services rendered by a person competent to perform the duty.

An exception to the finding of a master upon the facts before him is to be regarded only so far as it is supported by the statements of the master, or the evidence reported by him.

A master appointed "to hear the evidence and to report the same and all facts" bearing upon the questions at issue, has authority to decide upon controverted facts.

The findings of a master upon questions of fact are not to be set aside without clear proof of error or mistake on his part.

Notes given by the builder of a ship to a person who has furnished materials used in her construction, merely for the accommodation of such person, not to be credited on the bill, are not payment for the materials, and the fact that the notes have not been surrendered does not prevent the material-man from enforcing his lien.

The including in a claim of a lien on a vessel, materials furnished another vessel, through ignorance and not wilfully or knowingly, does not prevent the material-man from enforcing his lien against the first vessel for the materials actually used in her construction.

A person who performs labor on two vessels under an entire contract for a round sum, cannot maintain a lien under the Gen. Sts. c. 151, § 12, on one of the vessels for the work done on that vessel, whether he has performed his contract or has been prevented from finishing his work by the failure of the owner of the vessel to complete the vessel sufficiently for him to perform it.

A material-man, who has performed labor and furnished materials to two vessels under an entire contract for a round sum, and who after the work is done destroys, with the assent of the owner of the vessel, the original contract, and makes and antedates a new contract applicable to one vessel only, and sets up this contract in his claim for a lien as the one under which the work was done and materials furnished, cannot maintain a lien.

Under the Gen. Sts. c. 151, § 12, a lien exists for labor and materials furnished, as well as for labor performed and materials used in the construction of a vessel; and a person contracting with the owner of a vessel may enforce a lien for labor performed and materials furnished by persons with whom he has made a sub-contract.

A person employed at day's wages by the owner of a vessel to work as a blacksmith in making spikes and bolts from the owner's iron for use in the construction of the vessel, and who does this work and also some jobs on other vessels and some outside work by the owner's direction, has a lien on the vessel under the Gen. Sts. c. 151, § 12, for the labor performed on the spikes and bolts used in her construction.

A material-man, who, in his statement of a lien filed in the town clerk's office, wilfully and knowingly claims more than is due him, cannot enforce his lien.

BILL IN EQUITY filed May 10, 1871, against Nathaniel P. Keen; Allen Prior; Robert H. Patton and another, copartners; Abiel S. Lewis and others, copartners; Pembroke S. Huckins and another, copartners; J. W. Hathaway; Joshua Baker and others, copartners; Edmund H. Sears; Wadsworth Chandler, Jr.; William Bourne; Andrew Sampson and others, copartners; C. Thompson and another, copartners; Amos Merritt and others,

copartners ; Hiram Delano ; Nathaniel Delano ; Hugh Connor ; C. P. Wright ; J. D. Geary ; Ephraim Walker, Jr. ; Thomas White ; Miles Sampson ; John Henry ; John Dobbin ; Alexander McLean ; Charles Sproule ; and Franklin B. Cobb.

The bill alleged that in December, 1869, the defendant Keen commenced to build for himself at Duxbury, in this Commonwealth, a barque, which was at the date of the bill on the stocks unfinished ; that the plaintiff had a lien * on the vessel for materials furnished in her construction ; that the defendant Prior claimed to have a mortgage from Keen on the vessel for a large sum, and had notified Keen that he was about to sell the vessel under a power of sale contained in the mortgage ; that there were other mortgages on the vessel, held by Patton and another, copartners, and by Lewis and others, copartners, and claims for a lien on the vessel made by the other defendants to a large amount for labor and materials furnished in the construction of the vessel ; that Keen was insolvent and unable to pay his debts ; that the barque constituted the greater part of Keen's property, and would if finished and launched and sold in a judicious manner realize a sum sufficient to pay all the claims for a lien, and a large portion of the mortgages ; that a sale of the barque in the time and the manner proposed by Prior would work great damage and waste and cause irreparable injury to the plaintiff and the other persons claiming a lien, and would be an illegal and inequitable interference with their rights.

The bill prayed for a writ of injunction to restrain Prior from selling the barque ; that a receiver be appointed to take possession of the vessel, with power to contract debts on the security

* The Gen. Sts. c. 151, § 12, provide that : " When, by virtue of a contract, expressed or implied, with the owners of a ship or vessel, or with the agents, contractors, or sub-contractors, of such owners, or any of them, or with any person having been employed to construct, repair, or launch, such ship or vessel, or to assist them, money is due to any person for labor performed, materials used, or labor and materials furnished, in the construction, launching, or repairs of, or for constructing the launching ways for, or for provisions, stores, or other articles, furnished for or on account of, such ship or vessel, in this state, such person shall have a lien upon the ship or vessel, her tackle, apparel, and furniture, to secure the payment of such debt ; which lien shall be preferred to all others thereon except mariners' wages, and shall continue until the debt is satisfied."

thereof, to take precedence of other liens and incumbrances thereon, for the purpose of completing and launching the vessel, and with power to make sale of the vessel, and to hold the proceeds subject to the order of the court.

A preliminary hearing was had before *Wells, J.*, who granted the prayer of the bill. A receiver was appointed, the vessel was completed, launched and sold, and the proceeds paid into court. The case was by an order dated May 22, 1871, sent to a master, who was directed "to hear the evidence which may be offered by all parties who make any claim by way of lien or otherwise to the property which is the subject of the above bill of complaint, and to report the same and all the facts bearing upon the validity, amount and priority of said claims or any of them to this court."

By a supplemental order the master was directed to fix and allow to the receiver proper compensation for his care, services, &c.

Lewis and others, the holders of the second mortgage, and Patton and another, the holders of the third and fourth mortgages given by Keen on the vessel, filed answers January 15, 1872, in which they denied the jurisdiction of the court on the ground that the plaintiff had a plain, adequate and complete remedy at law. It did not appear that the other parties consented to the filing of these answers at this time, and they were not filed by leave of court. The other defendants made no objection to the jurisdiction of the court. The master filed his report April 17, 1872. So much of the evidence reported by him as relates to the question whether the holders of the second, third and fourth mortgages had a right to take an objection to the jurisdiction of the court, at the time when they filed their answers, is stated in the opinion of the court.

In regard to the compensation to be allowed the receiver the master reported as follows: "The receiver has charged for his services the sum of \$1219.90; viz., five per cent. on the gross amount of the proceeds of the sale of the vessel; and included in his disbursements is the sum of \$300 paid to counsel employed by him in reference to the execution of his official duties. No question was made before me as to the propriety of his employing counsel, or as to the reasonableness of his counsel's bill. But several of the parties claimed that the receiver had charged too

much for his own services, and counsel urged that five per cent. on the gross amount of sales was no proper measure of the value of the services rendered. I have great doubt whether the basis upon which the receiver estimates his compensation is sustained by custom, or is a reasonable one. Circumstances might be such that such a rate of compensation would be grossly inadequate. I regret that the evidence on this point is such as to leave me somewhat embarrassed. I am of the opinion that an intelligent, competent, conscientious person is the best judge of the value of his services; and although objecting to the rule the receiver has adopted, I do not think the sum he has charged is unreasonable, and I allow it." The master reported the evidence bearing upon this question at length.

In respect to the claim of the plaintiff the master reported as follows: "I find there is due to him the sum of \$5260.74, and that he filed a statement of his claim in the clerk's office of the town of Duxbury, April 10, 1871, which statement was duly sworn to. I find that in that statement he claims to be due him, and for which he had a lien, the sum of \$5655.94. I find, moreover, that at the hearing before me it was proven that the sum of \$395.20 was the price of certain of the materials furnished by him which Keen used in the construction of other vessels than the one which is the subject of this cause. I find, however, that this fact was not known to the plaintiff when he filed his statement, and that he did not wilfully and knowingly claim in his statement more than was due him. Upon its appearing that said amount did not go into this vessel the plaintiff waived any claim of a lien for the same; and I deduct the same from \$5655.94, and find the value of the material and labor furnished by him and used in the construction of this vessel to be \$5260.74. All this is for materials, excepting that it includes charges for hauling said materials to the ship, amounting to \$26.88, and cash paid for surveying same, \$11.53. I find, moreover, that the plaintiff contracted with Keen to furnish the said materials and labor for the construction of said vessel; that said sum of \$5260.74 is the just value of the same; that said materials and labor went into the said vessel and the construction of her, and that no part of said sum of \$5260.74 had been paid, but was due when said lien statement was filed, and still remains unpaid. I find, moreover, that said statement

contained a just and true account of the demand claimed to be due and found by me to be due, with the exception above reported; that in it the plaintiff claimed a lien on said vessel for the amount thereof; that all just credits were given in said account and statement; and that it stated correctly the name of the person with whom the contract therefor was made, the name of the owner of the vessel, and a description of her sufficient for identification."

The master reported the evidence in respect to this claim at length. It was contended that the claim had been paid by notes. On this question the evidence was in substance as follows: Keen was the only witness called by the plaintiff. He testified in chief that he gave notes to the plaintiff for his accommodation, not to be credited on his bill; that he supposed the plaintiff had them still as the plaintiff had never surrendered them to him. The plaintiff was present at the hearing before the master, but did not testify. Three witnesses were called by the other defendants, who testified to various conversations with Keen, and with the plaintiff, and their evidence tended to show admissions on the part of Keen and the plaintiff that the claim had been paid by notes, that one or more of the notes had been paid by Keen, and that nothing was said about the notes being accommodation notes. Neither Keen nor the plaintiff testified in rebuttal.

As to the claim of Andrew Sampson and others, the master reported that he found the sum of \$1088.84 due them for labor, that they made a contract with Keen to caulk this vessel and a schooner for \$1262.50; that they had finished their work on both vessels and had not received any payment except that they had credited Keen with pine boards to the amount of \$2.16.

The master also reported the evidence in regard to this claim as follows: Sampson testified: "I have charged 336½ days' work for the whole contract, of which 292½ are on the ship. I get at this by a fair division of the tonnage. I kept account on each until they got so mixed that I couldn't keep it correct for each separately. I know the number of days for both is correct. The schooner's tonnage was about 120 tons, old measure. I think I had the two jobs together, and so I shifted from one to the other, back and forth. The schooner was a very unprofitable vessel. I divided on the tonnage and also for the last reason. Mine is a

fair estimate. I have been a caulker for thirty years. I have caulked twenty or twenty-five vessels under contract; have worked on five hundred. I estimated the \$171.50 from other vessels which I had caulked of same length and breadth. I estimated on the basis that the schooner was 120 tons, and the ship 869 tons. I have caulked a schooner before this of 120 tons, and received \$188." N. P. Keen testified: "I think Sampson's estimate is a very fair one. It is worth \$2.00 a ton to caulk the schooner. They charged at that time about \$1.25 a ton to caulk a ship. Sampson's estimate leaves him less than \$1.25 a ton on the ship." Sampson's contract was to caulk this vessel and another for a round sum.

To the allowance of this claim the defendant Prior filed the following exception: "That the master found that Andrew Sampson and others, who did work under an entire contract for two vessels, have performed all the acts which entitle them to a lien; whereas, from the testimony reported by him, they could not have a lien."

In regard to the claim of Edmund H. Sears, the master found that there was due Sears the sum of \$348.18, for labor performed on the vessel, under such circumstances that there was a lien on the vessel for the amount. To this finding Prior filed the following exception: "That the master has not reported, though requested to do so, all the testimony, and especially the testimony in relation to the claim of Edmund H. Sears, in an entire contract for work on two vessels: whereas he should have reported the same, or found, if competent, that he had no lien."

The master thereupon made a supplemental report in which he reported certain additional facts in the Sears case, as follows: "Sears made a contract with Keen to do the outboard joining on this ship and a schooner for \$1125. He finished his work on the schooner, but was not able to complete that on the ship, owing to the failure of Keen to go on with the carpenter's work of the latter vessel. The evidence showed that it would cost \$150 to finish his work; that Sears worked on the schooner 59½ days, and that a fair price for the labor would be at the rate of \$3.25 per day, making \$192.56; and that he worked on the ship 66½ days, and that a fair price for the labor would be at the rate of \$3.25 per day, making \$215.31; and that he also worked on the ship

249 days, the fair price for this labor being at the rate of \$3.50 per day, making \$871.50. This makes the value of work done on the ship, estimated by days' wages, \$1086.81. He did not however make a claim for days' wages, but in his statement of a lien he claimed a reasonable compensation for as much of the work as he had done on the ship in proportion to the fair price to be paid under the contract for the whole work done, which I find to be \$782.44; and I find that, after deducting all just credits, there is due him the sum of \$348.18, for which I find that he has a lien on this ship."

No further exception was taken by any one to the allowance of this claim.

The facts in the case of Jones and Cottrell are fully stated in the opinion of the court.

The facts in the case of Amos Merritt and others, were found by the master to be as follows: These persons agreed to do the ship-carpenter's work on the vessel. They made a contract with one Simpson to do the fastening of the vessel for \$850, and Simpson after doing a portion of the work made a sub-contract for the remainder with Henry, Dobbin, McLean, and Sproule, and that there was due for work done under the sub-contract the sum of \$350.20. Simpson did not file any claim for a lien. Henry and the others did, but their claims were disallowed by the master on the ground that they in their statements wilfully and knowingly claimed more than was due them. The master further reported in the alternative that Merritt and others were to be allowed either \$4428.09 or \$4077.89 as the sum of \$350.20 was added or not.

In regard to the claims of Hiram Delano and Nathaniel Delano, the master reported as follows: "The facts in relation to these two claims are the same; and I find them to be, that the claimants are blacksmiths, and were employed by Keen to work in his shop on his iron, and mostly with their own tools, at day's wages for this ship; and they did such work for the ship, and afterwards and during the time they thus worked for this vessel they did a few jobs on other vessels and some outside work by Keen's direction. At the end of each week they undertook to ascertain and did actually ascertain how much of their labor was expended upon the spikes, bolts, &c., which were manufactured by them for this

ship, and which were actually used in her construction. This estimate is correct, and these two claimants made their lien claim for the amounts thus ascertained, which were duly sworn to and were recorded. Said statements filed by these claimants contained the formal statements required by the statute."

To the allowance of these claims Prior filed the following exception: "That said master has found that Nathaniel Delano and Hiram Delano furnished labor for said ship: whereas he should have found, if competent to find at all, that the amount due them, which is undisputed, was not for services for which a lien is allowed by law."

The case was reserved by *Gray, J.*, upon the bill, answers, master's report, the exceptions thereto, and the supplemental report of the master, for the consideration of the full court.

J. A. Loring, for the plaintiff.

C. G. Davis & A. Mason, for Prior, the first mortgagee; and Cobb.

J. L. Eldridge, for Patton and another, and Lewis and others, the second, third and fourth mortgagees.

H. J. Blodgett, for Cottrell and Jones.

T. P. Proctor, for C. Thompson and another.

J. Lathrop, for Huckins and another; Hathaway; Baker and others; Sears; Chandler; Bourne; A. Sampson; Merritt and others; H. Delano; and N. Delano; contended in the cases of Sampson and Sears: 1. That under the exceptions the question as to the entirety of the contract was not open. 2. That the exceptions were too general and pointed to no particulars, and cited *Dexter v. Arnold*, 2 Sumn. 108, 125; *Holcomb v. Holcomb*, 3 Stockt. 281; *Ashmead v. Colbey*, 26 Conn. 287, 309. 3. That the entirety of the contract did not prevent a lien for the work done on each vessel. In addition to the cases cited in the opinion of the court, the following cases were referred to on this point: *Wilson v. Forder*, 30 Penn. St. 129; *Davis v. Farr*, 13 Ib. 167; *Harper v. Keely*, 17 Ib. 234; *Taylor v. Montgomery*, 20 Ib. 443; *Butler v. Rivers*, 4 R. I. 38.

W. E. L. Dillaway, for Connor; M. Sampson; Wright; Walker; White; and Geary.

ENDICOTT, J. This case presents for decision questions raised upon the bill, answers, master's report, and the exceptions thereto.

The parties, including all who have entered a formal appearance, filed answers or offered proof of claims, and have an interest in the proceeds of the sale of the barque Etta Loring, are twenty-seven in number, representing twenty-eight different claims, which have been passed upon by the master. This enumeration does not include the owner, who is a mere nominal party having no interest in the result. These parties may be divided into two classes: there are twenty-four, who claim liens for labor performed and materials furnished in the construction of the barque under the Gen. Sts. c. 151, §§ 12, 13, 14; and three, who claim under four different mortgages made upon her hull by her owner Keen, during her construction; the third and fourth mortgages being held by the same persons.

No question is raised and no objections are taken to the finding of the master, in allowing a large number of the claims for labor and materials, or in rejecting several because the parties had wilfully and knowingly claimed more than was due, in the certificate of their claims, filed in the town clerk's office, § 13, *supra*. But in the master's report and the exceptions thereto, questions both of law and fact arise in regard to certain of these claims passed upon by the master, including that of the plaintiff, and also including the master's decision upon the compensation to be allowed the receiver. Questions are also open respecting the rights of the several mortgagees to share the proceeds, and it is insisted by the parties, holding the second, third and fourth mortgages, that this bill cannot be maintained, because the plaintiff has a full, complete and adequate remedy at law. These questions will be considered in reverse order.

1. In considering whether this bill should be dismissed because the plaintiff has a remedy at law it will be necessary to examine somewhat the facts, and the circumstances under which this question is presented. It is raised by Lewis & Co., who hold the second mortgage, and Patton & Ginn, who hold the third and fourth mortgages. All the other parties desire to proceed under this bill, as affording the most speedy and satisfactory determination of their rights, and of the numerous questions presented. Indeed it would raise serious complications, and work much mischief if it should be necessary at this stage to dismiss the cause. The bill seeks not only for a determination of the various liens

upon the vessel for labor and materials, but that the mortgagees may be enjoined from selling under their mortgages, and that a receiver may be appointed to finish the vessel and sell her for the benefit of all parties. At the hearing May 22, 1871, to determine whether a receiver should be appointed and the mortgagees enjoined as prayed for, the order passed by the court to that effect and also the order appointing the master seem to have been assented to by all parties. One member of the firm of Patton & Ginn was present at the hearing and made no objection. Before the sale of the vessel by the receiver, July 11, 1871, both Lewis & Co., and Patton & Ginn, had notice that the sale would take place on that day, and had retained counsel, who consulted with the counsel for the plaintiff, and no objection was made to the proposed sale or to any of the proceedings. On August 14, following, both these parties entered a formal appearance on the docket, employing the same counsel. The hearings before the master commenced October 4, and were continued from time to time until November 9, 1871. At these hearings these parties were present in person and by counsel, taking part in the proceedings; some of them were examined as witnesses, their mortgages and certain certificates they had filed were put in evidence, and they were heard, as other claimants. After the case was closed before the master, they filed answers on January 15, 1872, and for the first time they raised this question, denying the jurisdiction because there was a full, adequate and complete remedy at law. We do not think it was then open to them. They submitted to the jurisdiction, made no objection to the appointment of the receiver or to the sale, and tried their case before the master to obtain their share of the proceeds. If they intended from the first to raise the question, they did not act in good faith in delaying until January 15, 1872. If it was an afterthought, having taken their chance with the others at the hearing, it was too late to raise it at that stage of the proceedings. No one appears to have consented to the filing of these answers, and all the other parties oppose the dismissal of the bill. We do not therefore think it necessary to consider the question thus raised. The objection, so far as these parties have the right to avail themselves of it, we must consider to have been waived. *First Congregational Society v. Trustees*, 23 Pick. 148. *Russell v.*

Loring, 3 Allen, 121. *Dearth v. Hide & Leather National Bank*, 100 Mass. 540. *Lawrence v. Bassett*, 5 Allen, 140.

2. These mortgagees also contend that their mortgages have priority to the claims for labor performed and materials furnished in the construction of the barque. We think it well settled that they have no such preference, but that liens attach and have priority over mortgages, and this is clearly so where the mortgages are created after the contract. The mortgage of Lewis & Co. was not recorded till May, 1871, and the mortgages of Patton and Ginn were recorded in November, 1870, and all the contracts for labor and materials appear to have been made prior to that time, as the work on the ship was suspended in December, 1870, by reason of the insolvency of Keen. Allen Prior, who holds the first mortgage, does not raise this question. *Donnell v. The Starlight*, 103 Mass. 227. *The Granite State*, 1 Sprague, 277. *Dunklee v. Crane*, 103 Mass. 470. *The Kiersage*, 2 Curtis, 421.

3. Objection is made by Allen Prior, the first mortgagee, in his exceptions to the master's report, to the amount allowed by the master to the receiver as compensation for his services, and also for counsel fees. The basis upon which the receiver estimated his services, a commission of five per cent. on the sale, was incorrect. It was held in *Grant v. Bryant*, 101 Mass. 567, that the compensation of a receiver could not be determined by a fixed commission on the amount of money passing through his hands, but such an amount should be allowed as would be reasonable for the services rendered by a person competent to perform the duty. The master, objecting to the basis adopted by the receiver, determined the sum charged to be reasonable and allowed it. We see no reason to disturb his finding upon the evidence reported. Nor do we see any reason for disturbing the finding of the master, allowing in the disbursements of the receiver a charge for counsel fees. No objection was made before the master to the propriety of his employing counsel or the reasonableness of the bill. The master was not requested to report the evidence on the subject. We are therefore unable to pass upon that question, and it is not open on the exception. An exception to the finding of a master upon the facts before him is to be regarded only so far as it is supported by the statements of the master, or the evidence reported by him. *Harding v. Handy*, 11 Wheat. 103. *Adams v. Brown*, 7 Cush. 220.

4. Another objection made by the same party, that the master had no authority under the order of the court to decide upon controverted facts, but could only report evidence, is equally untenable. It is the province and duty of a master to report his conclusions of fact upon all matters referred to him; in the order appointing him in this case there is no such limitation or restriction as to preclude him from the performance of his accustomed official duty. *Dean v. Emerson*, 102 Mass. 480.

5. Several parties except to the finding of the master allowing the claim of the plaintiff. A large amount of testimony is reported on this point. The two principal objections raised are that the lumber was furnished on general account and not for the Etta Loring, and that during the building of the vessel notes were given by Keen in payment. The findings of a master are not to be set aside without clear proof of error or mistake on his part. Upon reviewing the testimony we find that there was direct evidence that the lumber was furnished for the Etta Loring; and that, although during her construction notes were given by Keen to the plaintiff, they were given for his accommodation, not to be credited on the bill, and without regard to the amount due. Evidence to contradict and control this on both points was introduced, but it was for the master to decide upon the preponderance of the evidence submitted, and we cannot say that there is such proof of error or mistake on his part as would justify the setting aside of his finding. Keen never paid any of these notes, as they were accommodation notes, not given on account of the bill for lumber. The fact that they have not been surrendered to Keen does not prevent the plaintiff from proving his claim, which the master finds is still due and unpaid.

The fact that an item for materials actually used in another vessel was included in the plaintiff's certificate, filed in the town clerk's office, does not invalidate his claim, as the master finds he did not know it at the time of filing, and did not wilfully or knowingly claim more than was due. Gen. Sts. c. 151, § 14.

The other exceptions based upon the incidental statements of particular witnesses, or upon the fact that the plaintiff did not contradict them, cannot affect the general finding of the master. The master's finding on this claim must therefore stand.

6. Exceptions are taken to the allowance of the claims of Andrew Sampson and others, and of Edmund H. Sears. Both the claimants made a contract with Keen, one to do the caulking, the other the outboard joining on the barque, and also on a schooner for a round sum for both. No apportionment was made of the amount of labor to be performed or the sum to be paid on either vessel.

In making the estimate of the lien to which each claimant is entitled, the master bases his finding in the case of Sampson and others, on the comparative tonnage of the two vessels, and the cost per ton of doing the work contracted for; and in the case of Sears on a fair compensation for the work done on the barque in proportion to the fair price to be paid under the contract for the whole work done. It is obvious that elements are here introduced not included in the original agreements for a round sum, and in the absence of any statute provision giving a lien in such case, we think no lien exists. The considerations controlling each party in making such a contract we cannot now determine.

It does not appear in terms or by implication to have been based in the first case upon the tonnage of the two vessels, or the cost per ton to do the work on each; nor in the second, upon a fair compensation for doing a portion of the work on the barque. It has been held that upon a general contract to furnish material or labor for one or more vessels or buildings, no entire sum for the whole being stipulated, but the same to be furnished at certain rates, or without any rate being named, then the amount furnished on each particular vessel or building may be estimated and a lien attach for the same. *Rogers v. Currier*, 13 Gray, 129. *Briggs v. A Light Boat*, 7 Allen, 287. *Shaw v. Thompson*, 105 Mass. 345. *The Kiersage*, 2 Curtis, 421. But these claims being based upon an entire contract for a round sum, do not fall within the rule laid down in these cases; but are to be governed by the principles stated in *Morrison v. Minot*, 5 Allen, 403; *Graves v. Bemis*, 8 Allen, 573; *Mulrey v. Barrow*, 11 Allen, 152; *Driscoll v. Hull*, 11 Allen, 154; where it was held that on a contract to furnish labor and materials for several buildings for a gross sum, no lien could be enforced upon one of the buildings. The St. of 1872, c. 318, was probably intended to meet the difficulty suggested in these cases.

7. Upon the claim of Jones and Cottrell the master submits the facts for the decision of the court. It appears that they had a written contract with Keen, dated August 15, 1870, to do certain work and furnish certain materials for the barque Etta Loring, and also for the schooner D. K. Ham, for the gross sum of \$2200. If the claimants relied only on this contract, their lien would fail for the reasons above stated. But they in fact rely on a substituted contract. Some time after the schooner was finished the first contract was annulled and destroyed, and a new contract was made relating solely to the barque, wherein they agreed to do certain work for \$1700, and to furnish certain materials for \$300, and this new contract was dated back to correspond to the date of the original contract, August 15, 1870. Jones, one of the partners, was a witness; he was unable to tell when the second contract was written, but said that it was not as late as February, but he would not swear that it was not as late as January, 1871. He also stated that the old contract was torn up and the new one substituted, "because he thought his lien would be better on the ship." In the certificate of lien filed in the town clerk's office January 10, 1871, they claim \$1925 due upon the last contract, deducting \$75 for labor and material contracted for, but not furnished to Keen. In proof of this they offer the substituted contract. This clearly is not the contract under which the labor and material were furnished. It differs materially from the original in applying to one and not to two vessels. It is impossible to tell what was due for labor and material on the schooner. The apportionment attempted is purely arbitrary, made after Keen's insolvency, for the purpose of preparing the new contract and to obtain an unfair advantage. As the work was done and the material furnished under the first contract, and as no apportionment can be made between the schooner and the barque, the lien must fail and the claim be disallowed.

8. Upon the claim of Amos Merritt and others, a question arises upon the alternative report of the master, whether they shall be allowed not only for their personal labor, but for the labor of persons employed by them. The language of the statute provides for this. When "money is due to any person for labor performed, materials used, or labor and materials furnished," "such

person shall have a lien," &c. Gen. Sts. c. 151, § 12. It is true that the laborer, whose labor is thus furnished by the party making the contract and claiming the lien, may also enforce his lien, but the statute contemplates this, and provides in section 19 against the enforcement of a double lien for the same labor. See also the St. of 1862, c. 185. The larger sum found by the master, which includes the labor furnished, should be allowed.

9. The facts are also reported by the master upon the separate claims of Hiram and Nathaniel Delano, for the decision of the court. The facts are the same in each. Both claimants are blacksmiths, employed by Keen, at day's wages, to work in his shop in making spikes, bolts, &c., for this barque. During the time they were thus working they did some work on other vessels, and some outside work at Keen's direction. At the end of each week they made a memorandum of their labor performed on the spikes, bolts, &c., which went into the barque. This the master finds correct, and for the amounts thus found respectively, they claim a lien. No payment had been made to them for their work. They were not mere laborers as in the case of *The Calisto*, Daveis, 29, where from the course of employment no presumption of contract to furnish labor for a particular vessel could arise; nor were they employed as blacksmiths under a general agreement for labor without any specific application thereof to a particular vessel, as in *Read v. Hull of a New Brig*, 1 Story, 244. They were by their agreement to make the bolts, spikes, &c., for the barque in the yard in which she was building, and did other work occasionally at Keen's direction. As an accurate memorandum of the amount of this work was made, as found by the master, we think they were entitled to a lien.

10. The several claims of Henry, Dobbin, McLean and Sproule, were properly disallowed; they having in their several certificates filed in the town clerk's office knowingly and wilfully claimed more than was due.

The result is that all the claims for lien by reason of labor and materials furnished, in the amounts found by the master are allowed, and are entitled to be paid from the fund, excepting the four rejected by him, and excepting also the claims of Cottrell and Jones, Andrew Sampson and others, and E. H. Sears. After the payment of the liens the mortgages are entitled in their order. The terms of the decree to be settled by a single judge.

CHARLES P. CURTIS & another *vs.* SAMUEL S. PIERCE.

Suffolk. March 6. — June 18, 1874. WELLS & ENDICOTT, JJ., absent.

An assessment upon an estate under the St. of 1866, c. 174, which has been paid by a lessor, is a tax which may be recovered by him of a lessee, who by a lease made before the passage of that statute has covenanted to pay "such sum or sums of money as shall be equal to the amount of the rates, taxes and duties of every kind that shall be levied or assessed on the demised premises, or on the lessors of the same; as well those assessed or levied by the authority of the United States, or those assessed or levied by the authority of the State of Massachusetts, or of the city of Boston, for each year and part of a year," if the lease was made and the assessment laid before the passage of the St. of 1871, c. 382.

CONTRACT by the owners of the building on the corner of Tremont and Court Streets in Boston, against the lessee to recover the amount assessed thereon by the city of Boston, November 20, 1871, pursuant to the St. of 1866, c. 174, under an order passed by the Board of Aldermen November 4, 1870, to widen Tremont Row and Court Street, and paid by the plaintiffs on April 29, 1872, after notice to the defendant. The writ was dated May 3, 1872.

In the Superior Court the case was submitted on the following agreed facts; judgment was ordered for the defendant, and the plaintiffs appealed:

"The lease of the premises was dated August 16, 1861, and embraced a term of ten years from January 1, 1862. The lessee occupied during the whole of the term, and said widening and assessments were made during said term. The lease contained the following covenant, viz.: 'And the said lessee for himself, his executors and administrators, doth hereby covenant to and with the said lessors, their heirs and assigns, that he will pay the said rent quarter-yearly in equal sums of twelve hundred and fifty dollars, the first of which payments shall be on the first day of April, 1862; that he will, from time to time, upon the request of the lessors, pay them such sum or sums of money as shall be equal to the amount of the rates, taxes and duties of every kind that shall be levied or assessed on the demised premises, or on the lessors of the same; as well those assessed or levied by the authority of the United States as those assessed or levied by the authority of the State of Massachusetts, or of the city of Boston, for each year

and part of a year, during the term aforesaid.' The widening of the street was actually begun early in the spring of 1871, and completed before the first of August, 1871.

"The court shall be authorized if they find for the plaintiffs to render judgment for them in the sum of \$1520, with interest from April 29, 1872, and costs. Otherwise judgment for the defendant with costs."

J. P. Healy & R. Lund, for the defendant, were first called upon. In the case at bar the covenant does not use the word "assessment," but uses the words "rates, taxes and duties of every kind;" and then proceeds to point out specifically what is meant, and limits the liability to those assessed or levied by the United States, the State of Massachusetts, or the city of Boston, for each year and part of a year. This shows clearly that the parties only intended the annual assessments, and, at farthest, such as could be apportioned according to the time of the occupancy. It cannot mean such an assessment as the one in question. This is made once for all time, and in one sum, and is not susceptible of being apportioned into yearly payments. This language is guarded, and shows an intention to covenant to pay only such assessments as are ordinary and annual, and cannot be applied to a covenant to pay for permanent improvements on the premises.

E. Merwin, for the plaintiffs.

GRAY, C. J. The indenture sued on appears to the court to have been carefully and clearly framed to express the intention of the parties that the burden of every description of taxes, which might be assessed upon the estate during the term of the lease, either under laws already existing, or under future legislation, should be borne by the lessee and not by the lessors. It is well settled in this Commonwealth, that an assessment upon an estate under the betterment acts, though local and special in its character, is yet a kind of tax. The covenant of the lessee in this case in terms includes "the amount of the rates, taxes and duties of every kind;" it is not limited to taxes assessed upon the lessee, but embraces those "that shall be levied or assessed on the demised premises or the lessors of the same;" it is declared to be equally applicable whether the tax is imposed by national, by state, or by municipal authority; and, like the previous covenant for the payment of rent, it speaks not only of every year, but of

any part of a year, during the term of the lease. Each of these clauses appears to us to have been inserted with a view of making more sure that the covenant should have as comprehensive a scope and effect as possible, and not of restricting it in any particular. The St. of 1871, c. 382, having been passed since the making of this indenture and the laying of the assessment in question, has no application to this case. The plaintiffs are therefore entitled to maintain their action. *Payne v. Burrige*, 12 M. & W. 727. *Thompson v. Lapworth*, L. R. 3 C. P. 149. *Bleecker v. Ballou*, 3 Wend. 263. *Harvard College v. Aldermen of Boston*, 104 Mass. 470, 483. *Codman v. Johnson*, Ib. 491. *Walker v. Whittemore*, 112 Mass. Judgment for the plaintiffs.



EDWARD BLAKE & another vs. RICHARD BAKER & others.

Suffolk. March 13.—June 18, 1874. COLT & ENDICOTT, JJ., absent.

In a lease for three years of land made after the passage of the St. of 1866, c. 174, the covenant by a lessee to pay "all taxes and duties levied or to be levied thereon during the term," binds him to pay to the lessor an assessment upon the estate, for the laying out of a street, in pursuance of the said statute, and of the St. of 1868, c. 276, made during the term of the lease, and which the lessor has paid.

An order of the board of aldermen made under the St. of 1871, c. 382, § 2, reducing the amount of an assessment for a betterment, is not a new assessment.

CONTRACT by Edward Blake and John A. Loring, trustees under the will of Fitz Henry Homer, to recover of the defendants the amount of an assessment made upon an estate on Central Wharf, Boston, in pursuance of the St. of 1866, c. 174, and the St. of 1868, c. 276, by the city of Boston, for the laying out of Atlantic Avenue. The writ was dated December 24, 1872.

In the Superior Court the case was submitted upon the following agreed facts; judgment was entered for the plaintiffs for a sum stated; and the defendants appealed:

"On January 1, 1868, the plaintiffs leased to the defendants an estate on Central Wharf, for the term of three years, at the rate of \$600 a year; the lessees agreeing to pay 'all taxes and duties levied or to be levied thereon during the term.' The order laying out Atlantic Avenue was passed December 18, 1868,

and the betterment was assessed upon the demised premises, December 15, 1870, at the sum of \$1050, and on September 30, 1872, by an order of the board of aldermen, the amount was reduced to seven hundred dollars; and the present action is brought to recover the last sum. The amount has been paid to the city by the plaintiffs."

J. A. Loring, for the plaintiffs.

H. C. Hutchins, for the defendants. 1. This assessment is not a tax within the terms of the lease. It is undoubtedly true, as was held in *Harvard College v. Aldermen of Boston*, 104 Mass. 470, that such an assessment is, in its legal character, a tax; but, as was also said in that case, p. 483, "In a covenant for the payment of taxes by a lessee, it is to be ascertained by construction what was contemplated by the parties in the use of the terms employed. Those terms are not necessarily to be taken in their strict legal signification." Taking the most favorable view for the plaintiffs, here is an assessment made only sixteen days before the expiration of the short term of the lease, and of an amount larger than the annual rent. It has never been held that the word "taxes" in a covenant in a lease embraces these assessments. In *Codman v. Johnson*, 104 Mass. 491, the lease was for a long term, twenty years; and in this case and in *Walker v. Whittemore*, 112 Mass. , the covenant was to pay "all taxes and assessments." The word "taxes," as used in the covenants in leases for short terms, means the ordinary annual taxes, and not extraordinary impositions or assessments "in view of a permanently increased value of the estate by reason of a public improvement in its vicinity." And, when it is intended to embrace extraordinary rates, other and additional words are introduced.

2. The assessment was not "levied during the term." The order of September 30, 1872, was under the St. of 1871, c. 382, § 2, and was a reassessment. Until this statute was passed there was no power to increase or reduce or change an assessment for a betterment. By that section it was provided that all "assessment upon real estate, invalid by reason of any error," &c., may be remade. The assessment, therefore, of December 15, 1870, was abrogated, and was never paid by the plaintiffs; and consequently they cannot recover for it.

GRAY, C. J. The words of the covenant in this case are less comprehensive than in the case of *Curtis v. Pierce*, ante, 186. But it was made while statutes were in force authorizing assessments for betterments similar to that here sought to be recovered. It must therefore be held to include assessments of this character, levied on the premises during the term. *Codman v. Johnson*, 104 Mass. 491. *New York v. Cashman*, 10 Johns. 96. *Astor v. Miller*, 2 Paige, 68.

The orders laying out the street and assessing the betterment were passed during the term of the lease. The order of September, 1872, did not lay a new assessment, but merely made a deduction from that formerly laid. For the balance of that assessment, therefore, *The plaintiffs must have judgment.*

DANA H. ELKINS vs. BOSTON & ALBANY RAILROAD.

Suffolk. March 11. — June 18, 1874. COLT & ENDICOTT, JJ., absent.

In an action against a railroad corporation to recover for injuries sustained by the wagon, in which the plaintiff was driving on a highway crossing the railroad track, being struck by a train of cars, evidence tending to show that the wagon was being driven slowly along the highway; that the plaintiff, and another person who was driving, did not know that they had arrived at the railroad crossing, nor see or hear the engine or cars; that there was no sign-board at the crossing; that the train was going at the rate of thirty miles an hour, and that the whistle of the engine was not sounded or the bell rung before reaching the crossing, and not showing that the approaching train was in sight from the highway, is sufficient, if uncontrolled, to justify the inference that the plaintiff was in the exercise of ordinary care. And the facts that the plaintiff, a boy ten years old, in a cold afternoon in winter, had the lappets of his cap tied over his ears; that he had previous knowledge that the railroad crossed the highway at the place of the accident, and did not tell his companion of it; and that he did not look or listen for the train, are not conclusive against the plaintiff upon the issue of ordinary care on his part, if there is evidence that the plaintiff and his companion did not know that they were at the crossing, and that the defendant did nothing to warn them of it or of the approach of the train, until it was too late.

In an action against a railroad corporation for injuries sustained by being run into at a place where a highway crosses the railroad, evidence that there was no sign-board at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff.

In an action to recover damages for injuries sustained through the negligence of the defendant, the age of the plaintiff is admissible in evidence to show that he exercised such care as was reasonably to be expected of him.

In an action by a boy ten years old for a personal injury, a physician called as a witness for the plaintiff testified to the extent of the injury. The defendant offered to show that the physician and the plaintiff's mother three years before the injury drove together to an apothecary's shop and there remained until one o'clock at night, under circumstances showing great intimacy. *Held*, that this evidence might properly be rejected by the presiding judge as immaterial.

Upon a motion for a new trial a verdict which, upon the issue submitted to the jury, is against the weight of evidence introduced at the trial, cannot be sustained by the opinion of the court upon a distinct ground of liability, which has not been alleged or tried.

In an action against a railroad corporation to recover damages for injuries sustained by a train of cars striking the wagon in which the plaintiff was riding at a highway crossing, the declaration charged the defendant with not ringing a bell before crossing the highway, but did not allege that there was no sign-board at the crossing, or that the absence of a sign-board there had any connection with the accident. At the trial, evidence of the absence of the sign-board was admitted only on the issue of due care on the part of the plaintiff, and the jury were instructed that the defendant could be held liable only upon the ground alleged in the declaration. The jury found a verdict for the plaintiff, and a motion for a new trial having been argued, the judge reported that he was of opinion that the evidence did not warrant the jury in finding that the defendant was in fault in respect of ringing the bell or sounding the whistle, or negligent in any manner in the running of the train, and that the verdict ought to be set aside for that reason; unless the failure to maintain a sign-board at the crossing might properly be considered as evidence of such negligence, or as a ground of liability, either under the present or under an amended declaration. *Held*, that even though the want of a sign-board would be a ground of liability under an amended declaration, the defendant was entitled to a new trial.

TORT for personal injuries sustained by the plaintiff. The declaration contained three counts. The first count was for negligence of the defendant in driving its engine and cars over a crossing at grade in the town of Natick, and thereby injuring the plaintiff, then travelling on the highway, and using due care. The second count was for negligence of the defendant in not ringing a bell of at least thirty-five pounds' weight at the distance of at least eighty rods from said crossing as required by law, or any bell before crossing said highway, the plaintiff using due care. The third count was for running into the plaintiff, at said crossing, with its cars and engine, without ringing any bell, as required by law, before reaching such crossing, the plaintiff using due care.

At the trial before *Wells, J.*, the jury returned a verdict for the plaintiff for \$3500, and the following report was made to the full court: "The plaintiff, on February 21, 1871, being at that time ten years old, was riding with another boy sixteen years

old, named Enos H. Bigelow, in a four-wheeled buggy chaise drawn by one horse, in a southerly direction, over a road in the town of Natick, crossing at grade the railroad of the defendant; and just as the carriage crossed the track, the hind wheel was struck by the engine on the quarter past five o'clock afternoon train, then coming from South Framingham on the way to Boston.

"Enos H. Bigelow, a witness called by the plaintiff, was asked by the plaintiff's counsel whether, just before the collision, while riding towards the crossing, he saw any sign-board at the crossing. The defendant objected to the evidence, on the ground that the plaintiff had not alleged in his declaration that at the time of the collision there was no sign-board at the crossing, or that the absence of a sign-board at this crossing had any connection with the collision or alleged injury. The court admitted the evidence, not for the purpose of showing negligence in the defendant, but as bearing on the question whether the plaintiff was in the exercise of due care at the time. To this ruling the defendant excepted. The witness answered that there was no sign-board at the crossing at this time. The court admitted, against the defendant's objection and subject to the defendant's exception, other evidence tending to show that there was no sign-board at this railroad crossing at the time of the collision, for its bearing on the question of the plaintiff's care at the time, but not for the purpose of showing negligence in the defendant.

"Enos H. Bigelow, a witness called by the plaintiff, testified as follows: 'Sometime after four o'clock in the afternoon, on February 21, 1871, I started in a top-buggy from Framingham, and drove to the house of the Elkins boy, and there took the Elkins boy in. I had never seen the Elkins boy before; don't know how far this was from the railroad; should think one or two miles. I didn't know the road. I was driving, sitting on the left side, and the Elkins boy on the right side. The carriage was four-wheeled and covered, and was going at an ordinary rate of speed; the horse was not a very good one for speed; I quickened him up once in a while; was going at a fair trot. I saw no sign; I first knew I was on the railroad from hearing a sharp quick whistle right at the side of the crossing; previous to that had heard no whistle or ringing of a bell. When I heard the whistle I had my watch out, and the reins were in

one hand ; I then put the watch in my mouth and seized the reins, and that is all I know. Till I heard the whistle, I did not know there was a railroad track. It seemed to me the whistle was right by the boy. I did not hear the engine or cars ; ground was frozen ; carriage not new — don't know how old — and rattled some, and the ground was rough. It was between five and six o'clock. I did not see by my watch what time it was. It was growing dusky at the time.' *Cross-examined.* 'I went for Mrs. Allard, the teacher, to get the boy's mother. She was not at home, and the boy Elkins went with me to show where his mother was. I hadn't much conversation with the boy while riding along. I remember talking with him ; I was looking at my watch to see what time it was, not showing it to the boy. I was told to get back by six o'clock, and was not hurrying. I had quickened the horse, — had struck him with the whip.'

'Jackson W. Parker, a witness called by the plaintiff, testified :
'I live near the crossing ; lived there all my life ; for forty-three years. This road crossing the railroad has been used as a highway as long as I remember anything. I remember seeing these boys driving by. I went out the back door to get a rope to tie the horses. I saw this team go by, and did not see them afterwards. Both the houses near the crossing are mine. The horse was going at a slow trot, in my sight, for a distance from one corner of the court room to the other ; cars then came along ; they blowed the whistle just before they got to the crossing, then whistled for brakes, to stop ; cars were ten or fifteen rods from the crossing when they whistled, as near as I could judge. I heard the cars coming. I don't remember hearing any bell or whistle before. I saw that there was a smash-up, and went down ; the boys were together ; Bigelow boy was hurt ; Elkins boy said he was not hurt ; both boys were walking around, as I supposed, hunting up the horse.' *Cross-examined.* 'The crossing was from fifteen to thirty rods from my house, and my house is on the east side of the street. I went home with the Bigelow boy ; the Elkins boy went home on foot. Elkins boy used to pasture a cow in my field the summer before, within twenty or thirty rods north of my house. There is a school-house about eighty rods north of the railroad. I had just come out of the house that minute when I saw these boys driving by.'

I came out and was fussing with a rope and heard the first whistle. The first whistle was a crossing whistle, what I am in the habit of hearing when the cars are at the eighty-rod post. I could see them, the boys, till within a few rods of the crossing. I could have seen the cars before I saw them first if I had looked up. The whistle was a quarter of a minute in length; then they broke up.'

"Charles Hyde, a witness called by the plaintiff, testified as follows: 'At the time of the accident I lived at the first house on the right-hand side north of the crossing. I didn't see the boys; I saw the carriage going by right opposite the house, horse going at a common trot; didn't see who was in the carriage; horse and carriage were in view till they reached the crossing; when they got to the crossing I saw the cars on to them. My house is on an elevation. I didn't see the cars till I saw their carriage on the track. I heard the cars whistle five rods, I should judge, from the crossing. I didn't hear any ringing of the bell or any whistling before. I could look from my house to the crossing. At the time of the whistle the carriage was about on the track; I couldn't tell exactly where, but about on the track. I didn't see the collision, and I didn't go out of the house or down to the crossing. No sign-board at the crossing.' *Cross-examined.* 'When the carriage passed I was in the kitchen on the south side of the house towards the railroad. I was standing at the window, at work; I saw the carriage when opposite the house; no window in the road side of the room I was in; window and doors of the room were shut. First I heard was the whistle; I was looking towards the crossing at the time; I saw the cars right after I heard the whistle; whistle might have been a quarter of a minute long, but it did not seem so. Cannot say if the carriage got to the line of the fence along the northerly side of the railroad; I saw the cars, carriage and all, at the same time; I expected to see them smashed, all the time. Mr. Parker came to my house with the boys; there a half hour with me and wife; Elkins boy showed no bruise; answered questions; said he was not hurt; he had on a thick overcoat and tippet on his neck, cap on his head. I was at work on shoes; I stopped working and looked at the carriage after it passed, the cars were so near. I heard the cars before I heard the whistle; that made me think

the carriage was in danger. I saw the carriage, and then heard the cars when the carriage was between the house and the crossing, half-way down. From that time I watched it because I thought it had not time to get across the track. One quarter of a minute after, I heard the whistle. I first supposed there was no one in the team, it was going so slow. I thought it ought to stop or go faster. I think they had a chance to get by the crossing; I didn't hardly know; I thought no one was in the carriage, because they didn't go faster. I saw no jumping of the horse; should not suppose there was any difficulty in stopping the horse before the crossing; I should have supposed they had time enough. I thought they were pretty careless.'

"Percis Allen, a witness called by the plaintiff, testified that she was his grandmother; that the plaintiff had lived with her before the accident and attended school; that he had work three or four days with his uncle on the south side and near this crossing, going in the morning and returning at night; that she used to caution him about crossing the railroad.

"Addie Merrill, called by the plaintiff, testified that before the accident the plaintiff attended the school where she taught, and that the school-house was on the road which makes this crossing where the collision was, and that the school-house was about twice as far from the crossing as the house of Parker, the former witness, on the same side of the crossing.

"The plaintiff testified as follows: 'I remember the time Enos Bigelow started off with me to go to Natick village. The place where I was was my grandmother's, and was one and one half or two miles from the crossing. We were talking right along the same as anybody. My attention was not called to the railroad. I did not hear the cars before on the crossing. I did not hear any whistle or bell, or see the cars. The first thing I knew I was on the railroad. When on the railroad I heard a whistle. I don't know what next happened. I found myself on a pile of sleepers. I don't remember the Bigelow boy's taking his watch out. I remember his putting it in his mouth on the sound of the whistle. The whistle seemed to be right on to us. I knew the railroad ran across this road. There was nothing to remind me of it — never thought of it. Nothing was said to me about it by the Bigelow boy. There was no light of the car.' *Cross-examined.*

'The horse before reaching the crossing was going along as he was a mind to. I had on a fur cap: a tippet around my neck, and a cap on. The cap had pads. The pads were over my ears and tied under my chin. I knew the cars came there, and I knew this crossing; my grandmother had cautioned me against this crossing. I didn't look to see the train or listen at all. I said nothing about the crossing to the Bigelow boy. I had been to school near there. I pastured a cow near there, on the same side as Mr. Parker's house. Sometimes went to the village by way of this crossing, and sometimes the other way. Worked at my uncle's before the accident, not since. The whistle was a short one; about one quarter of a minute long. We were right on the track. The horse was on the track. We were on the north rail and the horse on the south rail when I first heard the whistle. I didn't touch the horse. I remember nothing after hearing the whistle. I didn't see the cars.'

"This was all of the plaintiff's evidence, bearing upon the question whether the plaintiff at the time was in the exercise of due care.

"The defendant's counsel asked the court, on the conclusion of the plaintiff's case, to rule that on this evidence the plaintiff could not recover, as it showed contributory negligence on his part, and did not show that he was in the exercise of due care. The court declined so to rule, and the defendant excepted.

The defendant called several witnesses who were upon the train, to testify that the whistle was sounded and the bell rung at the proper point and for the proper time before reaching the crossing, and that no reasonable precaution to prevent the collision was omitted on the part of those in charge of the train. The evidence tended to show that the usual rate of speed of the train at that point is at least thirty miles an hour, and that the train was going at its usual rate of speed at the time of the accident.

"When all the evidence was in, the defendant renewed the above request. The court refused so to rule, and submitted the case to the jury, and the defendant excepted.

"The plaintiff produced as a witness, the physician who attended the boy at the request of his mother after the accident, who testified that in his judgment the plaintiff had had epilepsy as a consequence of the accident. The defendant introduced evi-

dence tending to show that the plaintiff had not sustained any serious injury, and had not had epilepsy, and to show the bias under which the physician gave his evidence, offered evidence to show a great degree of intimacy between this physician and the plaintiff's mother; that they drove up together one night to an apothecary's store, and so remained till one o'clock at night, under circumstances showing great intimacy, some three years before the accident. The court excluded the evidence, and the defendant excepted.

"The court, among other instructions, instructed the jury as follows: The plaintiff must satisfy you that he was not in fault. He is bound to take care, if knowingly approaching a railroad, to see if a train is coming. He has no right to go upon a railroad and neglect to use his ears and eyes. Did the plaintiff use reasonable precaution? In determining this, you should consider his age, his familiarity with the place, the fact that the other boy was driving, and how far he had a right to rely on the other boy. Consider the fact that he was familiar with the place, and the other was not. Consider this in connection with the facts that there was no sign-board, and that the boy knew of the railroad. Consider whether it was negligence in the plaintiff to pay no attention, and not call the other boy's attention to the railroad. The plaintiff was not bound to an extreme anxiety of care, but to reasonable precautions. If he failed in such care as was reasonably required under the circumstances, or failed to caution the other boy when in the exercise of reasonable care he should have done so, the defendant is not liable. To these instructions the defendant excepted.

"In respect to the alleged negligence of the defendant, the court instructed the jury that the only ground on which the defendant could be held liable was for failure to ring the bell or sound the whistle for the eighty rods before reaching the crossing; that if the bell was rung or the whistle sounded for that distance before reaching the crossing, or if the jury were not satisfied that there was a failure so to ring the bell or sound the whistle, the defendant was not liable; but if the bell or whistle were not one or the other sounding for that distance, the defendant was negligent; and if this negligence was the cause of the accident, and the plaintiff was in the exercise of due care, the defendant was liable in this action.

" The defendant then asked the court to give the jury the following instructions: 1. That the absence of a gate or a flagman was no evidence of negligence on the part of the defendant, there being no evidence of any requisition on the part of the proper authorities therefor. 2. That at all events, it was not so, unless under ordinary circumstances, the nature and character of the crossing were such that, in the exercise of ordinary care on their part, the plaintiff has satisfied the jury that this was a reasonable, proper and necessary precaution in general, and at the particular time, place and circumstances of the accident. 3. That it is the plaintiff's duty to satisfy the jury of this; and further, to satisfy the jury that such omission was the efficient cause of the alleged injury. 4. That if the plaintiff knew of the crossing and omitted to make any use whatever of his senses, to ascertain if a train was crossing, it was contributory negligence, which would deprive him of any right to recover, without regard to the absence or presence of a flagman. 5. If the plaintiff knew that there was a railroad crossing at the place in question, it was his duty, in the exercise of due care, to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he would expose himself to a collision; and if he made no use at all of these senses for that purpose, it was contributory negligence on his part, which would preclude any right of recovery against the defendant. 6. If there was a railroad crossing at the place in question, and the plaintiff knew it and did not look or listen to ascertain if any train was coming, because he did not think of it, it was a want of due care, which deprives him of any right to recover.

" The court declined to add anything to the instructions already given; and the defendant alleged exceptions to the rulings and instructions above stated.

" The defendant also filed a motion for a new trial, on the ground that the verdict was contrary to the evidence. Upon a hearing, I am of opinion that the evidence did not warrant the jury in finding that the defendant was in fault in respect of ringing the bell or sounding the whistle, or negligent in any manner in the running of the train, and that the verdict ought to be set aside for that reason; unless the failure to maintain a sign-board at the crossing might properly be considered as evidence of such

negligence, or as a ground of liability for the injury to the plaintiff, either under the present counts or under an amended declaration. For the purpose of presenting this question to the full court, as well as those raised by the defendant's exceptions, I order the whole case to be reported. If all the rulings and instructions excepted to by the defendant should be sustained, but it should be held that the failure of the defendant to maintain a sign-board at the crossing cannot avail the plaintiff in any manner, then a new trial is to be granted upon the motion therefor; otherwise the case is to stand for hearing and further order upon that motion. The defendant is to have the benefit of the exceptions alleged as above, to the same extent as if they had been separately allowed."

G. S. Hale, for the defendant.

T. H. Sweetser & W. S. Gardner, for the plaintiff.

GRAY, C. J. The evidence introduced by the plaintiff at the trial tended to show that the wagon was being driven slowly along the highway, that the plaintiff and the boy who was driving did not know that they had arrived at the railroad crossing, nor see or hear the engine or cars, that there was no sign-board at the crossing, that the train was going at the rate of thirty miles an hour, and that the whistle of the engine was not sounded nor the bell rung before reaching the crossing; and did not show that the approaching train was in sight from the road. This evidence, if not controlled by evidence on the part of the defendants, would justify the inference that there was ordinary care on the part of the plaintiff. The facts that the plaintiff, a boy ten years old, on a cold afternoon in winter, had the lappets of his cap tied over his ears, that he had previous knowledge that the railroad crossed the road at this place, and did not tell his companion of it, and that he did not look or listen for the train, were elements to be considered by the jury. But, taken in connection with the facts (if believed by the jury) that the plaintiff and his companion did not know that they were at the crossing, and that the defendants did nothing to warn them of it, or of the approach of the train, until it was too late, they were not conclusive against the plaintiff upon the issue of ordinary care on his part at the time of the accident. *Mayo v. Boston & Maine Railroad*, 104 Mass. 137. *Commonwealth v. Fitchburg Railroad*, 10 Allen, 189. *Reed v. Deerfield*, 8 Allen, 522.

The want of a sign-board at the crossing was rightly admitted in evidence as bearing upon the question whether the plaintiff and his companion knew or should have known that they were approaching the crossing, and therefore upon the issue whether they used ordinary care to guard against the accident.

The age of the plaintiff was also competent evidence upon the question whether he had used such care as was reasonably to be expected of him. *Lynch v. Smith*, 104 Mass. 52. *Lane v. Atlantic Works*, 107 Mass. 104, and 111 Mass. 136. *Railroad Co. v. Gladmon*, 15 Wallace, 401.

The evidence offered by the defendants, tending to show intimacy between the physician called as a witness for the plaintiff and the plaintiff's mother on one occasion three years before the accident, might properly be rejected by the presiding judge as remote and immaterial.

The instructions given to the jury met and covered the instructions requested, and were sufficiently favorable to the defendants.

All the exceptions taken by the defendants at the trial must therefore be overruled, and it only remains to consider the motion for a new trial.

The presiding judge has found as matter of fact that the whole evidence in the case did not warrant the jury in finding that the defendants were in fault in respect of the bell, sounding the whistle, or managing the train, and that the verdict cannot therefore be sustained on either of those grounds.

Those grounds are the only ones which have been tried, or which the defendants have had any opportunity to contest; for the failure of the defendants to maintain a sign-board at the crossing was not alleged in the declaration, and was distinctly excluded from the consideration of the jury, except so far as it bore upon the issue of due care on the part of the plaintiff; and the jury were expressly instructed that the only ground on which the defendants could be held liable was for failure to ring the bell or sound the whistle for the eighty rods before reaching the crossing.

If negligence in not maintaining a sign-board at this crossing had been alleged as a ground of action, and it had been found by a jury that the defendants should have erected such a sign-board

and that their neglect to do so occasioned the injury to the plaintiff, they might have been held liable. *Linfeld v. Old Colony Railroad*, 10 Cush. 562.

But a verdict which, upon the issue submitted to the jury, is against the weight of the evidence introduced at the trial cannot be sustained by the opinion of the court upon a distinct ground of liability, which has not been alleged or tried, and which can only be put in issue by an amendment of the declaration and by evidence which the jury have never been permitted to consider, nor the defendants to be heard upon before them. *Rex v. Malden*, 4 Bur. 2185. *Wheelock v. Wheelwright*, 5 Mass. 104. *Tyler v. Ulmer*, 12 Mass. 163. *Shaw v. Boston & Worcester Railroad*, 8 Gray, 45, 76, 77. *Cairns v. Cairns*, 109 Mass. 408. *Verdict set aside, and new trial ordered.*

JOHN A. GOOD vs. GEORGE W. FRENCH.

Suffolk. March 6. — June 18, 1874. WELLS & ENDICOTT, JJ., absent.

In an action for a malicious prosecution, the burden of proof is on the plaintiff to show that the defendant acted without probable cause.

In an action for a malicious prosecution, whether there was a want of probable cause is a question of law upon the facts proved.

If a person obtains flour by falsely representing himself to be the agent of another, evidence that he is in good credit, that he has money in the hands of another person sufficient to pay for the flour, and that there is a practice amongst flour dealers, not shown to be one of the established usages of the trade, to buy flour in the name of other persons, has no tendency to show that a prosecution for obtaining the flour by false pretences was instituted without probable cause.

The docket of a municipal court is the record of proceedings in that court, until the more full record is made up, and is sufficient proof of those proceedings.

TORT for malicious prosecution and for slander. Trial in the Superior Court before *Rockwell, J.*, who allowed a bill of exceptions in substance as follows :

It appeared that the plaintiff had bought a lot of flour in the name of one Cutler, of the firm of which the defendant was a member ; that he had not authority to use Cutler's name ; that the flour was not paid for, and that the defendant made a complaint before the Municipal Court of the city of Boston, and

caused the plaintiff to be arrested for obtaining the flour by false pretences, and that he was discharged. To prove the proceedings in the Municipal Court, the plaintiff offered in evidence a paper purporting to be a copy of the record of the proceedings in that court. The assistant clerk of that court who made the copy, testified that the record of the case had never been extended, and that the only record in the office was the docket. The defendant's counsel objected to the admission of the copy, but it was admitted. The plaintiff then caused the docket to be produced and the entries of the same were put in, by which it appeared that the plaintiff was arrested on the complaint of the defendant for obtaining goods by false pretences, and was discharged. But the plaintiff contended, and relied on the copy of the record as *prima facie* proof, that the defendant had caused the arrest of the plaintiff without probable cause, and so argued to the jury; and the copy went to the jury, and the substance was stated to them.

The plaintiff on his direct examination testified to facts tending to show that he was in good credit, and had funds in the hands of a third person sufficient to pay for the flour, and that there was a practice among flour dealers to buy flour in the name of other persons, and that the reason of this practice was to conceal the names of the actual purchasers, and cover up any speculation in which the actual purchaser might be engaged. To the admission of this evidence the defendant objected.

The plaintiff on cross-examination admitted that he used the name of Cutler in the purchase of the flour because he feared that his credit would be called in question if he attempted to buy in his own name; and that he did not want the defendant to understand that credit for the flour was to be given to him.

At the conclusion of the plaintiff's case the defendant requested the court to order a verdict for the defendant, and the same request was made when the testimony on both sides was put in. These requests were refused.

The evidence on the counts in slander was conflicting, and these counts were not relied upon.

The jury found a verdict for the plaintiff for five hundred dollars, and in answer to a question of the court, as to what count the verdict was found on, replied that it was a general verdict but that the jury dwelt upon the view that it seemed to them

from the evidence that the defendant caused the prosecution to be instituted for private motives, and not on public considerations.

The defendant excepted to the admission of the above evidence, and to the refusal of the court to direct a verdict for the defendant.

W. W. Warren, for the defendant.

J. L. Eldridge, for the plaintiff.

AMES, J. In this, as in most cases of the kind, the real controversy was upon the question of probable cause. The want of probable cause is a vital and indispensable element in the plaintiff's case, as to which the burden of proof rests upon him. Whether there was a want of such cause is a question of law upon the facts proved. *Kidder v. Parkhurst*, 3 Allen, 898. It is to be judged of, not upon the actual state of the case, but upon the honest and reasonable belief of the party that instituted the prosecution complained of. *Bacon v. Towne*, 4 Cush. 217. The case reported in this bill of exceptions shows that the plaintiff represented himself, in making the purchase, as the agent of Cutler, which was not true; that he made this false representation for the sake of concealing the fact that he was the real purchaser; that he did not intend to have the flour charged to himself for fear that his credit might be called in question, and that he obtained possession of the property by means of that false representation.

By way of explanation of what at first sight and without explanation appears to be a disingenuous and suspicious proceeding, well calculated to create an honest and reasonable belief in the mind of the defendant of a fraudulent intent, the plaintiff offered evidence tending to show the existence of a practice among flour dealers to buy in the name of some person other than the real purchaser, with the purpose of concealing the name of the real purchaser, "and to cover up any speculation in which he might be engaged." But it does not appear to be claimed by the plaintiff that this was one of the established, notorious and accepted usages of the trade which the defendant must be assumed to have known and recognized, and we are by no means prepared to say that such a usage, if proved, could have any legal validity. And, what is perhaps more material, it does not appear by the bill of exceptions that the defendant had any knowledge of the existence

of this alleged practice. The defendant had a right to judge from appearances, and the evidence offered wholly fails to do away the effect of these appearances. Neither the existence of the alleged practice nor the fact that the plaintiff had funds with which he could have paid for the flour, have any tendency to show that the defendant instituted the prosecution without probable cause.

The proceedings of the Municipal Court were sufficiently proved by the docket, which is the record, until the more full record is made up. *Pruden v. Alden*, 23 Pick. 184. *Read v. Sutton*, 2 Cush. 115. The other exceptions taken in the case we have not deemed it necessary to consider. The evidence relied upon by the plaintiff, whatever its effect may be to explain his conduct, and to acquit him of any fraudulent intent, has no tendency to show that the defendant was not acting under an honest and reasonable belief, and with apparent or probable cause. This defect in the plaintiff's case is insuperable, and therefore the defendant's

Exceptions are sustained.



CATHARINE KEATS vs. JOHN HUGO & Wife.

Bristol. October 30, 1873. — June 18, 1874. **COLT & AMES, JJ., absent.**

GEORGE EATON & others vs. WILLIAM EVANS.

Suffolk. March 24, 1873.— June 18, 1874. **COLT & DEVENS, JJ., absent.**

D. WALDO SALISBURY & others vs. WILLIAM T. ANDREWS & others.

Suffolk. March 24. — June 18, 1874. **AMES & DEVENS, JJ., absent.**

The grant of an easement of light and air is not implied from the grant of a house having windows overlooking land retained by the grantor.

If the eaves of a house belonging to one person have projected over the land of another for more than twenty years, the owner of the house has no title in the land of such other person under the eaves, and cannot prevent him from building on that land, if he can do so without interfering with the eaves.

THE FIRST CASE was an action of tort for obstructing the passage of light and air to the plaintiff's dwelling-house in Attleboro.

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In the Superior Court judgment was ordered for the defendants on the following agreed facts, and the plaintiff appealed to this court :

On August 10, 1871, the defendants conveyed to the plaintiff by warranty deed in the usual form a certain lot of land with a dwelling-house thereon, situated on the line between the parties, created by said conveyance ; the said lot so conveyed being part of a larger lot then, and the remainder of which is now, owned by the defendants. The dwelling-house had windows and a door in that part of the house adjoining the line. Since said conveyance, the defendants placed a structure and wood-shed on their own land against said house, within about eight inches of the same, and still continue said structure there. The dwelling-house is in the same situation as it was at the time it was conveyed to the plaintiff.

J. Daggett, for the plaintiff.

J. Brown, for the defendants.

THE SECOND CASE was a bill in equity by the trustees under the will of Amherst Eaton, for an injunction to prevent the building of a wall which it was alleged would obstruct the windows of a dwelling-house on Washington Street, in Boston, and an interference with the light and air coming to the same. After the bill was filed the defendant finished the wall, and an amended bill was filed.

The case was reserved for the full court by *Morton*, J., upon the bill, amended bill and answers, and agreed facts, and was as follows :

In 1802 Sarah Davies, under whom both parties claim, purchased a lot of land on the westerly side of Washington Street, in Boston, which now comprises the estates of both parties to this suit. In 1803, by two separate deeds, she conveyed the estate, now held by the plaintiffs to Charles W. Windship, and Windship built thereon the dwelling-house now standing thereon, and owned by the plaintiffs. Said house then had in it windows on the westerly side thereof, overlooking the other land of said Davies, now owned by the defendant, and still has them, though obstructed and darkened by the acts of the defendant. In 1804, Windship reconveyed to Davies all the land so conveyed to him, with the dwelling-house, out-buildings, privileges

and appurtenances. In 1815, Davies died seised of both estates, and at the time of her death she lived in a dwelling-house standing on that part of said lot which is now owned by the defendant, at a distance of about sixty feet from the house now owned by the plaintiffs, the intervening land remaining open and not built upon; and she left a will, by which she devised all her estates, except some pecuniary legacies, to her niece and adopted daughter, Sarah Davies Williams, from whom the defendant's title is derived. The administrator of Sarah Davies obtained from the proper court license to sell so much of her estate as was necessary for the payment of debts and charges, and did sell under such license, in 1816, the estate now owned by the plaintiffs, to Peter O. Thacher, under whom the plaintiffs claim. This deed conveyed "all the estate of which said Sarah died seised in and to the following described lot or parcel of land with the brick dwelling-house and stable standing thereon," (describing it by metes and bounds,) "with all the privileges and appurtenances to the same belonging." Sarah D. Williams became seised under said will of all that part of said estate which was not sold by the administrator as above stated, and with her husband, John Griggs, remained in possession till her death. After her death, her husband acquired by deed the title of his and her children, and conveyed the same to the defendant, "subject to certain easements of light and air claimed by said Amherst Eaton as owner of the adjoining estate, no such claim being admitted by the parties hereto to be valid." The cornice or eaves of the plaintiffs' house from the time of the erection of the same projected and still project several inches beyond the northerly line of the plaintiffs' wall. The defendant, at the time of the filing of this bill, had commenced the erection of a market-house on his lot adjoining that of the plaintiffs, and has since completed the same, building the southerly wall thereof directly against the northerly wall of the plaintiffs, and carried the same several feet higher than the wall of the plaintiffs' house, building above and below the cornice thereof, but not cutting off the same, and entirely obstructing and closing up several windows thereof, and entirely darkening some rooms and partially darkening others.

H. W. Paine & T. S. Harlow, for the plaintiffs.

J. P. Healy, for the defendant.

THE THIRD CASE was a bill in equity to prevent the erection of a building on Central Court, in Boston, to a greater height than nine feet and three inches. The case was heard on the bill and answer by *Wells, J.*, and by him reported to the full court, in substance as follows :

The estates on Central Court in Boston, now owned and occupied by the plaintiffs and defendants respectively, were both owned, in April, 1824, by Ebenezer T. Andrews, who in that month conveyed by deed to Henry Homes "a brick house and the land under and adjoining the same," describing the premises by metes and bounds. This is the estate now owned by the plaintiffs. At the time of the conveyance to Homes, the five story brick building now occupied by the plaintiffs was standing on the land, and then and now had two windows on each story opening upon a four foot way between said premises and the premises now occupied by the defendants. At that time a one story wooden building nine feet and three inches in height was standing upon the premises now occupied by the defendants on the opposite side of the passage way, and so has remained until December 15, 1872; and since that time the defendants have removed the one story building, and have built a brick building two and a half stories high in the place thereof.

"The plaintiffs contend that the new erection of the defendants since the 15th day of December last deprives them of the light and air necessary for the reasonable enjoyment of their estate. The defendants insist that there is no implied grant of light and air in favor of the plaintiffs' estate under the deeds of Ebenezer T. Andrews and Henry Homes referred to in the bill; and also deny that if there is any such implied grant, the erection complained of infringes thereon. It is agreed that the southeasterly line of the newly erected building of the defendants is at the same distance from the northwesterly line of the plaintiffs' building as was the one story wooden building standing upon the land of said Andrews at the date of his deed to Homes, the passage way between said lines being at all points four feet wide. The bill, answer, title deeds and plan annexed to the bill are all referred to. I reserve for the consideration of the full court the questions :

"First, whether any such implied grant of light and air as contended for by the plaintiffs exists in the present case.

"Second, if such implied grant exists, whether it sufficiently appears upon the bill, answer and facts agreed, that the defendants' erection of the new building does not infringe thereon.

"If it be found that no such implied grant exists, or if it sufficiently appears that said new building does not infringe thereon, the case is to stand for hearing only upon the question of the alleged infringement of the passage way; otherwise the case is to be heard upon the question whether the present erection infringes upon the implied grant of light and air, as well as upon the alleged infringement of the passage way."

D. Foster & J. P. Treadwell, for the plaintiffs.

W. G. Russell, for the defendants.

GRAY, C. J. In each of these cases, the counsel have argued with learning and ability the question whether a person, who sells a house having windows overlooking land retained by him, thereby deprives himself of the right to build on that land so as to obstruct the passage of light and air to the windows. This question is presented in the simplest and most direct form in the case in Bristol. But as each of the justices who did not sit in that case was present at the argument of the same question in one of the cases in Suffolk, all the justices have taken part in the consultation, and the opinion now announced is the judgment of the whole court. The question being of great practical importance to owners of real estate, and having heretofore been the subject of some variety and conflict of judicial opinion, we have thought this a suitable occasion to review the cases in this Commonwealth, and to refer to the principal ones in other states.

By the common law of England, as declared by the English courts, a right to have light and air pass to the windows of a house over adjoining land might be presumed from long and continuous adverse enjoyment, unexplained, where the house and the land belonged to different persons; and was granted by implication, if the owner of both house and land sold the house, retaining the land.

In *Story v. Odin*, 12 Mass. 157, which is the earliest American case, the law was stated in accordance with the English authorities. But it is to be observed that no suggestion appears

to have been made of any difference between the laws of the two countries in this respect, and that the facts of the case hardly required a decision upon the general question. The building sold to the plaintiff had not only windows, but a door, in each story, overlooking the vacant land retained by the grantor and afterwards sold to and built upon by the defendant; and the tenants of the first building and of other buildings surrounding the vacant land had been accustomed to use it, with the permission of the owner, as a passage way for the purpose of receiving goods into the buildings, and of depositing empty casks and boxes. The only objections made to the maintenance of the action were, 1st, that the plaintiff had not declared for an ancient and prescriptive right to the windows and doors; 2d, that the plaintiff purchased his building within twenty years; 3d, that the defendant purchased his land from the same grantor. Such were the circumstances under which a verdict was obtained for the plaintiff, and a motion for a new trial overruled.

The *obiter dicta* in *Thurston v. Hancock*, 12 Mass. 220, *Grant v. Chase*, 17 Mass. 443, and *United States v. Appleton*, 1 Sumner, 492, are based upon the English authorities and the case of *Story v. Odin*; and in neither of them was there any adjudication of the question. *Thurston v. Hancock* turned upon a question of the right of support. *Grant v. Chase* was a case of a right of way. *United States v. Appleton* was an action of trespass by the owner of land against his grantor for swinging a door over the land granted.

In the subsequent cases, the question of acquiring a right to light and air over the land of another by presumption or implication has been more fully considered on principle, and the constant tendency of judicial decision in this and most other states has been to deny the right. In no judgment of this court since *Story v. Odin*, has any right of light or air been upheld, except by express grant or agreement.

As early as 1818, in *Ingraham v. Hutchinson*, 2 Conn. 584, Judge Gould doubted whether the English rule had been adopted in this country; and pointed out the anomaly of holding that any right could be created by the existence of windows which did not project over or encroach upon the land of the adjoining proprietor, or in any way deprive him of the use of his land.

In 8 Dane Ab. 55, it is said : " This doctrine is vague and loose, the enjoyment must be *adverse*. What is adverse enjoyment ? An enjoyment claimed as rightful by one party and denied by the other — or by mere silent acquiescence ? What is to be understood by the expression *unexplained* ? A., twenty years ago, built his house near the line of B.'s land, and made a window looking into it. B. since has pastured, mowed or tilled his land, and had no occasion to build on it ; not a word has been said, or an act done by either party in regard to this window, a case of every day's practice. Is this a case *unexplained* ? Or has A. *adversely* enjoyed his window ? "

In *Parker v. Foote*, 19 Wend. 309, it was observed that in the case of ways, commons, markets, watercourses and the like, the use or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made, his property has been invaded or his beneficial interest in it rendered less valuable, the injury has been of such a character that he might have immediate redress by action, and therefore long continued acquiescence affords strong presumptive evidence of right. " But in the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit are not the subjects of property beyond the moment of actual occupancy ; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window." " There is no adverse user, nor indeed any use whatever of another's property ; and no foundation is laid for indulging any presumption against the rightful owner." " No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neighbor. How then has he forfeited the beneficial interest in his property ? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be — not for his own benefit, but for the sole purpose of annoying his neighbor." And it was held that the English doctrine of acquiring a right to light by prescription was without foundation in principle, not adapted to the existing state of things in the United States, and could not be applied in the growing cities and villages of this country, without working the most mischievous consequences.

Like decisions have been made upon similar reasons in many other states. *Pierre v. Fernald*, 26 Maine, 436. *Napier v. Bulwinkle*, 5 Rich. 311. *Cherry v. Stein*, 11 Md. 1. *Haverstick v. Sipe*, 33 Penn. State, 368. *Hubbard v. Town*, 33 Vt. 295. *Ward v. Neal*, 37 Ala. 500. *Mullen v. Stricker*, 19 Ohio State, 135, 142.

In *Atkins v. Chilson*, 7 Met. 398, and *Fifty Associates v. Tudor*, 6 Gray, 255, the objections to sanctioning the English rule as to acquiring a perpetual right of light and air by twenty years' enjoyment were raised, but not passed upon, because unnecessary to the decision in either case; the first, which was a bill in equity by a reversioner for an injunction, being disposed of upon the ground that no irreparable injury was shown; and the second, because it did not appear that the new wall, which was ten feet from the windows, substantially deprived them of light.

While the question remained unsettled by judicial decision in this Commonwealth, the legislature repeatedly restricted the acquisition of such rights. The St. of 1824, c. 52, provided that after the passing of that act no right should by lapse of time accrue to any person to have any privilege of air, light or way over the land of any other person who should have recorded and served a notice of his intention to prevent it. The Revised Statutes extended that provision to easements of every kind; and also provided that "no person shall acquire any right or privilege of way, air or light, nor any other easement, from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless such use shall have been continued uninterrupted for twenty years." Rev. Sts. c. 60, §§ 27, 28. Each of those statutes, while it prevented the acquisition of the rights in question by lapse of time, except as therein mentioned, left the question whether they could be acquired by enjoyment under any circumstances, unaffected by legislation, to be decided by the law as it previously existed. The St. of 1852, c. 144, went further, and, still leaving it to the courts to determine how far rights of light and air had already been acquired, prevented their acquisition by mere enjoyment for the future, by providing that, except by written assent, "no person who has erected or may erect any house or other building near the land of any other person, with windows overlooking such land of such other person, shall, by the

mere continuance of such windows, acquire any easements of light or air, so as to prevent such other person, and those claiming under him, from erecting any building on such land." See also Gen. Sts. c. 90, §§ 32-35.

In *Rogers v. Sawin*, 10 Gray, 376, it was directly adjudged, that the mere open and unobstructed use of a window for more than twenty years before the passage of the St. of 1852, did not entitle the owner of the window to an easement of light and air; that the fact that the window had a sill projecting over the neighbor's land did not alter the case, unless the owner had exercised some right, other than the mere ordinary use of the window for the admission of light and air, and working some wrong to the neighbor or depriving him of some beneficial right; and that the common law of England upon this subject was not the common law of Massachusetts, for the reasons already given by the courts of other states, which Mr. Justice Metcalf summed up thus: "1st. That the making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encroachment on his neighbor's rights, and therefore cannot be regarded as adverse to him; 2d. That the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages."

In *Carrig v. Dee*, 14 Gray, 583, it was held that the fact that a window was on hinges, swinging outward over the adjoining land, did not constitute such an adverse possessory use of that land, as to make any difference in the principle; because, in the words of Chief Justice Shaw, "it was not such a use as to encroach visibly or tangibly on the beneficial use and enjoyment of the land, over which such swinging window occasionally turned, or to diminish the owner's enjoyment, and so bring it within the principle that the law presumes that a man will not suffer another to make use of his property to his injury and inconvenience, and therefore presumes, if one man does make such use of another's property without objection on the owner's part, it is because he has a right by some instrument or grant, which is lost or cannot be produced."

So in *Richardson v. Pond*, 15 Gray, 387, (which in its leading facts curiously resembles *Story v. Odin*,) it was held that the pos-

session and use for more than twenty years of a window overlooking a neighbor's land, with shutters swinging over the land, created no easement of light and air, and gave no right to maintain an action for erecting a building on the land, except so far as it interfered with the right of swinging the shutters as incidental to a right to use the land for a passage way and for hoisting merchandise into the windows.

The steps have thus been traced by which it has come to be established as the law of this Commonwealth, that no right of light and air could be obtained by prescription. The cases bearing more directly upon implying a grant of such a right from a conveyance of a house remain to be considered.

In *Atkins v. Bordman*, 20 Pick. 291, and 2 Met. 457, the owner of two houses extending westwardly an equal distance from the street, and standing five feet apart, conveyed the lower one by a deed in which it was agreed that if the grantee should make any addition of building westwardly, he should not bring it nearer the other building; and it was held that he was not thereby restricted from raising the height of his own building, although by so doing he interrupted the access of light and air to the windows of the grantor's house.

In *Fifty Associates v. Tudor*, 6 Gray, 255, Chief Justice Shaw treated "an easement for light and air, derived from use and enjoyment, or implied grant," as governed, in either alternative, by the same considerations.

In *Collier v. Pierce*, 7 Gray, 18, the owner of two adjoining lots of land, on one of which was a building with a window in the wall close to the dividing line, overlooking the other lot, sold both by auction on the same day, and conveyed them to the respective purchasers, with the privileges and appurtenances thereto belonging, but without expressing, either by the terms of sale or by the deeds, that any specific easement of air or light was granted or reserved to one over the other. It was held, that the purchaser of the lot on which the building stood acquired no right to light and air by implication over the other lot, although the sale and conveyance to him respectively preceded the sale and conveyance of the other lot; and Chief Justice Shaw distinguished the case from *Swaneborough v. Coventry*, 9 Bing. 305; *S. C.* 2 Mo. & Sc. 362; upon the ground that in that case, by the word "lights," the right to lights, as they then actually existed, was expressly granted.

In *Randall v. Sanderson*, 111 Mass. 114, a house contained three windows, one in each story, which were the only means of lighting the rooms in which they were placed, overlooking the land adjoining. The house and land having been owned by one person, some of his heirs conveyed to the others the house "and all rights and privileges thereto belonging;" and on the same day all the heirs conveyed to a stranger the adjoining land, with a covenant against incumbrances. It was held that the grantee of the house took no easement of light and air over the land; and there is no intimation in the opinion that the decision would have been different if the deed of the land had not contained such a covenant, and had been made after the deed of the house.

In *Paine v. Boston*, 4 Allen, 168, which was a petition for damages for taking part of a lot of land for a street, the petitioner offered evidence that the lot was overlooked by ancient windows in an adjacent house, which the owner thereof claimed the right to maintain, and that the taking of part of the petitioner's lot made the right so claimed more injurious to the residue, than it had previously been. But this court, in the judgment delivered by Chief Justice Bigelow, held that the evidence was inadmissible, for the reason that a right to keep the windows open was not shown, "and never could exist except by actual grant."

In *Brooks v. Reynolds*, 106 Mass. 31, and *Royce v. Guggenheim*, 1b. 201, it was assumed to be the law of Massachusetts, that no right of light and air over adjoining lands could exist but by express grant or covenant. That proposition, though not in the strictest sense necessary to the decision of either of those cases, is yet involved in the course of reasoning by which they were decided, and seems to us to be a logical inference from the previous adjudications of this court.

In *Brooks v. Reynolds*, the question was of the right acquired under a deed which bounded the premises by a passage way, expressly agreed to be kept open for light and air, and particularly described. It was ruled in the Superior Court that the grantee took only the common law right of air and light; and that ruling was supported in argument here by reference to the case of *Fifty Associates v. Tudor*, 6 Gray, 255. But this court, referring to *Rogers v. Sawin*, *Carrig v. Dee*, and *Richardson v. Pond*, above cited, was of opinion that there was no such common law right in

this Commonwealth, and that the terms of the grant itself were therefore the only test of the extent of the right granted; and upon that ground held that the right was not limited to a protection against a substantial deprivation of air and light, and that the grantor could not build over any part of the passage way.

In *Royce v. Guggenheim*, the lessor of a house erected a building against the windows of two rooms therein, making them unfit for use. The tenant relied on this as an eviction; and, in an action brought against him for rent, obtained a verdict. It was considered by the court, that if the new building was erected upon land not included in the lease, and for the purpose of improving that land, it was a lawful act, which violated no obligation of the lessor to the lessee; and the plaintiff's exceptions were overruled, solely upon the ground that they did not show that the new building was not upon the demised premises.

By nature, air and light do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land is created not by the relative situation of that lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor indeed any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot therefore be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons, upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite

character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed.

In accordance with these views, the English doctrine of implied grants of rights of light and air has been wholly rejected in several well considered cases. *Palmer v. Wetmore*, 2 Sandf. 316. *Myers v. Gemmel*, 10 Barb. 537. *Haverstick v. Sipe*, 33 Penn. State, 368. *Mullen v. Stricker*, 19 Ohio State, 135. *Morrison v. Marquardt*, 24 Iowa, 35. And with the single exception of *Janes v. Jenkins*, 34 Md. 1, all the opinions of American judges, with which the learning and research of counsel have supplied us, in favor of the acquirement of such a right by mere implication from the conveyance of a house, have been either, as in *Lampman v. Milks*, 21 N. Y. 505, 512, *obiter dicta*, or, as in *Robeson v. Pittenger*, 1 Green Ch. 57, in those states in which a like right is held to exist by prescription, and therefore of no weight as authority in this Commonwealth.

Considering therefore that by the preponderance of reason and of authority no grant of any right of light or air over adjoining lands is to be implied from the conveyance of a house, we have only to apply this rule to the facts of the cases pending before us.

In the case of *Keats v. Hugo*, the action, being merely for the interruption of the access of light and air to the plaintiff's windows and door by building on the defendants' own land, cannot be maintained, and there must be

Judgment for the defendants.

So in the case of *Eaton v. Evans*, the deed made by the administrator of Sarah Davies, under a license of court to sell for the payment of debts, conveys by metes and bounds a parcel of land and the house upon it, without any mention of windows, light or air. Assuming (without deciding) that this deed had the same effect as a like conveyance from an owner in fee of the same house and land, no grant of any right of air and light over the adjoining lands can be implied. And the deed by which the defendant derives his title does not admit the validity of any claim of such a right.

The boundary of the plaintiffs' lot is shown by the terms of the deeds, and the actual occupation of the parties and of those under whom they claim title, to be the line of the wall of the plaintiffs' house. The fact that the eaves and cornices thereof projected over that line gave them no title to the land, and no right to prevent the defendant, owning that land, from erecting any building upon it, so long as he did not cut off or interfere with the eaves or cornices of their house. *Randall v. Sanderson*, 111 Mass. 114.

The plaintiffs therefore fail to show any claim to the interference of a court of equity, and their bill must be

Dismissed with costs.

The same considerations dispose of the case of *Salisbury v. Andrews*, and show that no right of light and air whatever was granted by the deed of Andrews to Homes. That case must therefore, according to the terms of the report,

Stand for hearing as to the right of way only.



MARY R. JENKS & others vs. JACOB L. WILLIAMS & another.

Suffolk. March 19, 20. — June 18, 1874. AMES & DEVENS, JJ., absent

The St. of 1799, c. 31, § 5, and the ordinance of the city of Boston of 1850, imposing penalties for making and maintaining bow-windows or other projections into the streets of Boston, are intended for the benefit of the public, and do not confer distinct rights on individual citizens or owners of property.

In the absence of any grant or agreement, the interference with the prospect from an estate, or the general diminution of its value, by the building on an adjoining estate of a bow-window, affords no ground for the interposition of a court of equity for the relief of the person so injured, unless the act complained of amounts to a nuisance.

BILL IN EQUITY against Jacob L. Williams, the occupant of a house on Mount Vernon Street, in Boston, adjoining a house in said street, owned by the plaintiffs, alleging that the defendant was about to construct a bow-window upon the front of his house, projecting before said front more than one foot, in violation of the St. of 1799, c. 31, § 5,* and the ordinances of the city of Boston

* The St. of 1799, c. 31, § 5, provides that: "No person shall in future make, erect or have any portico or porch, any bow-window, or other window,"

of 1850;* that said bow-window would obstruct the view from the windows of the plaintiff's house, and would diminish the light and air entering the same: and praying for an injunction to restrain the defendant from constructing the bow-window.

Before the case came to a hearing, the defendant completed the window, and the bill was amended by making Moses Williams, the owner of the building, a party. The amended bill alleged the completion of the window, that the view from the plaintiffs' windows was thereby obstructed, and the value of their house diminished, and prayed for an injunction to restrain the defendants from continuing the bow-window in front of their house, and that the defendants might be ordered to pull down and remove said window and every part of it which projected into the street beyond the front of their house.

The defendants demurred, and the case was reserved by *Devens, J.*, on the amended bill and demurrers for the consideration of the full court.

J. L. Thorndike, for the plaintiffs.

O. W. Holmes, Jr., & W. A. Munroe, for the defendants.

GRAY, C. J. The St. of 1799, c. 31, § 5, and the city ordinance of 1850, imposing penalties for making and maintaining bow-windows or other projections into the streets of Boston, are manifestly intended for the benefit of the public, and not to confer distinct rights on individual citizens or owners of property. The plaintiffs do not allege that they have any easement or right of light and air across the front of the defendant's house, and could not have, except by grant or agreement intended for their benefit.

which shall project into the streets of the said town of Boston, more than one foot beyond the front of his or her house: . . . and if any person shall hereafter offend against this provision, every person so offending, shall forfeit and pay the sum of one dollar for each and every day such portico or porch, bow-window or other window shall be continued, after notice given to him by the surveyors of highways, or by any person by them authorized to that purpose."

* The ordinance of 1850 provides that "no person shall construct or place, or cause to be constructed or placed, any portico, porch, door, window, or step, projecting into any street, under a penalty of not less than four nor more than fifty dollars for each offence, and a like penalty for every day that the said portico, porch, door, window or step may be continued as aforesaid, after notice to remove the same from the board of aldermen, or some person authorized by them."

Keats v. Hugo, ante, 204. *Paine v. Boston*, 4 Allen, 168. *Jewell v. Lee*, 14 Allen, 145. In the absence of any such grant or agreement, neither the interference with the plaintiffs' prospect, nor the general diminution of the value of their estate, by the building of the window, affords any ground for the interposition of a court of equity, unless it amounts to a nuisance, which cannot be seriously predicated of the injury alleged in the bill. *Attorney General v. Doughty*, 2 Ves. Sen. 453. *Squire v. Campbell*, 1 Myl. & Cr. 459. *Jackson v. Newcastle*, 3 De G., J. & S. 275. *Butt v. Imperial Gas Co.* L. R. 2 Ch. 158. The demurrer must therefore be sustained; and the *Bill dismissed, with costs.*



FIRST NATIONAL BANK OF GREEN BAY *vs.* JOHN B. DEARBORN.

Suffolk. March 4, 1873. — June 18, 1874. COLT, ENDICOTT & DEVENS, JJ., absent.

The delivery by an owner of goods of a common carrier's receipt for them, not negotiable in its nature, as security for an advance of money, with the intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin against an officer who afterwards attaches them upon a writ against the general owner.

REPLEVIN of one hundred barrels of flour. At the trial in the Superior Court, *Dewey, J.*, with the consent of the parties, withdrew the case from the jury, and reported it to this court in substance as follows :

At the trial the following facts appeared : R. G. Parks, residing and doing business in Green Bay, Wisconsin, under the name of R. G. Parks & Co., was engaged in the manufacture of flour at a mill in Neenah, in the State of Wisconsin, about thirty or forty miles from Green Bay. The plaintiff bank had its place of business at said Green Bay. Prior to the transactions, in regard to the flour in question, Parks had forwarded flour to Harvey Scudder & Co., at Boston, and drawn drafts upon them, only a part of which had been accepted and paid. On October 17, 1870, Parks applied to the plaintiff in Green Bay to advance \$400 upon

the one hundred barrels in controversy, which the plaintiff agreed to do. Parks then left with the plaintiff the following draft, addressed to Harvey Scudder & Co. of Boston: "\$400. Office of R. G. Parks & Co., Green Bay, Wisconsin, October 17, 1870. At sight, pay to the order of M. D. Peak, cash, four hundred dollars, value received, and charge the same to account of R. G. Parks & Co." Written in pencil across the face of the draft were these words: "Hold this till to-morrow when I will give you B. L."

On the following day Parks delivered to the plaintiff the following written instrument: "Chicago & Northwestern Railway Company, Neenah, October 17, 1870. Received from R. G. Parks & Co. one hundred barrels of flour, branded W. — Rec. in rain. Consigned to Harvey Scudder & Co., Boston, Mass., via Green Bay. To be forwarded to Ft. Howard Station, upon the terms and conditions of the published tariff of this company. A. H. Boardman, Agent." The plaintiff thereupon placed to the credit of Parks on their books the sum of \$400.

It was admitted by the defendant that Parks delivered the draft and the railroad receipt to the plaintiff for the purpose of securing the advance of \$400 on the flour; and that it was the understanding that by that transaction the property was transferred to the plaintiff as security for its advance.

The flour, which in fact was at the time of the above transaction the property of Parks, and was at his mill in Neenah until it was delivered to the railroad company, and had not been seen by the plaintiff or Parks, had been delivered to the agent of the railroad company by the agent of Parks, on October 17, prior to the signing of the railroad receipt.

The plaintiff forwarded the receipt and draft to Boston, where the former was presented to Harvey Scudder & Co., who declined to accept it, giving as a reason therefor that they had not received the bill of lading; and they never in fact made any advance or payment on account of the flour, or received or offered to receive the flour. Shortly before the flour arrived at Boston, one of the firm of Harvey Scudder & Co. informed a member of the firm of Scudder, Bartlett & Co., who were creditors of Parks, that the flour was likely to arrive, and that Harvey Scudder & Co. had no claim upon it; and upon its arrival at the depot in Boston, about November 7, 1870, the defendant, a deputy sheriff

attached it as the property of Parks & Co., on a writ in favor of Scudder, Bartlett & Co., and the defendant held it under said attachment at the time of service of this writ.

If upon these facts the plaintiff is entitled to maintain the action, judgment is to be entered for the plaintiff, with nominal damages, otherwise for the defendant.

R. M. Morse, Jr. & R. Stone, Jr., for the plaintiff.

J. W. Hubbard, for the defendant, contended, 1. that the transfer to the plaintiff was void as against the creditors of Parks under the law of Wisconsin, and cited *Rev. Sts. Wisc. c. 107, § 5*; *Whitney v. Brunette*, 3 Wisc. 621; *Menzies v. Dodd*, 19 Ib. 343; *Mayer v. Webster*, 18 Ib. 393; *Place v. Langworthy*, 13 Ib. 629: 2. That after the delivery to the railroad for Scudder & Co., Parks had no power to deliver the flour to the plaintiff.

AMES, J. It appears that when the draft was discounted and the receipt delivered to the plaintiff, both parties understood that it was an advance by the bank, "on the flour." Both parties intended that the property should be, and understood that it was, by that transaction, transferred to the bank, as security for that advance. The discounting of the draft was a sufficient consideration for such a conveyance. If there was a sufficient delivery of the property to the plaintiff, there was nothing to hinder the intention of the parties from going into full effect.

The character and situation of the property at the time of this transaction were such that an actual delivery was impossible. A constructive or symbolical delivery was all that the circumstances allowed, but a delivery of that nature, if properly made, would have been sufficient to give to the plaintiff corporation the title to the property, and an immediate right of possession, which it could maintain, not only against Parks himself, but also against his creditors. *Tuxworth v. Moore*, 9 Pick. 347. *Fettyplace v. Dutch*, 13 Pick. 388. *Whipple v. Thayer*, 16 Pick. 25. *Carter v. Willard*, 19 Pick. 1. The delivery of the evidences of title, with orders indorsed upon them, would be equivalent to the delivery of the property itself. *Gibson v. Stevens*, 8 How. 384. *Nathan v. Giles*, 5 Taunt. 558. *National Bank of Cairo v. Crocker*, 111 Mass. 163, and cases there cited. All that would be necessary in such a case would be that the thing actually delivered should have been intended as a symbol of the property sold.

In this case, the only thing which was delivered to the plaintiff, as the representative or symbol of the property intended to be transferred to the plaintiff, was the written acknowledgment of the railroad corporation that they had received the merchandise for transportation, consigned to Harvey Scudder & Co., of Boston. No order of any kind was indorsed upon this receipt, and no attempt was made to transfer it to the plaintiff in any mode, other than by mere manual delivery. But the receipt was evidence of ownership in Parks, and the only voucher which he had in order to show his right to the goods after parting with their actual possession. It was the means which he had of calling the carrier to account if the goods should be lost or injured, and it might well be supposed that the carrier would not ordinarily give up the goods except upon the production and surrender of that receipt. Whatever right Scudder & Co. might have had to take the flour into their own hands if they had accepted the draft, it is certain that on their refusal to receive the consignment, the property remained in the hands of the carrier, as the property of the consignor, or any person deriving title from the consignor; the carrier would not be wholly relieved of responsibility by the refusal of Scudder & Co. to receive the property, but would continue to be liable, at least for reasonable care in its custody, to the true owner.

It is true that a receipt of this kind does not purport on its face to have the *quasi* negotiable character which is sometimes said to belong to bills of lading in the ordinary form; neither does it purport in terms to be good to the bearer. But independently of any indorsement, or formal transfer in writing, the possession and production of it would be evidence indicating to the carrier that the bank was entitled to demand the property, and that he would be justified in delivering it to them. There are cases in which the delivery of a receipt of this nature, though not indorsed or formally transferred, yet intended as a transfer, has been held to be a good symbolical delivery of the property described in it. In *Haille v. Smith*, 1 B. & P. 563, Eyre, C. J., uses this language: "I see no reason why we should not expound the doctrine of transfer very largely, upon the agreement of the parties, and upon their intent, to carry the substance of that agreement into execution." In *Allen v. Williams*, 12 Pick. 297, 301

Shaw, C. J., in delivering the judgment of the court, says: "Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property; and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs." It is true that he adds that it was not necessary to place the case upon that ground. But this dictum was cited with entire approbation, in a case raising that exact point, in the Court of Appeals of the State of New York. *Bank of Rochester v. Jones*, 4 Comst. 497. In that case, as in this, the plaintiff had discounted a draft drawn against a quantity of flour, and its title, as in this case, depended upon a carrier's receipt, delivered to it without any written indorsement. The court held that the plaintiff thereby acquired a sufficient title to the property, and could call the consignee to account for it, he having converted the property to his own use, without accepting the draft. It is not necessary to hold that the plaintiff was absolute owner of the property; it is enough that it had a right of property and of possession to secure the payment of the particular draft; and the right of the former owner, Parks, in the specific property, had become divested, leaving him only a right in the surplus money which might remain after a sale of the flour, and a payment of the draft from the proceeds. *De Wolf v. Gardner*, 12 Cush. 19, 24.

Some reliance was placed by the defendant's counsel upon certain local statutes and judicial decisions of the State of Wisconsin. But, if applicable at all, they do not in our judgment affect the decision of the case. If we are right in holding that there was a sufficient delivery to pass the property to the plaintiff corporation, the carrier must be considered, after that time, as its bailee, and as holding the property for it, and not in any adverse relation. His possession would be the possession of the plaintiff.

Our conclusion therefore is that the clear intent of the parties, that the property should stand as security to the plaintiff in discounting the draft, was carried into effect in a manner sanctioned by sound authorities, and that there are no special equities in favor of an attaching creditor that make it desirable to defeat that intent.

Judgment for the plaintiff.

**FRANCIS E. STOLLENWERCK & others vs. HENRY C. THACHER
& another.**

**Suffolk. March 19, 1873. — June 18, 1874. WELLS, COLT & DEVENS,
JJ., absent.**

A cotton broker solicited orders for a firm of cotton buyers, receiving a commission of a fixed sum per bale from them, and looked to them and not to the cotton for its payment; each party paid its own expenses; in pursuance of an order procured by the broker, the firm obtained cotton, and sent the invoices thereof to the purchaser, and the bills of lading with drafts attached to the broker, with instructions not to deliver the bills of lading until the drafts were paid. *Held*, that the broker was not the partner, nor the general agent or factor of the firm, intrusted with the goods for sale, within the Gen. Sts. c. 54.

A special agent, authorized to deliver a bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery made without such payment.

If a bill of lading of goods is indorsed in blank and delivered to an agent of the owner for a special purpose, who is not authorized to sell or pledge the goods, a person who gets possession of it without the assent of the owner, although with the assent of the agent, acquires no title in the goods as against the principal.

A bill of lading, even when running to order or assigns, is not a negotiable instrument, like a bill of exchange, but a symbol or representative of the goods to which it relates.

A special agent cannot enlarge his authority by his own statements so as to bind his principal.

A., the owner of cotton, agreed to sell it to B., and sent it to his special agent with a bill of lading running to A. and indorsed by him in blank, with directions to hold the bill of lading until a draft drawn on B. for the price of the cotton was paid. The agent delivered the bill of lading to B. on his accepting the draft, but before he paid it. B. obtained the cotton of a common carrier, and paid the freight, and then pledged the cotton to C. for advances on the cotton. *Held*, in an action by A. against C. for the conversion of the cotton, that the measure of damages was the market value of the cotton at the time of the conversion, less the freight paid, but that commissions which would have been due B. had he paid for the cotton were not to be deducted.

TORT for the conversion of one hundred and eighty-nine bales of cotton. At the trial, before *Morton, J.*, the jury were directed to find a verdict for the plaintiffs, and the case was reported for the consideration of the full court, and is stated in the opinion.

H. W. Paine & R. D. Smith, for the defendants.

S. Bartlett & D. Thaxter, for the plaintiffs.

GRAY, C. J. This is an action of tort for the conversion of a number of bales of cotton. A verdict has been ordered for the plaintiffs, and the case reserved for the determination of the full

court upon a report containing an abstract of the evidence given at the trial, and a number of letters and documents. But the facts material to the decision, assuming all the controverted ones to be according to the testimony introduced by the defendants, are not many ; and a brief statement of them will tend greatly to narrow the discussion of the principles of law by which the case is governed.

The plaintiffs, being buyers of cotton in Mobile, made an arrangement with Joseph I. Baker, a cotton broker in Boston, by which they agreed to pay him, upon such orders on them as he should obtain from his customers here, fifty cents a bale, out of their own commission of one and a half per cent., furnish him with types of their classification of cotton, and keep him advised at their own expense of the condition of the cotton market in Mobile ; he agreed to procure and transmit the orders, and inform his customers of their acceptance or rejection ; and the invoices were to be sent by the plaintiffs to, and the drafts for the price drawn upon, the customers, and the bills of lading attached to the drafts.

In pursuance of an order given him by Gorham Gray & Company, Baker telegraphed to the plaintiffs to buy for them two hundred bales of cotton. The plaintiffs replied, refusing to negotiate on any other basis than that the bill of lading should be attached to the draft. They bought the cotton in Mobile, drew a bill of exchange on Gray & Company against the cotton, took the bill of lading in their own name, indorsed it in blank, attached it to the bill of exchange, procured the latter to be discounted at a bank in Mobile, informed Baker of what they had done, and instructed him, on receiving the draft and bill of lading, to hold the bill of lading until the draft was paid. Baker by telegram and letter assented to all this. The invoice sent by the plaintiffs to Gray & Company showed that the cotton was consigned to the plaintiffs' order. The Mobile Bank transmitted the draft, with the bill of lading attached, to a bank in Boston, which presented the draft to Gray & Company for acceptance. Upon such presentment, Gray & Company asked for the bill of lading, and were told that Baker was to receive it. Gray & Company then accepted the draft. the bank delivered the bill of lading to Baker, and he afterwards delivered it to Gray & Company, who obtained the cotton

from the carriers, gave them a check for the amount of the freight from Mobile to Boston, and pledged the cotton and delivered the bill of lading to the defendants as security for the payment of advances on the cotton. Gray testified that he accepted the draft upon Baker's assurance that he would hand him the bill of lading as soon as it came to Baker's possession, that Baker shortly afterwards delivered to him the bill of lading unconditionally, and that he transferred the cotton to the defendants believing that he owned it; and his testimony, though contradicted by Baker's, must be assumed to be true for the purpose of deciding whether a verdict was rightly ordered for the plaintiffs.

Baker and the plaintiffs were not partners as between themselves, and Gray & Company did not deal with Baker as a partner of the plaintiffs. His relation to the plaintiffs was that of a broker only. He looked to them, and not to the cotton, for the payment of his commission. The case is not within the Gen. Sts. c. 54.* Baker was not a factor, or a general agent intrusted with the goods for the purpose of sale; but a special agent, with positive and restricted instructions to receive the bill of lading on the acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Company. He had no right of possession of the bill of lading or the cotton for any other purpose, and no title in or lien on the cotton. This is not a case of stoppage *in transitu*. Gray & Company were not named in the bill of lading as consignees of the cotton, and the plaintiffs have never been divested of their property in the cotton as against Gray & Company or any persons claiming under them.

The numerous cases cited at the bar differ in their circumstances rather than in the statement of principles. A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of

* Gen. Sts. c. 54, § 2, provide that, "Every factor or other agent intrusted with the possession of merchandise, or a bill of lading consigning merchandise to him, for the purpose of sale, shall be deemed to be the true owner thereof so far as to give validity to any bona fide contract made by him with any other person for the sale of the whole or any part of such merchandise."

the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer thereof to a *bona fide* purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal. *National Bank of Green Bay v. Dearborn*, ante, 219. *Gurney v. Behrend*, 3 E. & B. 622, 632. *Pease v. Gloahec*, L. R. 1 P. C. 219, 228.

In the present case, Baker, being a special agent authorized to deliver the bill of lading only upon payment of the bill of exchange drawn against the goods and attached to the bill of lading, could not bind his principals by a delivery made without such payment. To hold otherwise would be to allow a person, intrusted with goods merely for the purpose of collecting the price and then delivering them, to sell them on credit. The authority of Baker, being special and limited, could not be enlarged by his own declarations. *Mussey v. Beecher*, 3 Cush. 511.

It follows that Gray & Company, not having paid the draft, nor acquired possession of the bill of lading with the plaintiffs' consent, had no property in the goods, and could convey none to the defendants, so as to defeat the plaintiffs' title. The plaintiffs are therefore entitled to recover.

This is not an action in the nature of assumpsit for the proceeds of a sale of the property, in which the plaintiffs might be deemed to have waived any tort, and be obliged to submit to a deduction of the expenses of the sale by which such proceeds had been obtained. It is an action in the nature of trover for the conversion of the goods, in which the plaintiffs are entitled to recover their market value at the time of the conversion by the defendants, and are not obliged to allow a commission to Gray & Company for doing an act which is not shown to have been for the interest or according to the intent of the plaintiffs. *Bartlett v. Bramhall*, 3 Gray, 257.

But the amount paid by Gray & Company to discharge the lien which the carriers had against the plaintiffs for the freight on the cotton enured to the benefit of the plaintiffs, and should be deducted from the market value of the goods. *Adams v. O'Connor*, 100 Mass. 515. *Whitney v. Beckford*, 105 Mass. 267. That amount must therefore, unless the parties agree upon it, be ascertained by an assessor, pursuant to the terms of the report, the verdict amended accordingly, and

Judgment rendered thereon for the plaintiffs.

FIFTH NATIONAL BANK OF CHICAGO vs. BENJAMIN F. BAYLEY.

Suffolk. Nov. 14, 1873. — June 18, 1874. ENDICOTT & DEVENS, JJ.,
absent.

Where a draft is drawn by the shipper of goods on the consignee, and a bill of lading by which the goods are deliverable to the order of the shipper, and which is indorsed to the consignee, is attached to the draft and delivered to the bank discounting the draft, as collateral security for the money advanced, such delivery transfers a special property in the goods to the bank and gives it a right of immediate possession sufficient to enable it to maintain replevin against the shipper and any one attaching the goods as his property; and the consignee has no right of property in the goods, nor right of possession of them, except upon payment of the draft.

REPLEVIN of four hundred barrels of flour. In the Superior Court judgment was ordered for the plaintiff on agreed facts in substance as follows, and the defendant appealed to this court.

On June 5 and 6, 1871, R. H. Sage owned and shipped at Chicago for Boston five hundred barrels of flour by bills of lading whereby the flour was deliverable to his own order. On the same days he made drafts in favor of I. G. Lombard, the plaintiff's cashier, upon E. Williams & Company, Boston, one for \$1800, and the other for \$1000, and attached the bills of lading thereto, and indorsed on each bill of lading, "Deliver the within to the order of E. Williams & Co. R. H. Sage," and delivered the bills of lading to the plaintiff as collateral security for the payment of the said sums which the plaintiff advanced him thereupon. The plaintiff then forwarded all the papers to Boston for collection.

These drafts were duly presented to E. Williams & Co., who refused to accept them, and they were immediately returned to the plaintiff.

On June 13, when the \$1000 draft was received by the plaintiff in Chicago, Sage delivered to the plaintiff, in exchange for it, a draft on Crockett Brothers for \$1000, and for the returned bill of lading which was delivered up to the transportation company, a new original bill of lading, indorsed: "Deliver to the order of Crockett Bros. R. H. Sage." The plaintiff then forwarded all the papers to Boston for collection.

On June 16, when the \$1800 draft on E. Williams & Co. arrived in Chicago, Sage paid the plaintiff on account, \$300, and delivered to the plaintiff, in exchange for the balance of the returned draft, a new draft for \$1500, on Crockett Brothers, and for the returned bill of lading, which was delivered up to the transportation company, a new original bill of lading, indorsed, "Deliver to the order of Crockett Brothers. R. H. Sage." The plaintiff then forwarded all the papers to Boston for collection.

Both lots of flour arrived in Boston, and while in the carrier's hands, two hundred barrels were attached by the defendant, a deputy sheriff, upon a writ in favor of a creditor of Sage, on June 16, and two hundred barrels on June 19.

Crockett Brothers refused to accept the drafts, which, with the other papers, were then immediately returned to the plaintiff, who again, and after the attachments had been made, exchanged the bills of lading for bills of lading indorsed to the plaintiff, and upon them received from the carrier the one hundred barrels not attached. The plaintiff then duly made demand on the defendant for the attached flour, and the defendant refused to deliver it to the plaintiff; and thereupon the plaintiff replevied the same in this action.

E. H. Abbot & L. A. Jones, for the plaintiff.

G. O. Shattuck & O. W. Holmes, Jr., for the defendant.

GRAY, C. J. This case is governed by those of *National Bank of Cairo v. Crocker*, 111 Mass. 163, and *National Bank of Green Bay v. Dearborn*, ante, 219.

The bills of lading by which the carrier undertook to deliver the goods to the shipper or his assigns were representatives of the property. The delivery of those bills of lading to the plain-

tiff corporation as collateral security for the payment of its advances, although it would not have enabled it to sue the carrier upon the contract therein made with the shipper, yet did transfer at least a special property in the goods to the plaintiff, (for which its discount of the drafts was a valuable consideration,) and gave it a right of immediate possession sufficient to maintain replevin against the shipper or any one attaching the goods as his property.

The drawees of the draft attached to each of those bills of lading were not entitled to the bill of lading or the property described therein, except upon acceptance of the draft, and having refused to accept it, the order, indorsed by the shipper upon the bill of lading, for the delivery of the goods to the drawees, never took effect.

Judgment for the plaintiff.

JOHN J. NEWCOMB vs. BOSTON & LOWELL RAILROAD CORPORATION.

Suffolk. November 17, 1873. — June 18, 1874. AMES & DEVENS, JJ., absent.

B. sent goods by railroad from another state to this, taking therefor a railroad receipt in which he was named as consignor and consignee; indorsed thereon an order to deliver to C.; drew a draft on C. for the price; attached the draft to the receipt and sent both to a bank in this state for collection; and forwarded an invoice of the goods to C., who went to the bank, accepted the draft, and afterwards sold the goods to D. A., at the request of C., and on an agreement with him that A. should sell the goods, and, after deducting the draft and his commission, account to C. for the balance, paid and took up the draft with the receipt attached; and C. indorsed on the receipt an order to deliver the goods to A. *Held*, that A. had a special property in the goods; that C., until he paid the draft, had no title in the goods, and could pass none to D.; and that the carrier, on delivering them to D., was liable to an action by A.

CONTRACT for non-delivery of two car-loads of oats alleged to have been delivered by the plaintiff's agents to the defendant for carriage over its railroad and for delivery to the plaintiff. In the Superior Court judgment was ordered for the defendant on agreed facts, in substance as follows, and the plaintiff appealed to this court:

On April 10 and 11, 1871, Botsford, Hibbard & Co. of Detroit, Michigan, sent to Salem, in this State, for and on account of C. H. Chandler & Co., of Boston, two car-loads of oats, and took railroad receipts therefor, in which Botsford, Hibbard & Co. were named as the consignors and consignees. Botsford, Hibbard & Co. indorsed on said receipts these words: "Deliver Messrs. C. H. Chandler & Co., or order, Botsford, Hibbard & Co.," and drew on C. H. Chandler & Co. two sight drafts for the price of each car of oats respectively, and attached said drafts to the receipts, and sent them to the Second National Bank of Boston for collection, and forwarded invoices of said oats to Chandler & Co., who went to the bank, and accepted the drafts, April 14, 1871. On April 17, 1871, Chandler & Co. called on the plaintiff, a commission merchant in Boston, with the invoices of the two car-loads of oats, and showed them to him, and said the drafts and receipts for the oats were at the Second National Bank, and were due that day; and they requested the plaintiff to go to said bank, and pay the drafts, and take the oats for himself, and said they would wait at the office and indorse the receipts over to the plaintiff on his return from the bank, and if after the plaintiff sold the oats there was any balance after taking out the amount of the drafts paid, and his commissions for selling, he was to account to them for it, which the plaintiff agreed to do. In pursuance of this agreement the plaintiff went to the bank, paid and took up the drafts and brought them to the plaintiff's office, with the receipts attached. The drafts were not paid at the bank in any other manner, and both the drafts and receipts were to be, and were retained by the plaintiff, and are still held by him. Chandler & Co. indorsed these words on the receipts, viz.: "Deliver J. J. Newcomb, or order, C. H. Chandler & Co.," in presence of the plaintiff at his office when he returned from the bank, but neither of said drafts or receipts was ever delivered to Chandler & Co., and the plaintiff furnished out of his own funds all the money to take up said drafts.

About the time the oats were due at Salem, the plaintiff called on the agent of the defendant there, offered to pay the charges for freight, and requested the agent to deliver the oats to him, but was informed by the agent that the oats had been deliv-

ered a few days before to Beckford & Dodge of Salem, and the defendant has never delivered the oats, or any part thereof, to the plaintiff.

On April 4, 1871, Chandler & Co. sold to J. V. & J. Hanson one of the said car-loads of oats to arrive, and gave them a bill of sale of them on that day. No receipt or invoice was shown to J. V. & J. Hanson, and they had no knowledge or information of any claim of the plaintiff, or any other party, upon said oats.

On April 15, 1871, Chandler & Co. sold to Beckford & Dodge the other of the said car-loads of oats to arrive, and they took a bill of sale of these oats on that day. No receipt or invoice was shown to Beckford & Dodge, and they had no knowledge or information of any claim of the plaintiff, or any other party, upon said oats.

Within a few days after April 15, both of said car-loads of oats arrived at Salem, and by order of Beckford & Dodge, who claimed them as theirs, were sent by the defendant to Gloucester. Beckford & Dodge showed the defendant's agent at Salem the bill of sale from Chandler & Co., of the car-load purchased of them, but no bill of sale of the other car-load, and no receipt or order for delivery of either car-load. The other car-load was ordered to Gloucester by Beckford & Dodge, by mistake, they supposing it to be a car-load which they were expecting.

The plaintiff had no notice of any claim of Beckford & Dodge, or of J. V. & J. Hanson, or any other party, to said oats, until he requested the agent of said defendant to deliver them to him as above stated, and the defendant had no notice of the plaintiff's claim until said request was made.

The defendant received said car-loads of oats as a common carrier for hire in the ordinary course of business, and carried them to Salem.

The statement of facts contained the value of the oats at the time they were demanded by the plaintiff, the amount of freight due on them, the amount of the drafts paid by the plaintiff, and what would be a fair commission for selling the oats.

S. Albee, for the plaintiff.

J. H. George (of New Hampshire) & *D. S. Richardson*, (*G. F. Richardson* with them,) for the defendant.

GRAY, C. J. The railroad receipts, in which Botsford, Hibbard & Co. were named both as consignors and as consignees, having been transmitted by them, together with the drafts drawn by them on Chandler & Co. for the price of the oats, to a bank in Boston for collection, were manifestly intended to be held by the bank as security for the acceptance and payment of the drafts. They continued to be held by the bank, after the drafts had been accepted by Chandler & Co., and until, at Chandler & Co.'s request, they were paid by the plaintiff, and the receipts, with the drafts still attached, were indorsed and delivered by Chandler & Co. to the plaintiff, to secure the reimbursement to him of the amount so paid, and of his commissions for selling the goods. This indorsement and delivery to the plaintiff gave him at least a special property in the goods to the extent of such advances and commissions, as against Chandler & Co., who never had any possession of the receipts, and, having no title or right of possession as against the plaintiff, could convey none to Bedford & Dodge. *Seymour v. Newton*, 105 Mass. 272. *National Bank of Green Bay v. Dearborn*, ante, 219. *Stollenwerck v. Thacher*, ante, 224.

The case having been submitted to the court upon an agreed statement of facts, all objections to the form of action are waived ; no point is made by the defendant of the amount for which judgment shall be rendered ; and the case must be referred to an assessor to ascertain that amount, unless the parties agree.

Judgment for the plaintiff.

JESSE F. ALDERMAN & another vs. EASTERN RAILROAD
COMPANY.

Suffolk. March 10. — June 18, 1874. COLT & ENDICOTT, JJ., absent.

When goods are consigned deliverable to the order of the consignor, and the bill of lading, with a draft for the price, drawn on the purchaser of the goods, attached, is forwarded for collection, the purchaser has no title to the goods until the draft is paid and the bill of lading is indorsed to him ; and a previous sale of the goods, to arrive, is void as against a person advancing the money to pay the draft, to whom the bill of lading was indorsed by the drawee as soon as he obtained possession ; and a second carrier who receives the goods from the first carrier to transport to

their destination, with knowledge on whose account they are carried, though without knowledge of the bill of lading, is liable to the holder of the bill of lading, if he delivers the goods to such a purchaser.

TORT for the conversion of a car-load of oats. In the Superior Court judgment was rendered for the defendant on an agreed statement of facts, in substance as follows, and the plaintiff appealed to this court :

On March 13, 1871, Botsford, Hibbard & Company, of Detroit, Michigan, delivered the car-load of oats in question at Detroit, to a line of transportation known as the Blue Line Through Freight Company, to be transported to Salem, Massachusetts, and there delivered to the order of Botsford, Hibbard & Co., and received from that company a bill of lading accordingly. The oats were duly forwarded to Boston, and there delivered to the defendant, and were by it transported to Salem, consigned to Botsford, Hibbard & Co.

The oats had been forwarded by Botsford, Hibbard & Co. at the request of C. H. Chandler & Co. of Boston, and the bill of lading was sent by the consignors to a bank in Boston, with a draft for the price of the oats attached, drawn on Chandler & Co. The bank was authorized to indorse over the bill of lading to Chandler & Co. upon payment of the draft. The bill of lading and draft were duly received by the Boston bank, and the draft was accepted by Chandler & Co. on March 16, 1871. On March 18 the plaintiffs advanced to Chandler & Co. funds sufficient to take up the draft, and it was taken up by Chandler. At the same time the cashier of the bank, in pursuance of his authority, indorsed the bill of lading to Chandler & Co., who immediately indorsed it over to the plaintiffs to secure them for the money advanced by them to pay the draft.

Before, however, the bill of lading had been indorsed to the plaintiffs, Chandler & Co. sold a car-load of oats to arrive, to Beckford & Dodge, of Salem, and upon the arrival at Salem of the car-load described above as forwarded by the Blue Line, Chandler & Co. informed Beckford & Dodge by letter that this was the car-load of oats bought by them and intended for them, and authorized them to take it. This information and authority were communicated to the defendant by Beckford & Dodge, and the oats were thereupon delivered to them. This delivery was

subsequent to the indorsement of the bill of lading to the plaintiffs.

No bill of lading was ever exhibited to the defendant, and it had no knowledge of its existence until after the delivery of the oats to Beckford & Dodge, but the way bills of the Blue Line Company made out against Botsford, Hibbard & Co. were received and paid by the defendant, and all the bills, together with the charges of the defendant, were paid by Beckford & Dodge.

It was known to the defendant that Botsford, Hibbard & Co. were western shippers of grain, and it is in the ordinary course of business for western shippers to forward goods to the East consigned to their own order to be delivered there to those who purchase of them.

The plaintiffs, having duly demanded of the defendant said car-load of oats, and having tendered the amount of freight charges due them, now bring this action. If upon the foregoing facts the court enter judgment for the plaintiffs, the case is to be sent to an assessor to determine the amount of the plaintiffs' damages.

J. M. Browne, for the plaintiffs.

S. Lincoln, Jr. (S. B. Ives, Jr. with him,) for the defendant.

GRAY, C. J. This case cannot be distinguished from that of *Newcomb v. Boston & Lowell Railroad*, ante, 230, in any particular favorable to the defendant. The bill of lading, with the draft attached to it, was transmitted to the bank with directions to indorse the bill of lading to Chandler & Co. upon the payment of the draft. As soon as Chandler & Co. paid the draft and obtained the bill of lading from the bank, they immediately indorsed the latter to the plaintiffs as security for the money advanced by them to pay the draft, and a property in the goods thereby vested in the plaintiffs. The sale and delivery of the goods by Chandler & Co. to Beckford & Dodge passed no title as against the plaintiffs; because at the time of the sale Chandler & Co. had acquired none, and at the time of the delivery the plaintiffs' title had already vested. The only evidence which the defendant had of any title in the goods was that furnished by the way bill, that they belonged to the consignors. The delivery by the defendant to Beckford & Dodge was therefore a conversion of the property, for which it is responsible to the plaintiffs as rightful owners of the goods.

Judgment for the plaintiffs.

115 2361
149 97

NATHANIEL S. FRANCIS & another *vs.* HALE S. HOWARD & others.

Suffolk. March 6. — June 19, 1874. WELLS & ENDICOTT, JJ., absent.

The affidavit necessary for the arrest of a debtor under the Gen. Sts. c. 124, § 5, is not required to be sworn to before a magistrate within the county in which the arrest is to be made, or in which the debtor has a residence or place of business.

An officer made a return of service on a notice that a debtor arrested on a mesne process desired to take the oath that he did not intend to leave the state. The return did not state where the service was made, except that it was headed with the name of the county for which the officer was appointed. The service was actually made outside of his precinct, but this objection was waived. Evidence was admitted that the service was made at a certain distance from the place of the hearing, and that there were places within the county equally distant. *Held*, that the evidence did not contradict the officer's return, and was rightly admitted.

If an insufficient notice has been given to a plaintiff to appear at the examination of a debtor arrested on mesne process, the appearance of the plaintiff's attorney at the time and place mentioned to examine the notice and return is not a waiver of the objection to the notice.

CONTRACT against the principal and sureties on a recognizance entered into by them under Gen. Sts. c. 124, § 10, upon the arrest of the defendant Howard on mesne process in a suit against him by the plaintiffs in this action.

At the trial in the Superior Court before *Devens, J.*, the jury found for the plaintiffs, and the case was reported for the revision of this court, in substance as follows :

At the trial the defences relied upon were, that there had been no lawful arrest in the original action, and no breach of the recognizance.

The affidavit upon the writ, in the original action, purported to have been taken before a master in chancery in Suffolk County ; and upon this affidavit the arrest was made in Norfolk County. The defendant in the original action did not reside or have any place of business in Suffolk County at the time of the arrest. The court ruled that the arrest was legal.

When Howard was arrested he gave notice that he desired to take the oath that he did not intend to leave the state, and entered into the recognizance sued on, the condition being that he should within twenty days from the time of his arrest deliver himself up for examination, before some magistrate authorized

to act, giving notice of the time and place thereof in the manner provided by law.

To prove the breach of the recognizance, the plaintiffs introduced evidence tending to show that the only notice given to the plaintiffs of Howard's intention to take the oath mentioned in the recognizance, was served by an officer at twenty minutes past eleven o'clock in the forenoon of April 19, 1872, and that this stated that the examination was to take place at Randolph, in the county of Norfolk, which was fifteen miles from the place of service, at five o'clock in the afternoon of the same day.

It appeared incidentally at the trial that the notice was not served within Norfolk County, of which the officer was a deputy sheriff. The officer's return did not state the place of service, except that it was headed Norfolk, ss. The plaintiffs did not rely on or desire to prove that the place where the notice was served was without the officer's precinct, (as at the time of such service they waived objection thereto on that ground, though not on any other ground,) but only the fact that the service was made at a place fifteen miles from the place of hearing; but the defendants objected that this would be in contradiction of the officer's return. But, upon its being shown that there were various places within the officer's precinct, more than fifteen miles from the place of examination, the objection was overruled, and the plaintiffs proved the fact to be as contended for by them.

The defendants also contended that the notice had been waived by the plaintiffs. To enable this, which was the only question of fact, to be submitted to the jury, the above questions — the facts stated in connection therewith not being in dispute — were ruled *pro forma* against the defendants, upon the consent of parties that if the verdict upon the question of waiver should be against the defendants, the case should be reported to this court, and such verdict should stand and judgment be rendered thereon, or verdict set aside, and judgment rendered for the defendants as this court should order.

There was evidence tending to show that the attorney of the plaintiffs, in the original suit, who resided and had an office in the town and immediate neighborhood where the examination named in the notice was to take place, went in company with the magistrate who issued the notice, to the office where the exam-

ination was to be held, at about the time fixed therefor, and on arriving there asked to see the original notice, and the officer's return thereon; that on reading the same, he told the magistrate, in the presence of the debtor and his attorney, that he did not propose to examine the debtor under that notice and return, and requested the magistrate to preserve the same, and immediately arose and left the office. The defendants requested the court to rule as matter of law, that this was a waiver on the part of the attorney of any objection to the notice or service thereof, and that no breach of the recognizance appeared upon the evidence herein before recited. The court declined so to rule. The defendants then introduced the notice and the officer's return thereon; and also oral testimony bearing upon the question of waiver. The court submitted to the jury the question of waiver, under instructions not objected to, except as above stated.

W. E. Jewell, for the defendants.

J. B. Harris, (*J. F. Kilton* with him,) for the plaintiffs.

AMES, J. We see no reason to doubt the legality of the arrest of the debtor. Nothing contained in any statute upon the subject of arrest upon mesne process requires that the affidavit necessary for that purpose should be sworn to before a magistrate within the county in which the arrest is to be made, or in which the debtor resides or has his place of business.

It appears that the creditors had somewhat less than six hours' notice of the intended examination of the debtor, and that the distance from the place of service to the place of examination was fifteen miles. All objection to the sufficiency of this notice on the ground that it was served by an officer outside of the limits of his own county was expressly waived. But no other irregularity was waived, and the case stands substantially in the same position as if the parties had agreed that the place where the notice was served was within the county of Norfolk. It is manifest that no proper notice was given to the plaintiffs, if they were entitled to notice at the rate of not less than one day for every twenty-four miles of travel. Gen. Sts. c. 124, § 13. We see no reason why this objection to the notice may not be taken by the plaintiffs. They do not thereby contradict the officer's return, as that does not undertake to designate the place of service, except as being within his precinct. *Richardson v. Smith*, 1 Allen, 541

Smith v. Randall, 1 Allen, 456. As there are places more than fifteen miles from the place of examination within his precinct, the distance from that place to the place of service may be shown.

The appearance of the plaintiffs' attorney to examine the notice and return was in no sense a waiver of the objection. They are entitled for these reasons to *Judgment on the verdict.*

JAMES MAGUIRE vs. MIDDLESEX RAILROAD COMPANY.

Suffolk. March 5. — June 19, 1874. WELLS & ENDICOTT, JJ., absent.

In an action for an injury caused by the alleged unskilful driving of a person, evidence of similar negligent acts on his part at other times is not admissible.

The admission of material, incompetent evidence under objection is ground for a new trial, although neither counsel nor court alludes to it afterwards in the course of the trial.

The fact that a person injured by the negligence of the driver of a horse-car was intoxicated at the time of the accident will not prevent his maintaining an action for damages unless his intoxication contributed to the injury.

Standing on the front platform of a horse-car when there is room inside, is not of itself conclusive evidence that a person injured by the negligence of the driver of the car was not in the exercise of due care.

TORT for an injury sustained by the plaintiff while a passenger in one of the defendant's horse-cars, by being thrown from it by the alleged carelessness of the driver. At the trial in the Superior Court, before *Devens*, J., the plaintiff testified that in May, 1871, he was a passenger on one of the defendant's horse-cars, which had no conductor, and was driven by a man usually employed as a watchman, but who also was employed by the defendant once or twice in the evening to drive. The plaintiff also stated that when he entered the car he observed the seats within were full, and took his place on the front platform beside the driver; that the driver started his horses upon a run, and when he had ridden about half a mile, and the car was going down a declivity, the driver suddenly reined in the horses and applied the brake, and stopped the car, and he was thereby thrown from the platform and fell upon his side, and the wheel crushed his arm.

"The plaintiff also called as a witness a man who, previous to the accident, had been in charge of the stables of the defend-

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ant at Medford, who stated that he had hired for the company the driver of the car from which the plaintiff was thrown, and that this driver had driven but four or five times over the road, and the witness had seen him stop several times very suddenly, and the defendant objecting to such evidence, the counsel of the plaintiff proceeded no further with the inquiry, and thereupon the defendant took exception to this evidence."

The evidence at the trial was conflicting on the points whether the car stopped suddenly, and whether the plaintiff was intoxicated at the time of the accident.

The defendant requested the court to instruct the jury that if the plaintiff was standing on the front platform of the car, when there was room for him to have gone inside, and fell, or was thrown to the ground, that he could not recover; but the court declined so to rule, and left it to the jury to determine under all the circumstances of the case as proved, whether or not the plaintiff had shown that he was in the use of due care when he met with the injury.

The defendant also requested the court to instruct the jury that if the plaintiff was intoxicated at the time he received the injury, he could not recover; but the court declined to do so, and instructed the jury that if they were satisfied that the plaintiff was intoxicated, and that his intoxication contributed to the injury, then the plaintiff could not recover.

The jury found for the plaintiff, and the defendant alleged exceptions to these rulings and refusals to rule.

L. M. Child & H. N. Sheldon, for the defendant.

E. H. Derby & W. C. Williamson, for the plaintiff.

AMES, J. The only error that occurred in the trial in the court below was in the admission of the testimony that the driver had been seen on several previous occasions to stop the car suddenly. The plaintiff's complaint was that in consequence of a sudden stop he was thrown from the platform, and injured by being run over. The question for the jury, supposing he had satisfied them that he was in the exercise of due care, was as to the exercise of the like degree of care on the part of the defendant at the time of the accident. The fact that the same driver had at some other times been guilty of careless or unskilful management could have no legitimate bearing upon the question as to

the care or skill exhibited at the time in controversy. This evidence was objected to, and the plaintiff's counsel appear to have yielded to the objection, and to have proceeded no further in this line of inquiry. It is true that it does not appear that it was afterwards alluded to, either by the counsel or the court, but it had been given in the trial, and we do not find anywhere any instruction to the jury to disregard it. It is impossible to say that it did not have some influence upon their decision, and the case therefore comes within the rule laid down in *Brown v. Cummings*, 7 Allen, 507. See also *Ellis v. Short*, 21 Pick. 142; *Farnum v. Farnum*, 13 Gray, 508. The plaintiff had ceased to pursue the inquiry, but the evidence, so far as he had gone, was in, against the defendant's objection. The only way to prevent the jury from regarding it as legal and material was to give them a distinct ruling that it was not so, and this does not appear to have been done.

Upon this point only we find it necessary to

Sustain the exceptions.

WILLIAM W. BENNETT vs. CITY INSURANCE COMPANY.

Suffolk. March 10. — June 19, 1874. COLT & ENDICOTT, JJ., absent.

- Where a policy of insurance issued by an insurance company in the name of A. has been sent to the agent of A., and shortly afterwards is returned by the agent to the company with a request to have it made payable to B., and the company cancels the first policy, and makes a new one to B.; and there is evidence that what was done after the delivery of the first policy to A., by the agent, was done without the knowledge or authority of A.; the keeping of the new policy by B. for seven months does not as a matter of law constitute an acceptance, on the part of A., of the new policy, although it is admitted by A. that the possession of the policy by B. was not fraudulent.

CONTRACT on a policy of insurance containing the following provisions: "No insurance whether original or continued shall be considered as binding until actual payment of the premium," and, "If this insurance be a mortgagee's interest, the assured shall assign to this company, in case of loss, an interest in said mortgage equal to the amount of loss paid."

At the trial in the Superior Court, before *Lord, J.*, the loss was admitted, and there was evidence tending to show that a policy was issued by the defendant to the plaintiff, through an insurance agent named Prince, who was not the defendant's agent, about November 6, 1871, and that about November 15, 1871, the policy was returned by Prince to the defendant with a request, as alleged by the defendant, to "make a policy payable to Charles A. Kingsbury, mortgagee;" or as alleged by Prince, to "make the original policy payable in case of loss to Charles A. Kingsbury, mortgagee;" that the request, however made, was made without the knowledge or authority of the plaintiff; neither Prince or Kingsbury having authority from the plaintiff to alter or change said policy in any way; and that said policy came into the possession of Kingsbury by mistake; that the defendant cancelled the original policy and issued a new one to Kingsbury as mortgagee, containing also the above provisions; that Kingsbury received the policy and retained it for seven months, when the insured premises were destroyed by fire; that the plaintiff then for the first time knew of the alteration of the policy; that Kingsbury offered to surrender the second policy if the defendant would pay the first one; but this the defendant refused, offering however to pay the second on Kingsbury assigning his mortgage to it, in accordance with the provisions of his policy; that the plaintiff paid Prince the premium on his policy when he received it, but Prince did not pay it over to the defendant until December, 1871, after the issue of the second policy, when he paid it together with other premiums paid on policies issued through him. In the course of the trial the presiding judge inquired of the counsel for the plaintiff whether it was claimed that the possession of the policy by Kingsbury was fraudulent, to which the counsel replied that no such claim was made.

The presiding judge ruled that upon the foregoing evidence the case could not be submitted to the jury, "because as matter of law the keeping of the policy by Kingsbury, for seven months, was an acceptance by the plaintiff of the second policy as a substitute for the first, notwithstanding the plaintiff gave no authority to Kingsbury, or Prince, or any one to have any change made in the policy, and notwithstanding the plaintiff had no knowledge of the circumstances:" and directed the jury to return

a verdict for the defendant; the plaintiff excepted to the above ruling.

W. Gaston & W. A. Field, for the plaintiff.

J. Turner, (of Rhode Island,) for the defendant.

AMES, J. The defendant insists that the original policy did not take effect for the reason that the premium was not paid; and also that it was cancelled before the loss occurred. It is not denied that the plaintiff paid the amount of the premium, but the defendant insists that this payment was upon the new policy. It appears that the original policy soon after its issue found its way back into the defendant's hands, and that a new one was issued by it, which it insists is still outstanding and in force, and upon which it professes to be ready to pay the loss.

But the plaintiff claims that he was not a party to this substitution; that it was transacted without his knowledge or consent; that it was not consented to by any person acting under any authority express or implied from him; that it was the result of mistake which did not come to his knowledge till after the loss occurred, and that the effect of the new policy is not merely to insure Kingsbury the mortgagee against loss, but also to require him in case of loss to assign the mortgage to the defendant, and thereby to deprive the plaintiff of all benefit from the policy. If the original policy took effect when it was first issued, and we see no reason to doubt it, it would continue in force until it was cancelled or modified by mutual consent. The alleged substitution of a new and different policy in its place could not be made by the defendant without the consent of the plaintiff, or of some person acting by his authority. Whether there had been any such consent or authority was a question of fact, and should have been submitted to the jury. The keeping of the new policy by Kingsbury the mortgagee for seven months, was a matter eminently proper for their consideration, as having some tendency to show an acceptance by the plaintiff of the alleged new arrangement. It was a mistake however to rule that as a matter of law it constituted an acceptance on the plaintiff's part. He should have been permitted to show that he gave no authority to any one to make the substitution, and that he had no knowledge of the circumstances and matters of fact relied upon by the defendant. If the alleged cancellation occurred without his express consent,

or under such circumstances that his concurrence should not be implied, the defendant is liable upon the original policy, and the case should have been submitted to the jury with an instruction to that effect.

Exceptions sustained.

LEONARD S. JONES vs. BENJAMIN B. NEWHALL.

Suffolk. March 27. — June 20, 1874. AMES & DEVENS, JJ., absent.

In this Commonwealth jurisdiction in equity can only be exercised when the parties have not a plain, adequate, and complete remedy at law.

If the only relief to which the plaintiff would be entitled in equity is the same in measure and kind as that which he might obtain in a suit at law, this court has not jurisdiction in equity, unless the remedy at law is doubtful, circuitous, or complicated by multiplicity of parties having different interests.

Equity will not decree specific performance of a written contract of sale at the instance of the vendor when all that is to be done by the vendee is the payment of money, for which the vendor may maintain an action at law, after a tender of performance on his part.

BILL IN EQUITY to enforce specific performance of the following agreement signed and sealed by the parties thereto :

“ This indenture, made this fourth day of December, A. D. 1872, by and between Leonard S. Jones, of Cambridge in the Commonwealth of Massachusetts, and Benjamin B. Newhall, of Boston in said Commonwealth, witnesseth,

“ That said Jones agrees to sell, and said Newhall to purchase, first, all the right, title, share and interest of the said Jones to and in any and all property belonging to the Worthington Land Associates, together with one promissory note for ten thousand dollars, dated April 18, 1872, belonging to said Jones, and being one of five of even amount and date given by Samuel A. Wheelock and secured by mortgage on land conveyed by said associates to R. A. Ballou and others ; second, all the right, title, share and interest of said Jones to and in any and all property belonging to the Dorchester Land Association, the share of said Jones consisting of fourteen shares of the stock of said Dorchester Land Association, together with two mortgage notes of \$3467.95 and \$4743.36, respectively, given by Samuel A. Wheelock to said Benjamin B. Newhall.

“ For which said property, said Newhall agrees to pay to said Jones the amount of all moneys invested by said Jones in said associations, interest on the same at seven per cent. per annum from the time of investment to the date hereof, and the additional sum of five thousand dollars as bonus. Said investments, interest, and bonus, amounting in all to thirty-four thousand one hundred and ninety-six $\frac{33}{100}$ dollars, payable as follows ; viz., ten per cent. of said sum, viz., 3419 $\frac{33}{100}$ dollars in cash, on the delivery of this agreement, and the balance in nine monthly payments, the first five of such payments to be 3755 $\frac{33}{100}$ dollars each, and to be made one in each of the first months of the year A. D. 1873, and the remaining four of said nine payments to be of 3000 dollars each, and to be made one in each of the months of June, July, August, and September of said year 1873, with interest on said payments at the rate of seven per cent. per annum. It is agreed, nevertheless, that if said Newhall shall elect to anticipate any of said payments, said Jones shall receive the same when offered.

“ And it is further agreed, that of said first payment of ten per cent. of said whole amount, two thousand dollars shall be applied to the payment of the property second above described, and 1419 $\frac{33}{100}$ dollars shall be applied to the payment of said property first above described ; that the five of said monthly payments next ensuing shall be applied to the payment of said property first above described, and, together with said 1419 $\frac{33}{100}$ dollars, shall be deemed full payment therefor ; and when made, said Jones agrees to transfer, convey, and deliver to said Newhall or his heirs or assigns, all the property first above described, and execute and deliver to him or them all instruments of conveyance necessary or proper for the conveyance of said property ; that after said transfer or delivery, the property second above described shall be transferred, conveyed, and delivered to said Newhall or his heirs or assigns, in amounts of one thousand dollars or multiples thereof, as payments of like amounts shall then be made by said Newhall ; an amount of said property equal to said 2000 dollars of said first payment of ten per cent. being retained by said Jones until the final transfer ; and that all proper instruments of conveyance of the same shall be executed and delivered as is above provided in the case of the property first described.

"All increase arising in the mean time from the sale of either of said properties above described or otherwise, whether in cash mortgages, notes, or other securities, shall be held in trust by said Jones for said Newhall, and delivered, transferred, and conveyed to said Newhall, his heirs or assigns, at the times above provided for the final transfer of either of said properties respectively. And it is further agreed, that said Newhall shall hold said Jones harmless from all taxes or assessments of whatever kind or by whomsoever levied or assessed upon said property above described, whether now existing or hereafter created.

"Said Newhall is hereby empowered to appear at all meetings of the associations above named, vote, and otherwise take part in the transaction of business at said meetings, in the place and stead of said Jones, as fully as said Jones could do: and is hereby nominated and appointed the attorney of said Jones to that extent."

The bill alleged the execution of the above agreement, the transfer of the plaintiff's interest in the Worthington Land Association, and payment therefor; that there remained due to the plaintiff from the defendant four of the monthly payments of three thousand dollars each mentioned in the agreement, with interest at seven per cent., together with the assessments that may be made on the Dorchester Land Association.

The bill also alleged readiness on the part of the plaintiff to perform his part of the contract and tender of performance, and refusal on the part of the defendant.

To this bill the defendant demurred on the ground that the plaintiff had a plain, adequate, and complete remedy at law. The demurrer was overruled, and the defendant appealed.

The case was then heard before *Ames, J.*, who reported it to the full court in substance as follows: The defendant executed the contract set up in the bill. The interest of the plaintiff in the Worthington Land Association has been conveyed to the defendant and paid for by him. In regard to the Dorchester Land Association, one instalment of \$3000 became due to the plaintiff under the contract, which the defendant refused to pay on demand, and also refused to pay an assessment then due or about to become due.

The plaintiff was permitted to testify, against the defendant's objection and exception, that his purpose in making said contract with the defendant was to effect a sale of his interest in the Dorchester Association property, and that the \$5000 bonus or profit was entirely on account of the Worthington property.

It appeared also that the defendant had made payments on the Dorchester Land Association property, amounting to the sum of \$4800, before the above mentioned instalment had become due.

It further appeared that the legal title to the land belonging to said association was in trustees, and that the plaintiff's interest therein was the right to receive a certain portion of the net proceeds of the sale of said land.

Upon these facts, the defendant insisted that the plaintiff was not entitled to relief in equity, on the ground that he had a full, adequate and complete remedy at common law.

The judge decided that the plaintiff was entitled to a decree according to the terms of his bill, and that a decree should be entered accordingly. From this decision the defendant appealed; and the case is accordingly reported for the consideration of the full court, on said demurrer, and all the above questions of law and fact.

R. D. Smith & A. E. Jones, for the plaintiff.

A. C. Clark, for the defendant.

WELLS, J. Jurisdiction in equity is conferred upon this court by the Gen. Sts. c. 113, § 2, to hear and determine "suits for the specific performance of written contracts by and against either party to the contract, and his heirs, devisees, executors, administrators and assigns." The power extends alike to written contracts of all descriptions; but its exercise is restricted by the proviso, "when the parties have not a plain, adequate and complete remedy at the common law." This proviso has always been so construed and applied as to make it a test, in each particular case, by which to determine whether jurisdiction in equity shall be entertained. If the only relief to which the plaintiff would be entitled in equity is the same in measure and kind as that which he might obtain in a suit at law, he can have no standing upon the equity side of the court; unless his remedy at law is doubtful, circuitous, or complicated by multiplicity of parties having different interests. *Charles River Bridge v. Warren*

Bridge, 6 Pick. 376, 396. *Sears v. Boston*, 16 Pick. 357. *Wilson v. Leishman*, 12 Met. 316, 321. *Hilliard v. Allen*, 4 Cush. 532, 535. *Pratt v. Pond*, 5 Allen, 59. *Glass v. Hulbert*, 102 Mass. 24, 27. *Ward v. Peck*, 114 Mass.

In contracts for the sale of personal property jurisdiction in equity is rarely entertained, although the only remedy at law may be the recovery of damages, the measure of which is the difference between the market value of the property at the time of the breach, and the price as fixed by the contract. The reason is, that, in regard to most articles of personal property, the commodity and its market value are supposed to be substantially equivalent, each to the other, so that they may be readily interchanged. The seller may convert his rejected goods into money; the purchaser, with his money, may obtain similar goods; each presumably at the market price; and the difference between that and the contract price, recoverable at law, will be full indemnity. *Jones v. Boston Mill Corporation*, 4 Pick. 507, 511. *Adderley v. Dixon*, 1 Sim. & Stu. 607. *Harnett v. Yeilding*, 2 Sch. & Lef. 548, 553. *Adams Eq.* 83. *Fry Spec. Perf.* §§ 12, 29.

It is otherwise with fixed property like real estate. Compensation in damages, measured by the difference in price as ascertained by the market value, and by the contract, has never been regarded in equity as such adequate indemnity for non-fulfilment of a contract for the sale or purchase of land, as to justify the refusal of relief in equity. When that is the extent of the right to recover at law, a bill in equity is maintainable, even in favor of the vendor, to enforce fulfilment of the contract and payment of the full amount of the price agreed on. *Old Colony Railroad v. Evans*, 6 Gray, 25.

Although the general subject is within the chancery jurisdiction of the court, yet inadequacy of the damages recoverable at law is essential to the right to invoke its action as a court of chancery in any particular case. The rule is the same whether applied to contracts for the sale of real or of personal estate. The difference in the application arises from the difference in the character of the subject matter of the contracts in respect to the question whether damages at law will afford full and adequate indemnity to the party seeking relief. If the character of the property be such that the loss of the contract will not be fairly

compensated in damages based upon an estimate of its market value, relief may be had in equity, whether it relates to real or to personal estate. *Adderley v. Dixon*, 1 Sim. & Stu. 607. *Duncuft v. Albrecht*, 12 Sim. 189, 199. *Clark v. Flint*, 22 Pick. 231. Story Eq. Jur. § 717. Adams Eq. 83. Fry Spec. Perf. §§ 11, 23, 30, 37.

The property in question in this case appears to be of such a character. It is not material, therefore, whether the interest of the plaintiff is in the nature of realty or of personalty. But the relief he seeks is not such as to require the aid of a court of equity. At the time this bill was filed the only obligation, on the part of the defendant, to be enforced either at law or in equity, was his express promise to pay a definite sum of money as an instalment towards the purchase of certain property from the plaintiff. That promise is supported by the executory agreement of the plaintiff to convey the property, contained in the same instrument, as its consideration ; but in respect of performance the several promises of the defendant are separable from the entirety of the contract, and each one may be enforced by itself as an assumpsit. The plaintiff is not obliged to sue in damages upon his contract as for a general breach. He may recover at law the full amount of the instalment due. In equity he can have no decree beyond that. He cannot come into equity to obtain precisely what he can have at law. *Howe v. Nickerson*, 14 Allen, 400, 406. *Jacobs v. Peterborough & Shirley Railroad*, 8 Cush. 223. *Gill v. Bicknell*, 2 Cush. 355. *Russell v. Clark*, 7 Cranch, 69.

The plaintiff has no occasion for any order of the court in regard to performance by himself. At most, all that is necessary for him to do in order to recover his judgment at law, is to offer a conveyance of a portion of his interest corresponding to the amount of the instalment due.

We do not regard the fact, stated in the report, that the defendant "also refused to pay an assessment then due, or about to become due," for which he was bound by the contract to provide, and hold the plaintiff harmless ; because that is immaterial upon demurrer, there being no allegation in the bill in reference to it. And besides, there would be sufficient remedy at law for such a breach, if it were sufficiently alleged and proved.

If the plaintiff will be compelled to bring several actions for his full remedy at law, it is because he has a contract payable in instalments; that is, he may have several causes of action. But he may sue them severally, or he may join them all in one suit, when all shall have fallen due, at his own election. He is not driven into equity to escape the necessity of many suits at law.

It is true, as the plaintiff insists, that a different rule exists in the English courts of chancery; and that in numerous cases, not unlike the present, relief in equity has there been granted by decree for payment of a sum of money due by contract, although equally recoverable at law. The maxim which, as we apply it, makes the want of adequate remedy at law essential to the right to have relief in equity in each case, has always been attached to chancery jurisdiction. But in the English courts it has been rather by way of indicating the nature and origin of the jurisdiction, and defining the class of rights or subjects to which it attaches, than as a constant limit upon its exercise. Courts of chancery were created to supply defects in proceedings at common law. Story Eq. Jur. §§ 49, 54. Their jurisdiction grew out of the exigencies of the earlier periods in the judicial history of the country, and was from time to time enlarged to meet those exigencies. Its limits, having become defined and fixed by usage, have not contracted as the jurisdiction of the common law courts was extended. It has always been held that jurisdiction once acquired in chancery, over any subject or class of rights, is not taken away by any subsequent enlargement of the powers of the courts of common law, nor by reason of any new modes of remedy that may be afforded by those courts. Story Eq. Jur. § 64 *i.* Snell Eq. 335. *Slim v. Croucher*, 1 De G., F. & J. 518.

Hence arose a wide range of concurrent jurisdiction, within which chancery proceeded to administer appropriate remedies, without regard to the question whether a like remedy could be had in the courts of law. *Colt v. Woollaston*, 2 P. Wms. 154. *Green v. Barrett*, 1 Sim. 45. *Blain v. Agar*, 2 Sim. 289. *Cridland v. De Mauley*, 1 De G. & S. 459. *Evans v. Bicknell*, 6 Ves. 174. *Burrowes v. Lock*, 10 Ves. 470. One of its maxims was that there must be mutuality of right to avail of that jurisdiction. Accordingly, if the contract or cause of complaint was

such that one of the parties might require the peculiar relief which chancery alone could afford, it was frequently held that the principle of mutuality required that jurisdiction should be equally maintained in favor of the other party, who sought and could have no other relief than recovery of the same amount of money due or measure of damages as would have been awarded by judgment in a court of law. *Hall v. Warren*, 9 Ves. 605. *Walker v. Eastern Counties Railway*, 6 Hare, 594. *Kenney v. Wexham*, 6 Mad. 355.

In contracts respecting land there is an additional consideration for maintaining jurisdiction in equity in favor of the vendor as well as the vendee, which is doubtless much more influential with the English courts than it can be here; and that is the doctrine of equitable conversion. It is referred to as a reason for the exercise of jurisdiction at the suit of the vendor, in *Cave v. Cave*, 2 Eden, 139. *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 331. Fry Spec. Perf. § 23.

In Massachusetts, instead of a distinct and independent Court of Chancery, with a jurisdiction derived from, and defined and fixed by long usage, we have certain chancery powers conferred upon a court of common law; whose jurisdiction and modes of remedy, as a court of law, had already become extended much beyond those of the English courts of common law, partly by statutes and partly by its own adaptation of its remedies to the necessities which arose from the absence of a Court of Chancery. This difference in the relations of the two jurisdictions would alone give occasion for different rules governing their exercise. *Black v. Black*, 4 Pick. 234, 238. *Tirrell v. Merrill*, 17 Mass. 117, 121. *Baker v. Biddle*, Baldw. 394.

The successive statutes by which the equity powers of this court have been conferred or enlarged have always affixed to their exercise the condition that "the parties have not a plain, adequate and complete remedy at the common law." This has been construed as referring "to remedies at law as they exist under our statutes and according to our course of practice." *Pratt v. Pond*, 5 Allen, 59. It has also been repeatedly held that, in reference to the range of jurisdiction conferred, the several statutes were to be construed strictly. *Black v. Black*, and *Charles River Bridge v. Warren Bridge*, *ubi supra*.

No reason or necessity remains for the maintenance of concurrent jurisdiction, except for the sake of a more perfect remedy in equity when the plaintiff shall establish his right to it. And such we understand to be the purport and intent of our statutes upon the subject. *Milkman v. Ordway*, 106 Mass. 232. *Angell v. Stone*, 110 Mass. 54.

A similar restriction upon the equity jurisdiction of the federal courts is so construed with great strictness. *Oelrichs v. Spain*, 15 Wall. 211, 228. *Grand Chute v. Winegar*, Ib. 373. *Insurance Co. v. Bailey*, 13 Ib. 616. *Parker v. Winnipiseogee Lake Cotton & Woollen Co.* 2 Black, 545. *Baker v. Biddle*, Baldw. 394. See also *Woodman v. Freeman*, 25 Maine, 531; *Piscataqua Ins. Co. v. Hill*, 60 Maine, 178.

Even in courts of general chancery powers and of independent organization, while the power to entertain bills relating to all matters which, in their nature, are within their concurrent jurisdiction, is maintained, yet the usual course of practice is to remit parties to their remedy at law, provided that be plain and adequate, unless for some reason of peculiar advantage which equity is supposed to possess, or some other cause influencing the discretion of the court. Kerr on Fraud & Mistake, 45. Bispham Eq. § 200; also § 37. Snell Eq. 334. *Clifford v. Brooke*, 13 Ves. 131. *Whitmore v. Mackeson*, 16 Beav. 126. *Hammond v. Messenger*, 9 Sim. 327. *Hoare v. Bremridge*, L. R. 14 Eq. 522; S. C. L. R. 8 Ch. 22.

The doctrine of *Colt v. Woollaston*, 2 P. Wms. 154, and *Green v. Barrett*, 1 Sim. 45, though not expressly overruled, has been questioned, (*Thompson v. Barclay*, 9 Law J. Ch. 215, 219,) and does not seem to govern the usual practice of the courts. See cases above cited, and *Newham v. May*, 13 Price, 749.

But, independently of statute restrictions, the objection that the plaintiff may have a sufficient remedy or defence at law in the particular case is a matter of equitable discretion rather than of jurisdictional right; and is therefore not always available on demurrer. *Colt v. Nettervill*, 2 P. Wms. 304. *Ramshire v. Bolton*, L. R. 8 Eq. 294. *Hill v. Lane*, L. R. 11 Eq. 215. *Barry v. Croskey*, 2 Johns. & Hem. 1.

According to the practice in this Commonwealth, on the other hand, under the statutes relating to the exercise of jurisdiction in

equity, a bill is demurrable, not only if it show that the plaintiff has a remedy at law, equally sufficient and available, but also if it fail to show that he is without such remedy. *Pool v. Lloyd*, 5 Met. 525, 529. *Woodman v. Saltonstall*, 7 Cush. 181. *Pratt v. Pond*, 5 Allen, 59. *Clark v. Jones*, 5 Allen, 379. *Metcalf v. Cady*, 8 Allen, 587. *Mill River Loan Fund Association v. Claflin*, 9 Allen, 101. *Commonwealth v. Smith*, 10 Allen, 448. *Bassett v. Brown*, 100 Mass. 355. *Same v. Same*, 105 Mass. 551, 560. The demurrer therefore must be sustained, and the
Bill dismissed.

HALES W. SUTER vs. NATHAN MATTHEWS.

Suffolk. March 27. — June 20, 1874. AMES & DEVENS, JJ., absent.

In this Commonwealth equity has no concurrent jurisdiction in a case of fraud where there is a plain and adequate remedy at law.

A bill in equity brought by S. against M. alleged that M. by false and fraudulent representations obtained from S. certain sums of money, a negotiable note, and a number of shares of railroad stock as collateral security therefor, and prayed for the repayment of the money, the surrender and cancellation of the note, and the return of the stock to the plaintiff. It appeared in evidence that M. indorsed the note before it was due to a bank, and deposited the shares with it as collateral; that S. knew this before the maturity of the note; and that the note not being paid when due, the shares were sold, and the amount received credited on the note. The stock was purchased by S. at the sale. M. then sued S. on the note, and this action was pending when the bill in equity was brought. *Held*, that the bill could not be maintained, as the plaintiff had a plain and adequate remedy at law.

BILL IN EQUITY. The case was heard by *Ames, J.*, who ruled that the bill could not be maintained for the reason that the plaintiff had a plain and adequate remedy at law, and reserved this question for the consideration of the full court, and also the question whether upon the evidence the bill could be maintained. The nature of the case appears in the opinion.

S. Bartlett & C. T. Russell, for the plaintiff.

D. Foster, for the defendant.

WELLS, J. The plaintiff's bill alleges that he has paid the defendant certain sums of money, has given to the defendant his promissory note for \$25,000, and deposited as security therefor

certain certificates of shares of corporate railroad stock ; that all these have been obtained from him under the pretence and representation that the defendant had, at the plaintiff's request, purchased for him five hundred shares of stock in the Boston Water Power Co., had advanced the commissions and purchase money for the same, and was carrying the stock for the accommodation of the plaintiff ; and that such pretence and representation were false and fraudulent.

The relief sought is, 1st, that the note may be declared void, and ordered to be surrendered and cancelled ; 2d, that the certificates of stock deposited as collateral may be restored to him ; 3d, repayment of the sums of money which he has paid.

One defence, relied on in the answer, is that there is full, complete and adequate remedy at law. In aid of this defence it avers that the defendant has already commenced an action upon the note, which is now pending in this court, as a court of law : also that, before the maturity of the note, the defendant indorsed it to the National Bank of the Commonwealth, and transferred to the bank the certificates of stock ; that, upon the dishonor of the note, the stock was sold by the bank and the proceeds applied in part payment of the note ; and that the plaintiff was informed and knew of the fact of such indorsement and transfer before the maturity of the note, and also of the sale of the stock afterwards, and that he became the purchaser thereof, and now holds the same by himself or by some friend for his use and benefit.

It appears from the plaintiff's own testimony that these facts are as alleged in the answer.

The note being now in the defendant's hands, cannot be again transferred so as to avoid the plaintiff's defence. That defence is just as complete and available at law as in equity.

The plaintiff, having already secured control of the identical shares of stock, cannot have, nor does he require specific relief for their restoration to him. His only claim, in that respect, is now reduced to that of compensation, the measure of which is the cost of the repurchase. It has become a money claim, recoverable at law upon the money counts in implied assumpsit ; the money so paid having been applied to the note in pursuance of the defendant's order and authority.

It is true that this repurchase was made after the bill was filed. But before filing his bill the plaintiff knew that the stock was held by the bank. By joining the bank as defendant and preventing the sale he might have secured specific relief. Omitting to do so, and securing control of the stock through the sale by the bank, he is not in the condition of one who has been deprived of specific relief to which he was entitled, or supposed himself to be, when he brought his bill, by the act of the defendant and without fault on his own part. *Milkman v. Ordway*, 106 Mass. 232. Under this bill he could not have prevented the sale; and, if the stock had been sold to a stranger, he could have recovered only the same damages for its conversion as he would recover in an action at law.

His cause of complaint, in this particular, having now become substantially a liquidated claim for money, as well as that for repayment of the several sums of money which the plaintiff has paid directly to the defendant, may be joined in one action of assumpsit. Or the latter might have been, and perhaps may still be filed under a declaration in set-off in the action already commenced against this plaintiff upon the note; and the plaintiff in that suit would then be unable to escape a judgment upon it by discontinuance of his suit. Gen. Sts. c. 130, § 21.

The position of the counsel for the plaintiff is doubtless correct, that in the English courts a concurrence of jurisdiction is recognized and maintained; and that in very many cases, especially in matters of fraud, jurisdiction in equity is upheld and exercised, notwithstanding the existence of a plain and adequate remedy at law. It is often so even where the remedy must be precisely the same in either court. But the mode in which chancery powers have been conferred upon this court, and the restrictions imposed upon their exercise, require the application of a different rule of practice in this respect, from that which the English courts have sometimes followed. The considerations bearing upon this point are set forth in *Jones v. Newhall*, ante, 244, considered and determined at the same time with this case. It may be added that the recent enactments making parties witnesses for and against themselves, and giving the right to interrogate each other in writing, remove one ground which formerly had much influence upon the question whether a party defrauded should find relief in

equity or be remitted to his remedy at law upon such proofs as were there attainable.

The rule in Massachusetts and the reasons for it, as stated in *Jones v. Newhall*, apply to cases of fraud as well as to other matters of equitable jurisdiction. We are satisfied that the ruling of the single justice, before whom the case was heard, was correct, that the bill cannot be maintained, for the reason that the plaintiff has a plain and adequate remedy at law.

Bill dismissed.

FREDERICK F. HASSAM vs. ADELINE BARRETT & others.

Suffolk. March 25. — September 9, 1873. COLT, J., absent.

April 4. — June 20, 1874. COLT, J., absent.

A deed absolute in form may in equity be shown by oral evidence to have been intended as security for a debt.

The relief afforded by equity in declaring a conveyance of real estate, absolute in form, to be a mortgage, where it is shown by oral evidence that it was given as security for the payment of a debt, is given on purely equitable grounds, and in the absence of such equitable consideration, the relief will be refused.

A voluntary conveyance of land absolute in form made by a debtor to one creditor in order to defraud his other creditors will not be deemed an equitable mortgage by proof of a subsequent oral agreement between the grantor and the grantees, whereby the latter agreed to reconvey on payment of the amount due him.

BILL IN EQUITY against the administrators and the heirs of George Barrett, deceased, to compel the reconveyance of a certain parcel of real estate, conveyed by the plaintiff to said Barrett by a deed absolute in form, but which the bill alleged was agreed between the parties to be security for a debt which the plaintiff owed Barrett. The bill did not allege that the agreement to that effect was in writing; the plaintiff offered to pay such sum as should be found due to the defendants.

The defendants demurred to the bill assigning for grounds of demurrer, that the agreement set forth, being in regard to an interest in lands, and not to be performed within one year from the making thereof, was not expressed to be in writing.

S. J. Thomas, for the defendants.

B. E. Perry & S. W. Creech, for the plaintiff.

WELLS, J. The questions raised by this demurrer have been discussed at length in the case of *Campbell v. Dearborn*, 109 Mass. 130, which was under consideration by the court when this case was argued. The decision in that case covers the ground of this and the demurrer must be *Overruled.*

The defendants having put in an answer, the case was heard before *Morton, J.*, who reserved it for the consideration of the full court on the following report :

"On January 8, 1856, the plaintiff was the owner of the premises described in his bill, subject to a mortgage for \$1500. He had a partner in business, who, for his private speculations, issued the notes of the firm to a large amount, rendering the firm and the partners insolvent. George Barrett was a creditor of the plaintiff, individually, to the amount of \$2250. For the purpose of securing Barrett and of preventing the creditors of the firm from reaching this property by attachment or proceedings in insolvency, the plaintiff made a deed, absolute in form, of the premises, to Barrett, and caused it to be recorded without Barrett's knowledge. Afterwards, within a month, he informed Barrett of the fact, and the following oral agreement was then made : Barrett was to pay the \$1500 mortgage, and to hold the property as security for the amount paid and his debt of \$2250, with interest at the rate of seven per cent. per annum. The plaintiff was to pay Barrett \$315 a year in the form of rent for the premises. As this amount exceeded the interest agreed on, it was agreed that upon a settlement the excess should be allowed to the plaintiff, with interest at the same rate of seven per cent. ; and upon such settlement, and the payment to Barrett of the amount found to be due, he was to convey the estate to the plaintiff.

"The plaintiff occupied the estate under this arrangement, paying taxes and repairs and paying the yearly sum of \$315 in the form of rent, until the death of Barrett. In July 1866, the parties accounted together orally, and it was found that, allowing for the excess of yearly payments over interest, and some other payments made by Hassam, there was then due Barrett \$3000. Barrett soon after became insane, and remained insane until his death in 1869.

"It also appeared that Hassam has, since this deed was given, settled with his creditors. Upon these facts the case is reported for the determination of the full court, such judgment to be entered as it shall deem proper."

B. E. Perry & S. W. Creech, for the plaintiff.

S. J. Thomas, for the defendants.

WELLS, J. This action cannot be maintained upon Barrett's oral agreement to reconvey the land, Gen. Sts. c. 105, § 1, and c. 100, § 19; nor by regarding the conveyance to him by the plaintiff as voluntary and unsupported by a legal consideration. *Blodgett v. Hildreth*, 103 Mass. 484. *Titcomb v. Morrill*, 10 Allen, 15. *Bartlett v. Bartlett*, 14 Gray, 277.

The demurrer was overruled because the bill alleged that the deed was given merely for security of a debt, and that the whole transaction constituted, in equity, only a mortgage, upon the principle established in *Campbell v. Dearborn*, 109 Mass. 130. But the theory of that decision is that dealings between borrower and lender of money, or debtor and creditor, conducted by requiring an absolute deed for security, and a renunciation of all legal right of redemption, are so significant of oppression, and so calculated to invite to or result in wrong and injustice on the part of the stronger towards the weaker party in the transaction, as in themselves to constitute a quasi fraud against which equity ought to relieve; as it does against the strict letter of an express condition of forfeiture. The grounds of relief being purely equitable, it may and should be refused if the equitable considerations upon which it rests are wanting.

In the present case they are manifestly so. The plaintiff himself, without any pressure or inducement from his creditor, appears to have taken advantage of the existence of his debt to Barrett to give validity to his deed, by furnishing for it a legal consideration; and thereby more certain efficiency to his attempt to defraud his other creditors. We do not feel called upon to defeat that purpose; unless it be in behalf and for the benefit of those whom he intended to defraud.

Fraud against creditors cannot be set up, it is true, by any one not standing upon the rights of a defrauded creditor, to defeat any legal claim or interest which the fraudulent debtor may seek to enforce. But such a party is in no condition to ask a court of

equity to interfere actively in his behalf, to secure to him the fruits of his fraudulent devices. One who comes for relief into a court whose proceedings are intended to reach the conscience of the parties, must first have that standard applied to his own conduct in the transactions out of which his grievance arises. If that condemns himself, he cannot insist upon applying it to the other party. The result is, the plaintiff must go out of court.

Bill dismissed, with costs.

ISAAC N. STANLEY vs. JOHN H. STARK & another.

Suffolk. March 19. — June 20, 1874. AMES & DEVENS, JJ., absent.

If the final decree of a single justice of this court, sitting in equity, is appealed from, without a report of the evidence or facts found upon which the decree was made, the only question raised by the appeal is whether the decree followed the frame of the bill and is justified by the record.

A bill in equity alleged that the plaintiff and one of the defendants had been members of a firm; that the firm had received a sum of money from the treasurer of a relief fund, upon the express trust that it should be used by the firm in reestablishing its business; that the money was placed in the hands of the defendant partner for this purpose, who delivered it to the other defendant, both parties having knowledge of the trust; that the defendant partner retired from the firm, agreeing that the plaintiff should continue the business and have the money for this purpose; that the plaintiff had made arrangements to continue said business, but the defendants refused to give it up, contending that the defendant in possession had the right to apply it to the payment of an old debt due him from the firm; that when the money was received from the treasurer, the firm gave ~~he~~ promissory note, without interest, with the agreement that if the money was used for the purpose named, the note should not be called for; and that when the defendant partner left, it was agreed that the plaintiff should take up this note, and give his own note in the place of it, and that this was done. The bill prayed that the defendants should be required to deliver the money to the plaintiff, and for general relief. *Held*, that a decree that the defendants should pay the sum of money to the plaintiff followed the frame of the bill and was justified by the record.

BILL IN EQUITY brought by the remaining partner in the firm of Stark, Stanley & Co. to recover a sum of money alleged to have been received by one of the defendants, a former copartner in said firm, upon a trust for the purpose of reestablishing the firm in business, and to have been deposited with the other de-

fendant, who had knowledge of the trust, and who applied it to the payment of a debt which the firm owed him.

At the hearing upon the pleadings and proofs, before *Endicott, J.*, a decree was passed that the defendants should pay to the plaintiff the sum of five hundred dollars with costs. The defendants appealed to the full court. The evidence was not taken by a commissioner, and no report of the facts was made by the judge. The case is stated in the opinion of the court.

E. M. Bigelow, for the defendants, cited *Allen v. Furbish*, 4 Gray, 504; *Huntington v. Clemence*, 103 Mass. 482; *Fuller v. Randall*, 1 Gray, 608; *Lime Rock Bank v. Plimpton*, 17 Pick. 159.

J. W. Hubbard, for the plaintiff.

COLT, J. The bill charges in substance that the money which is demanded of the defendants was originally received by the firm of Stark, Stanley & Co. out of a relief fund raised by subscription to aid mechanics and other sufferers by the great fire of 1872, upon the express trust that it should be used by the firm in re-establishing its business; that the money was first placed in the keeping of the defendant James H. Stark, one of the firm, who afterwards put it into the hands of his father John H. Stark, the other defendant, who had an old debt against the firm, both defendants knowing of the trust at the time, and that the money was to be used for no other purpose.

The bill then alleges that the other members of the firm afterwards retired from the partnership with an agreement that the plaintiff should have the money so appropriated, to be used by him for the purpose named; that he had accordingly made all necessary arrangements for recommencing and prosecuting the former business, but the defendants refused to give up the money, John H. Stark contending that he had a right to apply it to the payment of his debt. It is further stated in an amendment to the bill, that a promissory note without interest was given by the firm, when the money was advanced, to Mr. Norcross the treasurer of the committee having charge of the relief fund, upon the understanding and agreement that if the money was used for the purpose named the note should not be called for; and that when the other partners left, the agreement was that the plaintiff should have the fund if he would take up this note and procure the as-

sent of the committee. This, it is alleged, was done by the substitution of his own note for the original note of the firm.

The prayer is that the defendants may be required to deliver the money to the plaintiff, and for general relief.

The answers deny the creation or existence of any trust growing out of the transaction with the treasurer of the relief fund.

The case was heard by a justice of this court, and this is a simple appeal from his final decree, without any report of evidence or fact found upon which the decree was made. The only question before us is whether the decree follows the frame of the bill and is justified by the record. If it does, then it must be presumed that all the facts necessary to support it were proved at the hearing. It is enough if under the pleadings we can see that it is possible to make out a case which would justify the decree. *Smith v. Townsend*, 109 Mass. 500. *Ross v. Harper*, 99 Mass. 175.

The defendants contend that the allegation that a note was given for the money is equivalent to an allegation that the legal and equitable title to the money vested in the firm, who could have no defence to an action on the note. But it does not appear that the note was negotiable, or when it was payable, or that it was payable absolutely. All the allegations, taken together, show that it was given upon a contemporaneous agreement in the nature of a condition which, for all that appears, was in writing, and we cannot see that the whole transaction and all the agreements construed together did not appear at the hearing to be entirely consistent with the express trust alleged.

Nor can we see that the words of the alleged trust devoting this money to aid the defendants "in reëstablishing their business," as applied to the subject matter and interpreted by the surrounding circumstances, were not properly held by the judge to exclude the payment of a preëxisting debt as a preliminary step towards reëstablishing their business.

Decree affirmed with costs.

CHARLES C. SEWALL, executor, vs. HELEN M. ROBERTS & others.

Suffolk. March 23, 24. — June 20, 1874. AMES & DEVENS, JJ., absent.

A voluntary settlement fully executed cannot be revoked or altered by a second settlement of the same property, in the absence of any provision in the deed of settlement reserving such power to the settler.

A. in 1825 made a voluntary conveyance, without reserving any power of revocation, of personal property to an annuity company in trust to pay the income to him for life, and upon his death to transfer the principal sum to his executor or administrator, in trust for the special use and benefit of any child or children of A.; if one only, in trust for his or her use and benefit; if more than one, for their use and benefit equally, the legal representatives to take their parent's share; in case of A.'s death without leaving any issue, to pay the principal to the mother of A. for her own use; in case A. survived his mother and died without leaving any lawful issue, then to pay the principal sum to his executor or administrator in trust for the use of his heirs at law and the heirs at law of his mother equally to be divided between them. A. subsequently undertook to change the terms of the settlement. In 1865 he adopted a child in pursuance of the provisions of the Gen. Sts. c. 110, and died in 1872, leaving no other child. *Held*, that A. had an equitable life estate, and no power to change the terms of the settlement. *Held, also*, that the adopted child took the remainder of the property as a "child" under the settlement, as one of the "legal consequences and incidents of the natural relation of parents and children," by virtue of the Gen. Sts. c. 110, § 7.

The provisions of the Gen. Sts. c. 110, § 7, declaring that an adopted child "shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in natural wedlock," is not unconstitutional unless it interferes with vested rights.

Under the Gen. Sts. c. 110, if the parents of the child to be adopted are dead, and the Probate Court on the petition of the guardian of the child for leave to adopt it, which is assented to by the petitioner as guardian, makes a decree in accordance with the prayer of the petition, the fact that no guardian *ad litem* was appointed, even if such appointment should have been made, does not make the decree void, but voidable only, and it cannot be avoided by a stranger to the injury of the child.

BILL IN EQUITY by the executor of the will of Robert Roberts, to obtain the instructions of the court as to the disposal of the trust fund hereinafter mentioned. The case was reserved by Ames, J., on the bill, answers and report; and thereby appeared to be as follows:

On June 2, 1825, Nathaniel Curtis and Isaac Clapp, the administrators of Robert Roberts, Senior, calling themselves trustees of Robert Roberts of Boston, the testator, deposited with the Massachusetts Hospital Life Insurance Company the sum of one

115 202
154 597

115 262
157 84

hundred thousand dollars, and received from the company the following instrument in writing signed by its officers :

“The Massachusetts Hospital Life Insurance Company, in consideration of the principal sum of one hundred thousand dollars received by them of Nathaniel Curtis and Isaac Clapp, trustees of Robert Roberts, of Boston in the State of Massachusetts, in trust, as hereafter mentioned, the receipt whereof is hereby acknowledged, do hereby promise and agree to and with the said N. Curtis and I. Clapp, trustees, their executors and administrators, that the said company shall and will invest the same in bank or other stock, or in real estate, or place the same out at interest on mortgage or other security at the discretion of the directors; and that the said company shall and will yearly and every year during the natural life of said Robert Roberts, of Boston in the State of Massachusetts, pay or cause to be paid to the said Robert, in annual payments on the first days of January in each and every year during the natural life of the said Robert (upon his separate order and receipt, to be dated on or subsequent to the several days on which the said several payments shall fall due; which annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof, and not subject to their debts or control), the first payment to be made on the first day of January next, the same rate of interest on said principal sum as the company shall actually make and receive upon their capital stock paid in and the other property in their possession, including real estate, stocks of the United States, bank or other stock, notes, bonds and mortgages, after deducting all necessary expenses and charges (excepting office rent and the salaries of the company's officers and servants), and all actual losses by bad debts or otherwise, not arising from the actual fault of the company or their servants, and also half of one per centum per annum for the expenses of their office, and the labor, trouble, and responsibility of investing, taking care of and managing said trust properly. The said principal sum received of said N. Curtis and I. Clapp, trustees, to be invested and managed, and the amount of the income thereof to be estimated, ascertained and determined, by the directors of said company, in the way and manner provided in the extract from the article on annuities in trust, printed at the bottom. Interest to commence June 22, 1825.

“ And the said company, for the consideration aforesaid, further promise and agree to and with the said N. Curtis and I. Clapp, trustees, their executors and administrators, that in sixty days after proof of the decease of the said Robert, they will assign, transfer and pay the amount of the aforesaid principal sum, (or such part thereof as shall not have been lost by bad debts or otherwise, without the actual fault of said company or their servants,) and all interest then due thereon at the time of his death, in real estate, stocks, notes, bonds and mortgages belonging to said company, all, any or either of them, at the pleasure and discretion of the directors, at the prices at which the same respectively shall stand charged in the books of the company at the decease of said Robert, in the way and manner provided in said extract from said article, to his executor or executors, administrator or administrators, in trust for the special use and benefit of any child or children of said Robert Roberts; if one only, in trust for his or her use and benefit; if more than one, for their use and benefit equally, the legal representatives to take their parent's share; and in case the said Robert Roberts shall die without leaving any issue, then at his decease to pay said principal sum to his mother, Eliza Roberts, for her own use; but in case the said Robert Roberts shall die without leaving any lawful issue, and his said mother shall die before him, then at his decease to pay said principal sum to his executor or executors, administrator or administrators, in trust for the use of his heirs at law and the heirs at law of his said mother, equally to be divided between them.” Evidence was introduced upon the question whether the money deposited in trust was derived by the testator by inheritance from his father, a statement of which is unnecessary for the understanding of the questions of law decided.

On July 17, 1855, an indenture was executed under their hands and seals, between the testator and his mother, Eliza Roberts, of the first part, Nathaniel Curtis, Junior, of the second part, and Helen M. Roberts, wife of the testator, of the third part, which, after reciting the terms of the annuity in trust before mentioned, proceeded as follows: “ Now this indenture witnesseth, that the said Robert and Eliza Roberts, the parties of the first part, in consideration of one dollar to them severally paid by the said Nath'l Curtis, Junior, party of the second part, and for

other good and valuable considerations them thereto moving, in the event of the said Robert Roberts dying leaving his said wife surviving, but without leaving any issue, do hereby severally give, grant, sell, assign and transfer to the said Curtis, his executor or executors, administrator or administrators, all their respective rights, titles and interests in and to said principal sum of one hundred thousand dollars, to hold upon the following trusts; to wit, during the life of the said Helen M. Roberts, party of the third part, to reinvest the same with the Massachusetts Hospital Life Insurance Company, and to collect the incomes or profits arising therefrom, and after paying and deducting a reasonable compensation for his services, to pay over the residue of the income to the said Helen M. Roberts, the party of the third part, during her life, to her sole and separate use, independently of any husband; and upon her decease to convey, pay over and transfer the principal sum to such person or persons as would have been entitled to the same if the said Robert Roberts had deceased at that time, and these presents had not been executed."

Eliza Roberts died in the latter part of 1855, and the testator on March 27, 1865, executed an instrument under his hand and seal, as follows:

"Whereas by an indenture dated July 17, 1855, between me and my mother, Eliza Roberts, since deceased, of the first part, Nathaniel Curtis, Junior, of the second part, and Helen M. Roberts, my wife, of the third part, a conveyance was made by me and my said mother to said Curtis of all our interests in the sum of one hundred thousand dollars, deposited in the Massachusetts Hospital Life Insurance Company, after my death; and whereas by the death of my said mother I have become her sole heir at law, and an interest then contingent in said sum may have since become vested in me:

"Now know ye that, in consideration of the premises and of one dollar to me paid by said Curtis, the receipt whereof is hereby acknowledged, I hereby ratify and confirm the said indenture, and hereby sell, assign and convey to said Curtis all my right, title and interest in said principal sum of one hundred thousand dollars, to hold upon the following trusts: to wit, during the life of said Helen M. Roberts to reinvest the same with said life insurance company, and to collect the income and profit aris-

ing therefrom, and after paying and deducting a reasonable compensation for his services, to pay over the residue of the income to the said Helen M. Roberts during her life, and after her decease upon the trusts declared in said indenture."

On May 7, 1864, the testator presented a petition to the Probate Court for Norfolk County, for his appointment as guardian of Ada Parker, and said court on the same day, her parents being both dead, but her grandparents all living and assenting thereto, but without the appointment of any guardian *ad litem*, or the assent of any one acting as next friend, appointed the testator as guardian, as prayed for. A bond was given, but no inventory was ever returned.

On April 1, 1865, the testator and his wife presented a petition signed by them to said Probate Court, for the adoption of said Ada Parker, she being then under the age of fourteen years, and for the change of her name. This was assented to by the testator as guardian. All the said grandparents who signed their assent to his appointment as guardian were living at the time of the presenting the petition for adoption, and the decree thereon; but nothing appears on the records or files of said court tending to show that said grandparents, or either of them, had any notice or knowledge of such petition or proceedings; no notice or order of notice was issued on such petition for adoption, no guardian *ad litem* was appointed, and, so far as the records show, no one acted or assented as the next friend of said Ada Parker; and on the same day said court decreed that "from this day said child shall, to all legal intents and purposes, be the child of said petitioners, and that its name be changed to that of Ada Parker Roberts."

In April, 1872, the testator died, leaving no issue or child, unless said Ada is such, but leaving a will, dated April 3, 1865, and duly proved, the clauses of which material to this case are as follows:

"Second, whereas I, the said Robert Roberts, am lawfully entitled to and do receive annually of the 'Massachusetts Hospital Life Insurance Company,' an incorporated company in the Commonwealth aforesaid, having their place of business in the city of Boston in the County of Suffolk and Commonwealth aforesaid, the rents, income, interest, and profits of the principal sum of one hundred thousand dollars, held by said company in trust upon the condi-

sions contained in a certain 'annuity of trust,' it being numbered 'three,' and bearing date the second day of June in the year of our Lord one thousand eight hundred and twenty-five, I do now give, bequeath and devise to my beloved and devoted wife, Helen M. Roberts, the whole of said rents, income, interests and profits for and during her natural life; and at her decease I give, bequeath and devise the one half of said rents, income, interests and profits to my daughter by adoption, Ada Parker Roberts, and the other half of said rents, income, interests and profits to Helen S. Brown and Susan H. Brown, children of Henry S. Brown of the city of Milwaukee in the State of Wisconsin, share and share alike, or to the survivors for and during their natural life.

"Third, I give, bequeath and devise to my said wife, Helen M. Roberts, all the rest, residue and remainder of all my estate, of whatever name and nature or wherever found, whether real or personal estate, to her the said Helen M. Roberts, her heirs and assigns forever."

The persons who would have been heirs at law of said Eliza Roberts at the time of her death, if the testator, her only child and heir, had not then been living, were Ephraim Harlow, her brother, and David Harlow, Hannah T. Robbins and Sylvanus Harlow, children of Jesse Harlow, another brother of said Eliza, and Desire H. Felt, daughter of Desire H. Stephens, a sister of said Eliza.

The persons who would have been heirs of said Eliza Roberts if she had died when her son Robert Roberts, the testator, died, are Hannah S. Adams, Zilpha W. H. Spooner and Jane H. Drew, children of said Ephraim Harlow, brother of said Eliza.

If the said Ada Parker is not the child and heir at law of said Robert Roberts, named in said instrument of annuity in trust, within the intent and meaning of that instrument, then his heirs at law are said Robert Clark, Mary C. Brooks and Eliza H. Clark, the only children of Mary Clark, the only sister of Robert Roberts, Senior, (the only brother of said Robert Roberts, Senior, having died in infancy without issue,) and Hannah S. Adams, Zilpha W. H. Spooner and Jane H. Drew, all children of said Ephraim Harlow.

S. E. Sewall, for the plaintiff.

W. Colburn, for Ada Parker Roberts.

J. B. Richardson, for Mary E. Brooks, administratrix of the estate of Mary C. Brooks; Eliza H. Clark; and Andrew L. Alden, administrator of the estate of Robert Clark. 1. The testator had no power to modify the indenture of trust. 2. Ada Parker Roberts was not legally adopted. The guardian could not assent to his own petition. The duty of a guardian in such case requires the exercise of judgment, discretion and choice. To allow the petitioner to perform the duty of guardian would be to allow him to be a party and judge in the same cause. *McGregor v. Crane*, 98 Mass. 530. *Williams v. Robinson*, 6 Cush. 338. 3. Ada Parker Roberts was not the child and heir at law of Robert Roberts, within the intent and meaning of the annuity in trust. The first legislation in this State in regard to adoption was in 1851, twenty-six years after these words, heirs at law, had been written in this contract, and after these words had been defined by courts, used by legislatures, and by all persons in one common, certain and well-understood sense and signification.

Heirs at law then meant kindred by blood and no others; no such artificially made heir as this, a stranger to the blood, family and kindred, made heir by a mere proceeding at law, could have then been imagined or conjectured. It was contrary to all ideas and notions of all persons taking their definition from the common law: "*Solus Deus potest facere heredem, non homo.*" Co. Lit. 191 a, § 6, 3, n. "The word 'heir' in legal understanding signifies him to whom lands, tenements or hereditaments, by the act of God and right of blood, descend of some estate of inheritance." "He only is heir who is *ex justis nuptiis procreatus.*" Broom's Legal Max. (5th ed.) p. 515. 3 Washb. Real Prop. 6. And in this common law sense and meaning was the term used, and should be construed in this instrument. The time when a contract is made is to be regarded in expounding it. *Eaton v. Smith*, 20 Pick. 150. Met. Con. 309. And, where language has in any case acquired any peculiar meaning with reference to the subject matter of the contract, that meaning should prevail in that particular case. Met. Con. 275. *Haley v. Boston*, 108 Mass. 576. Technical terms should receive a technical interpretation. *Clarke v. Cordis*, 4 Allen, 466.

The general rule in the interpretation of a contract is to give to it the effect which the parties intended. *Haley v. Boston*, 108

Mass. 576. "Heirs" has often been construed to mean "children" or "issue," in order to carry out the intention of the party. *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243. *Bowers v. Porter*, 4 Pick. 198. *Haley v. Boston*, 108 Mass. 576. The point decided in this last case was that the term "without heirs" signified "without children." A consideration of the existing law, the time, the circumstances and the language of the instrument, leads to the conclusion that the term "heirs at law" then meant kindred, — those who had right by blood, those who were or could be heirs at law at that time. The term "heirs at law" cannot in this case be construed to include Ada Parker without giving to the act of 1851 a retroactive operation contrary to the general rule. *King v. Tirrell*, 2 Gray, 331. *North Bridgewater Bank v. Copeland*, 7 Allen, 139. *Garfield v. Bemis*, 2 Allen, 445.

In *King v. Dedham Bank*, 15 Mass. 447, the court said: "Having ascertained the nature and legal effect of the contract when made, we cannot give it a different construction in consequence of the statute which was afterwards passed."

The Gen. Sts. c. 110, § 7, are far from giving an adopted child the character of an "heir at law." They do not even apply that term to him. They confer upon him a right "for the purposes of inheritance;" but it is plain that Ada Parker cannot take any of this money by inheritance. It is not the case or estate of inheritance. This money does not descend from Robert Roberts. Whoever takes it does so as purchaser, or by gift, under this contract. 4 Dane Ab. 512. *Sedgwick v. Minot*, 6 Allen, 171.

The words "heir at law," in the contract, are words of description, not of limitation. Nor do the words "other legal consequences and incidents" have any force to enlarge the right or power of such child to take property not hereditary. The limitation that the adopted child shall not take "by right of representation," not only by express declaration, omits or forbids many things essential to make him an "heir at law," but leads to the conclusion that the legislature intended to limit his right of taking property strictly to inheritance from its parents by adoption, of such estates or property as the parents owned absolutely, and of which they had the full unqualified right of disposal.

In the same clause in this instrument which contains the words "heirs at law," are the words "child or children," and "issue," and "lawful issue," and it is plain that the term child is used in the same sense as issue, and means issue, and lawful issue. which sense and meaning would certainly not include Ada Parker; but if Ada Parker in the meaning of the instruments is not the child of Robert Roberts, certainly she is not his heir at law, because under the statute the person adopted becomes an "heir at law" only by becoming a "child" of any person. If this adopted child can come in anywhere in said instrument, it would seem to be under the clause "child or children of Robert Roberts," and the parties to the instrument plainly intended that if Robert Roberts had a child the principal sum should go to it upon his death; but it is clear from the clauses which follow that the "child or children" which they meant was "issue," or "lawful issue," and no other. If the mother of the testator had survived him this adopted child would in no event have received anything, because the mother was to receive the principal sum if the testator "died without leaving issue," which would have been the case at any time, and because the child could not take by right of representation; but this certainly was not the fate which the parties to the contract meant should await any person who should be a child of Robert Roberts.

D. E. Damon, for Barnabas Churchill, administrator of the estate of Hannah T. Robbins; *Eliza S. Harlow*, administratrix of the estate of David Harlow; *Jesse Harlow*, administrator of the estate of Sylvanus Harlow; *Alden Chase*, administrator of the estate of Desire H. Felt.

I. D. Van Duzee, for Jane H. Drew.

E. Ames, for Zilpha W. H. Spooner and Hannah S. Adams.

B. F. Thomas, for Helen M. Roberts. The language of the annuity in trust if applied to real estate would create an estate tail in Robert Roberts. It is within the principle of the rule; the estate is limited to the issue, the heirs of the body of the grantee. *Wild's case*, 6 Rep. 16 b. *Wood v. Baron*, 1 East, 259. *Nightingale v. Burrell*, 15 Pick. 104. *Albee v. Carpenter*, 12 Cush. 382. *Burford v. Lee*, Freem. Ch. 210. *Anonymous*, lb. 287. *Fearne Cont. Rem.* 112. 2 Roper Leg. 1522.

A devise to one and his children, he having no children at the time, is a devise to him and his issue, and creates an estate tail. *Nightingale v. Burrell*, *supra*. *Baile v. Coleman*, 2 Vern. 670. *Sweetapple v. Bindon*, 2 Vern. 536. *Butter v. Ommamoy*, 4 Russ. 70. *Gawler v. Cadby*, Jac. 346. *Butterfield v. Butterfield*, 1 Ves. Sen. 138. *Robinson v. Fitzherbert*, 2 Bro. Ch. 127.

It is a settled rule that the same words which would create an estate tail as to freeholds give an absolute interest as to chattels. *Albee v. Carpenter*, *supra*. *Fearne* Cont. Rem. 463, and cases cited. It is immaterial that the interest or income only is given for life. *Tothill v. Pitt*, 1 Madd. 488; *S. C.* 7 Bro. P. C. 453. *Glover v. Strothoff*, 2 Bro. Ch. 83. *Chandless v. Price*, 3 Ves. 99.

J. Gibson, of New York, (*C. R. Train* with him,) for Helen S. Brown and Laura H. Brown. 1. The indenture of June 2, 1825, did not execute a trust, but could be revoked or modified by the testator at pleasure. *Harrison v. McMenomy*, 2 Edw. Ch. 251. *Godsal v. Webb*, 2 Keen, 99. *Beatson v. Beatson*, 12 Sim. 281. *Lynn v. Ashton*, 1 Rus. & Myl. 188. *Gaskell v. Gaskell*, 2 Younge & J. 502. *Buford v. McKee*, 1 Dana, 107. *Geary v. Page*, 9 Bosw. 290. In the present case there was never any communication to the heirs at law, or those claiming under them, that the testator had made, or ever intended to make, this gift to them, or had created or intended to create a trust for their benefit. The trust was therefore never executed, as there can be no gift without a donor, funds or property as the subject of donation, and a recipient and acceptance. There may be an intention to give; the donor may have property he could give; and there are many, no doubt, ready to accept anything that is to be given. But all these do not severally make an executed gift or create a trust for effectuating a donation. All must concur at one and the same time, not only in purpose and intention, but terminate in final and absolute execution, in order to constitute an executed gift or trust for that purpose. Here, there never existed this concurrence. The testator not only never offered the gift to those claiming, but before the time arrived when they could profit by its reception, and before any communication of the intention to give, he revoked the proposal. They not only never accepted the proposed bounty, but the fact on which an acceptance could have been based was never communicated, and the testator coun-

termanded the direction and gave the fund to others. This change was specially made as to the income of the fund, directed to be paid to his wife during her life, and this change was made over twenty years before his death; thus, *pro tanto*, modifying the trust from and after his death.

MORTON, J. In June, 1825, Nathaniel Curtis and Isaac Clapp, the administrators of Robert Roberts, Senior, describing themselves as trustees of Robert Roberts, deposited with the Massachusetts Hospital Life Insurance Company the sum of one hundred thousand dollars, and received from the company the instrument called an annuity in trust, of which a copy is annexed to the bill. The source from which Curtis and Clapp received this sum is not directly stated in the report, but the only fair inference from the facts stated is, that it was a part of the estate of Robert Roberts, Junior, which came to him by inheritance from his father. For the purposes of this suit, the sum deposited is to be regarded as deposited by Robert Roberts, Junior.

It presents the case of a voluntary conveyance by him to the insurance company as trustees, upon the trusts declared in the instrument delivered by them. The first question arising in this suit is whether such voluntary settlement was revocable by the settler during his life or by his will.

There is much apparent conflict in the numerous decisions upon this subject, but the rule is well settled upon the weight of the authorities, that where the conveyance is fully executed and the trust perfectly created, the settlement cannot be revoked or altered by a second settlement of the same property, in the absence of any provisions giving the settler the power to do so. The decisions in this state are uniform to this effect. In *Hildreth v. Eliot*, 8 Pick. 293, the court held that a voluntary settlement fairly made by a woman in contemplation of marriage, could not be set aside by the settler, or by the court upon her application. The same point was decided in *Falk v. Turner*, 101 Mass. 494. In *Salisbury v. Bigelow*, 20 Pick. 174, Wilde, J., says: "It seems to be a well settled principle of equity, that when a voluntary settlement is fairly made, it cannot be annulled by the settler, unless a power of revocation be reserved for that purpose."

In *Stone v. Hackett*, 12 Gray, 227, the settler transferred to a trustee certain shares of stock upon the trusts, that the dividends

were to be paid to him during his lifetime, and at his death the stock to go to certain charitable societies, reserving the power of revoking or modifying the trusts. He did not execute the power to revoke or modify the trusts, and the court upheld the settlement as valid against his widow claiming a distributive share of his estate. In delivering the judgment of the court, Bigelow, J., says: the principle is "now well established and uniformly acted on by courts of chancery, that a voluntary gift or conveyance of property in trust, when fully completed and executed, will be regarded as valid, and its provisions will be enforced and carried into effect against all persons except creditors or *bond fide* purchasers without notice. It is certainly true that a court of equity will lend no assistance towards perfecting a voluntary contract or agreement for the creation of a trust, nor regard it as binding so long as it remains executory. But it is equally true that if such an agreement or contract be executed by a conveyance of property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and *cestui que trust* is deemed to be established, and the equitable rights and interests arising out of the conveyance, though made without consideration, will be enforced in chancery." The same general rule is recognized in *Sherwood v. Andrews*, 2 Allen, 79. In *Viney v. Abbott*, 109 Mass. 300, the rule is said to be well established that "a voluntary settlement completely executed, without any circumstances tending to show mental incapacity, mistake, fraud, or undue influence, is binding and will be enforced against the settler and his representatives, and cannot be revoked, except so far as a power of revocation has been reserved in the deed of settlement."

Though the cases above cited differ in details from the case at bar, yet the principle upon which they turn applies to and is decisive of it.

The plaintiff's testator, through the administrators of his father, voluntarily transferred his property to the Life Insurance Company, who received it and for many years managed it, upon the trusts declared in the "annuity of trust." The conveyance was completed and executed, the trust was fully created. The legal title to the property vested in the trustees, and the settler parted with all his power and dominion over it. The declaration

of trust contains no power of revoking the trusts, but on the contrary provides that the "annuity and principal sum are both hereby declared to be inalienable by the respective grantees thereof, and not subject to their debts or control." It was a voluntary settlement fully completed and executed, and could not be revoked by the settler. *Ellison v. Ellison*, 6 Ves. 656. *Kekewich v. Manning*, 1 De G., M. & G. 176. It follows that the new settlement made on July 17, 1855, was invalid, that the will of Robert Roberts, Junior, is inoperative so far as it affects the fund in controversy, and that such fund must be distributed according to the provisions of the original settlement.

The property was held by the insurance company upon the trusts to pay the annuity or interest provided for in the declaration to the settler during his life, and upon his death to transfer the principal sum to his executors or administrators, "in trust for the special use and benefit of any child or children of said Robert Roberts; if one only, in trust for his or her use and benefit; if more than one, for their use and benefit equally, the legal representatives to take their parent's share; and in case the said Robert Roberts shall die without leaving any issue, then at his decease to pay said principal sum to his mother, Eliza Roberts, for her own use; but in case the said Robert Roberts shall die without leaving any lawful issue, and his said mother shall die before him, then at his decease to pay said principal sum to his executors or administrators in trust for the use of his heirs at law and the heirs at law of his said mother, equally to be divided between them."

It is argued that this language, if applied to real estate, would create an estate tail, and that its effect applied to personal estate is to give the settler an absolute property, and thus to render the fund subject to his control. But such a construction is clearly contrary to the intention of the parties, and would wholly defeat the purposes of the settlement. The fund is declared to be inalienable by the settler; the Life Insurance Company did not hold it as a mere agent, but during his life had a power coupled with an interest, and the whole scheme of the settlement shows that Roberts was to have merely an equitable life estate, and not an interest which would enable him at any time to terminate the trust and defeat the settlement. It is not like the case cited of

Albee v. Carpenter, 12 Cush. 382, where a bequest of personal property was made to one and her heirs, and if she die without issue, then a gift over. Here the gift is to Roberts for his life only, with a gift over to his children or issue, who take by purchase and not by limitation.

Robert Roberts died in 1872, his mother having died before him. He never had any issue born of his body, but in 1865 he adopted Ada Parker, who survived him, and is one of the respondents.

It is contended that this adoption was not legal and valid. The Probate Court, in due form, upon the petition of said Roberts and his wife, passed a decree permitting them to adopt the child, being under the age of fourteen years. She had no parents living, and her next of kin were her grandparents, who lived in New Hampshire. The said Roberts had been previously duly appointed guardian of the child, with the written consent of her next of kin. As such guardian he consented in writing to the adoption. It is objected that the decree is void because it does not appear that notice was given to the next of kin, or that a guardian *ad litem* was appointed to represent the child.

The statute provides that "The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption. If neither parent is living, the guardian of the child, or if there is no guardian, the next of kin in this State, may give such consent; or if there is no next of kin, the court may appoint some suitable person to act in the proceedings as next friend of the child, and to give or withhold such consent." Gen. Sts. c. 110, § 2.

The fourth section provides that a notice of the petition shall be published in a newspaper in the county, "when a child has no parent living, and no guardian nor next of kin in this State." No further provision is made for a case like the present, of a petition by a guardian for the adoption of his ward. There was a literal compliance with the statute, and the only question is whether the court should, upon general principles, have appointed a guardian *ad litem* for the infant.

The court had jurisdiction of the subject matter and of the parties; and if it be conceded that in such case it should appoint a guardian *ad litem*, the failure to do so would not render its de-

cree absolutely void. It would at most be an irregularity which might render it voidable by the infant at her election. *Austin v. Charlestown Female Seminary*, 8 Met. 196. *Hill v. Keyes*, 10 Allen, 258.

It was clearly for her benefit, and a stranger cannot avoid it to her injury. We are of opinion, therefore, that the adoption was valid, and the next inquiry is, what are the rights of the adopted daughter under her father's settlement.

The statute provides that "A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation." Gen. Sts. c. 110, § 7.* This language is very broad and comprehensive, and it was manifestly the intention of the legislature to provide that, with the exceptions named, the adopted child should, in the words of the sixth section, "to all legal intents and purposes be the child of the petitioner."

The adopted child, in this case, therefore, in construing her father's settlement, must be regarded in the light of a child born in lawful wedlock, unless the property disposed of by the settlement falls within one of the exceptions. It is true that if she takes under the settlement, the property does not come to her by inheritance, but it comes to her as one of the legal consequences and incidents of the natural relation of parents and children. Does it fall within either exception of the statute? It cannot be claimed that it falls within the last exception as property from the kindred of the parents by right of representation.

The other exception is that she cannot take property "expressly limited to the heirs of the body or bodies of the parents by adoption." The term "heir of the body" is a well established technical term, with which the words "children" or "issue" or "lawful issue" are not synonymous. The rule of construction

* In 1871, the sections of c. 110 of the Gen. Sts. relating to adoption were repealed; but the provisions of the sections cited were substantially reenacted. St. 1871, c. 310.

enjoined by our statutes is, that technical words or phrases which have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning, unless it is inconsistent with the manifest intent of the legislature or repugnant to the context. Gen. Sts. c. 3, § 7.

The language of the statute shows that the legislature intended to use the phrase "heirs of the body or bodies" in its primary technical sense. The terms of the settlement, above cited, do not limit the estate expressly "to the heirs of the body" of Roberts; and the terms therein used, "child or children," "issue" and "lawful issue," are not equivalent terms, and do not lead to the same construction and legal result as would be reached if the estate was in direct words limited to the heirs of his body. We are therefore of opinion that the case does not fall within either of the exceptions of the statute, and that, as to the property in question, Ada Parker Roberts is to be deemed the child of Robert Roberts, the same as if she had been born to him in lawful wedlock. It follows that, in the contingency which has happened, she is as such child entitled to the whole of the principal fund.

It is argued that this statute is unconstitutional, as applied to a settlement made before its passage, because it takes property from one person and gives it to another. But until the death of the settler it was uncertain what persons would take under the settlement, and no title ever vested in those who are now claiming as his heirs or the heirs of his mother against his adopted daughter. The statute is an important one, general in its application, and passed by the legislature as the guardian of the public interests, and is to be upheld unless it clearly exceeds their powers. Much more extensive powers have been exercised without question, in the enactment of statutes affecting tenures and the interests of persons unborn or having remote expectations. Such was the St. of 1791, c. 61, giving to tenants in tail the power to bar by deed the issue in tail, and the St. of 1804, c. 59, providing a method for barring remainders and reversions expectant on estates tail, and the St. of 1851, c. 14, § 1, for the barring of equitable estates tail. *Clarke v. Cordis*, 4 Allen, 466.

An instance more nearly like the statute we are considering is found in the provisions first enacted in the Revision of 1836

that an illegitimate child, if his parents intermarry and his father acknowledges him, shall be considered as legitimate to all intents and purposes. Rev. Sts. c. 61, § 4. St. 1853, c. 253. And in *Loring v. Thorndike*, 5 Allen, 257, it was held that this statute gave to an illegitimate child the same rights which a child born in lawful wedlock would have, under a will proved before the statute was passed.

The fact that the statute, as one of its incidental effects, changes the descent and devolution of property, does not render it invalid unless it defeats vested rights. As we have seen, in the contingency which has happened in this case, no right adverse to the adopted daughter had vested in the heirs who now claim, and therefore none have been defeated or impaired.

It is also argued that the result we have reached is opposed to the intention of the settler. But, as is often the case in deeds or wills providing for a remote future, he could have had no intentions as to the particular person who was to take. His general intention was that the property should go in the first instance to his children as a class. Whoever at his death fell within this class was within this general intention, and as his adopted daughter is by law his child, she belongs to the class intended to take, and her rights cannot be defeated upon the assumption that he did not intend her to take.

The views we have taken render immaterial the other questions argued at the bar. The result of the whole case is that Ada Parker Roberts, as the only child of Robert Roberts, the settler, is entitled to receive the whole of the principal of the trust fund.

Decree accordingly.

COMMONWEALTH vs. FRANKLIN INSURANCE COMPANY.

Suffolk. April 1. — June 20, 1874. COLT & AMES, JJ., absent.

Receivers, appointed in pursuance of the Gen. Sts. c. 58, § 6, of an insolvent insurance company, are not responsible merely by accepting the trust and receiving the assets of the company, on the covenants of a lease previously made by the company. To bind them there must be an election on their part, or some act equivalent in law to an election.

A. made a lease of a building to an insurance company for \$1250 a quarter; the company removed from the building and allowed B. to occupy it, and hired another building from B., for which they agreed to pay the same rent that was due from them to A. under the first lease. By a verbal agreement between the company and B., the company continued to pay A. the rent due under the first lease and paid no other rent. The company afterwards removed to a third building and underlet the second to C. The company then became insolvent and receivers were appointed. Before the January rent became due B. threatened to eject C. unless the rent was paid. C. notified the company and the receivers. A proposition was made to the receivers by B. to take \$1250 on January 1, and a dividend as the rent due April 1, when all the leases terminated. The receivers took no formal action on this, but on January 1, one of them gave B. a check for \$1250, and collected \$1200 of C. This check was indorsed and paid to A. as the rent of the first building. *Held*, that this was an election on the part of the receivers to pay to B. a dividend on the rent of the second building due April 1, but that it was not an election on their part to pay rent of the first building to A.

TWO PETITIONS: one of William S. Bullard and others, trustees, that the receivers of the Franklin Insurance Company should be ordered to pay them the rent of a building No. 44 State Street, Boston; the other of George Higginson and others, members of the firm of Lee, Higginson & Company, that the said receivers should be ordered to pay them the rent of a building at the corner of State and Devonshire Streets, Boston.

Hearing before *Morton, J.*, who reported the case to the full court as follows:

"The Franklin Insurance Company for many years occupied as their counting-room premises now numbered 44 State Street. In the year 1871 the occupation of this company was under a lease from William S. Bullard and others, trustees, at a yearly rent of \$5000, which lease expired April 1, 1873.

"Under the agreement with Lee, Higginson & Co., hereinafter set forth, the Franklin Insurance Company vacated 44 State Street in the year 1871, when Lee, Higginson & Co. as occupants and tenants entered into possession thereof, and still continue such occupation; but said Franklin Insurance Company continued to pay to said Bullard and others, trustees, the rent and taxes due and payable under and by virtue of said lease, and said trustees never released said company from any of its covenants or obligations under said lease.

"As an inducement for this change of occupation, Lee, Higginson & Co. paid said insurance company \$10,000 in cash, procured and underlet to said company rooms at the corner of Devonshire

and State Streets, under a lease expiring like the former on April 1, 1873, and reserving the same amount of rent; viz., \$1250 a quarter, and agreed verbally with said company that payment by the latter of the rent and taxes due said trustees should be equivalent to payment of rent under the new lease; in other words, that said company should pay rent under one lease only, viz., under the lease from said trustees.

"Under both leases \$1250 became due and payable on the first day of January, and first day of April, 1873, but no taxes then.

"In the fall of the year 1872, said company moved from the premises at the corner of State and Devonshire Streets to a third counting-room, No. 46 State Street, and verbally underlet to the Eliot National Bank the room at the corner of State and Devonshire Streets, for the remaining term of the lease from Lee, Higginson & Co., for the sum of \$1200. The Eliot Bank occupied the same from October 1872, till after April 1, 1873.

"By decree of this court the Franklin Insurance Company passed into the hands of receivers on December 3, 1872. In December, Lee, Higginson & Co. threatened to eject the Eliot Bank unless the quarter's rent due January first was paid, amounting to \$1250. Said bank notified said company and receivers of this threat and demand. Various propositions were made by the counsel of Lee, Higginson & Co. to said receivers relative to a settlement of the claim; among others, a proposition in writing to take \$1250 on January first, and a dividend as the rent and taxes due April first.

"No formal action was taken in regard to this by the receivers, but on January 1, 1873, one of the receivers paid Lee, Higginson & Co. \$1250, and collected of the Eliot Bank \$1200. The check for \$1250 was indorsed and paid to said trustees as rent of 44 State Street. Said trustees had always received said rent by check of said insurance company. No rent was paid on either lease April 1, 1873. No taxes were due.

"The petitioners, said trustees, claim \$1250, the whole rent due April first, or a dividend thereon, *pro rata*, with other creditors. The petitioners, Lee, Higginson & Co., claim a like dividend on the same sum, but admit that under their agreement with said company, if either claim of said trustees is allowed, they, Lee, Higginson & Co., have no claim."

F. V. Balch, for Bullard and others.

W. Minot, Jr., for Lee, Higginson & Co.

A. Jackson, for the receivers.

ENDICOTT, J. The first question to be considered is the claim of Bullard & others, trustees, for payment of rent of 44 State Street, from January 1 to April 1, 1874, under their lease to the Franklin Insurance Company. The receivers who were appointed December 3, 1872, were not responsible for this rent merely by accepting the trust, and receiving the assets of the Franklin Insurance Company. *Hoyt v. Stoddard*, 2 Allen, 442. They could have elected to take possession, and assume the liability to pay the rent, according to the covenants of the lease, if they had deemed it for the interest of the creditors so to do, but until such election, or the doing of some act, which would in law be equivalent to an election, they are not liable. As receivers they cannot be held merely on the covenants, but become liable solely by reason of their own acts. *Turner v. Richardson*, 7 East, 335.

It is not contended that the receivers were in possession, or did any act on the premises, but the claim is made that the payment of the rent due January 1, 1873, was equivalent to an election, and that they are therefore bound to pay the rent for the following quarter, or in other words, until the expiration of the lease. It is true that the check, by which the rent for 44 State Street due January 1, was paid, was the check of the receivers payable to Lee, Higginson & Co., and indorsed by them to Bullard & others, trustees, and was accepted by the trustees as a payment under their lease to the Franklin Insurance Company. But upon the facts reported this check was not given in settlement of the rent, then due for 44 State Street, but in pursuance of a compromise entered into with Lee, Higginson & Co., in regard to the occupation of the office at the corner of State and Devonshire Streets, under the lease from Lee, Higginson & Co. to the Franklin Insurance Company. This payment was made as one of the stipulations of the compromise, and in part performance of it by the receivers. Another stipulation was that the receivers should pay a dividend on the rent and taxes due April 1, 1873, on the same premises. The check being given under that compromise, and for that purpose, no inference can be drawn from its use by Lee, Higginson & Co. for another purpose forming no part of the

compromise. The fact that they did so use it does not bind the receivers, and is not equivalent to an election to take the lease of 44 State Street, for the benefit of the creditors, while it does clearly indicate an election to assume the liability for the rent of the office on the corner of State and Devonshire Streets. There must be some occupation and use of or some dealing and intermeddling with the estate, or some act, admission or agreement which in terms, or by necessary implication, indicates an election. *Copeland v. Stephens*, 1 B. & Ald. 593. *Thomas v. Pemberton*, 7 Taunt. 206. *Hill v. Dobie*, 8 Taunt. 325. *Ansell v. Robson*, 2 Crompt. & J. 610. *Hanson v. Stevenson*, 1 B. & Ald. 303. *Ex parte Faxon*, 1 Lowell, 404. *Martin v. Black*, 9 Paige, 641. The petition of Bullard & others must therefore be dismissed.

The second question arises on the petition of Lee, Higginson & Co., for allowance of the rent claimed to be due them April 1, 1873, under their lease to the Franklin Insurance Company. We think the receivers, by their dealings and agreement with Lee, Higginson & Co., have elected to take this lease, and to pay the rent and taxes according to its covenants. But the agreement by which this was done stipulates for the payment of a dividend only on the rent and taxes due on that date. Lee, Higginson & Co. are therefore entitled to such dividend on the amount of rent and taxes so due as is paid to other creditors.

Decree accordingly.



FREDERIC POPE vs. ALVAH A. BURRAGE & others.

Suffolk. March 27. — June 20, 1874. AMES & DEVENS, JJ., absent.

Although an advertisement, under a power of sale in a mortgage, does not state the terms of sale, or that the terms would be stated at the time of the sale, the fact that at the sale a deposit was required, and that this prevented a person then present from bidding, does not invalidate the sale, if the mortgagee acted in good faith, and the requiring a deposit was usual and reasonable.

The finding as a fact that the holder of a mortgage in selling the mortgaged premises did all that was required by the terms of the power of sale contained in the mortgage, and by the good faith required of a mortgagee selling under a power, is equivalent to a finding that the terms of the sale were usual and reasonable, and calculated for the protection of all parties interested.

BILL IN EQUITY against Alvah A. Burrage and William W. Burrage, executors of William Burrage, Josiah Burrage and Edward G. Russell, to redeem a parcel of land in Cambridge from a mortgage. Hearing before *Devens, J.*, who reported the case for the consideration of the full court substantially as follows :

The defendants, Alvah A. and William W. Burrage, assignees of the mortgage, advertised the premises for sale under the power. The advertisement gave no notice that any sum of money was to be required as a deposit at the time of sale.

At the sale, September 8, 1873, the auctioneer gave notice that a deposit of two hundred dollars would be required, unless the purchaser was known either to the holders of the mortgage or to the auctioneer. The defendants, Josiah Burrage and Russell, were both present at the sale in consequence of having seen the advertisement, and the said Russell, being unknown, did not bid because he had not the sum of money to make the deposit, and the estate was sold to the defendant, Josiah Burrage, for \$2550. The plaintiff did not know of and was not represented at the sale. On September 17, 1873, Josiah Burrage sold the estate to the defendant Russell, for \$3000.

The defendants, Alvah A. and William W. Burrage, had made several written demands upon the plaintiff for payment of the mortgage debt ; and on June 27 gave notice that if the debt was not paid they should foreclose the mortgage ; and on July 29, 1873, gave him written notice that they should proceed to foreclose the mortgage, but gave no notice to the plaintiff of the time or place of the sale, other than by publishing said advertisement.

The judge found that there was no want of good faith on the part of the holders of the mortgage ; that upon all the evidence, the holders of the mortgage did all that was required by the terms of the power, and by the good faith required of a mortgagee selling under a power, subject to the opinion of the full court on the question reserved ; and that the premises were worth at least three thousand dollars.

The presiding judge reserved the question whether, inasmuch as the advertisement did not state the terms of sale, or that the terms would be stated at the time of the sale, the fact that at the sale a deposit was required as above set forth, and that this prevented a bid by said Russell, rendered the sale invalid, and entitled the complainant to the relief prayed in his bill.

O. W. Holmes, Jr. & W. A. Munroe, for the plaintiff. A scrupulous regard to the interests of the mortgagor is always required in the summary proceeding under a power of sale. *Montague v. Dawes*, 14 Allen, 369, 373. Thus in the form of the advertisement a literal compliance with the terms of the power is not enough, if anything more can reasonably be done to secure the interests of the purchaser. It must show who orders the sale. *Roche v. Farnsworth*, 106 Mass. 509. *Hoffman v. Anthony*, 6 R. I. 282. It must properly describe the premises and the interest to be sold, so that parties may know what they are going to buy. *Fenner v. Tucker*, 6 R. I. 551, 553. *Fowle v. Merrill*, 10 Allen, 350. *Burnet v. Denniston*, 5 Johns. Ch. 35, 42. It must set forth the time and place of the sale. *Fenner v. Tucker, supra*. It must, in short, inform the public beforehand what, when and how they may buy. It is another equally clear principle that any conduct of the person controlling the sale which tends to diminish competition is a ground for setting the sale aside, especially if the mortgagor is absent. It is enough that he causes the loss of a single bid. *Fenner v. Tucker, supra*. 1 Sugd. Vend. & Purch. (Am. ed.) 17, and cases cited note *q*.

W. W. Burrage, for the defendants A. A. & W. W. Burrage.

A. B. Coffin, for the defendant J. Burrage.

H. C. Hutchins, for the defendant E. G. Russell.

MORTON, J. The report finds that there was no want of good faith on the part of the holders of the mortgage, and that they did all that was required by the terms of the power, and by the good faith required of a mortgagee selling under a power.

It also finds that the advertisement gave no notice, that any sum of money would be required as a deposit at the time of the sale, or that the terms would be then stated, that at the sale the auctioneer gave notice that a deposit of two hundred dollars would be required, unless the purchaser was known either to the holder of the mortgage or to the auctioneer, and that Russell was present at the sale in consequence of having seen the advertisement, and did not bid because he had not the sum of money to make the deposit. The only question reserved is whether the fact, that a deposit was required as above set forth, thus preventing a bid by said Russell, of itself rendered the sale invalid.

The power of sale in the mortgage is very broad. It authorizes the mortgagee or his assigns to sell the granted premises at public auction on or near the premises. It does not undertake to prescribe the mode in which the auction sale shall be conducted, and by reasonable implication it authorizes the mortgagee to adopt such terms of sale as are usual and necessary to execute it with effect. The power to do an act includes the power to do all such subordinate acts as are usually incident to or are necessary to effectuate the principal act in the best manner. *Goodale v. Wheeler*, 11 N. H. 424. The literal terms of the power would authorize a sale for cash. The requiring a deposit of two hundred dollars, unless the purchaser was known to be responsible, was designed, and naturally tended, to protect the interest of the mortgagor and mortgagee. We cannot say, as matter of law, that it was unreasonable. The finding of the court that the donee of the power did all that was required by the terms of the power, and by the good faith required of a mortgagee selling under a power, implies that the terms adopted at the sale were usual and reasonable, and calculated for the protection of all parties interested.

A similar question arose in *Model Lodging House Association v. Boston*, 114 Mass. . In that case the donee of the power required a deposit of one hundred dollars at the time of the sale, though this was not stated in the published notice as one of the terms of sale. It was found as a fact that the donee acted in good faith, and it was held that the adoption of this condition did not, of itself, invalidate the sale and defeat the title of a stranger who purchased in good faith.

Upon the facts stated in the report, we are therefore of opinion, that no sufficient ground is shown to set aside the sale and defeat the title of the purchaser.

Bill dismissed.

CHESTER POPE & another vs. FREDERICK S. LEONARD & others

Suffolk. November 25, 1872. — January 6, 1873. AMES, J., absent.

CHESTER POPE & another vs. SALAMANCA OIL & REFINING COMPANY & others.

Suffolk. March 26. — June 20, 1874. AMES & DEVENS, JJ., absent.

To a bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers or stockholders of a corporation for its debts, the corporation must be made a party defendant.

A bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers or stockholders of a corporation must be in behalf of the plaintiff and all the other creditors of the corporation, and the non-joinder of the other creditors is not excused by an allegation in the bill that there are no other creditors known to the plaintiff.

A claim against the officers of a corporation under the St. of 1862, c. 218, on the ground that they did not file the certificate required by the St. of 1862, c. 210, and also upon the ground that they signed the certificate required by the Gen. Sts. c. 61, § 8, knowing it to be false, cannot be joined in one bill in equity with a claim against the stockholders, upon the ground that the capital stock was never fully paid in.

In a bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, an allegation that the corporation was organized as a manufacturing corporation under the Gen. Sts. c. 61, and that at a certain meeting the said corporation was established in Boston, is a sufficient allegation that the corporation was organized and established in Boston, without showing in detail that all the preliminary steps were taken.

A bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, is not multifarious because it contains three distinct grounds of liability, if all the defendants are under the same liability and have a common interest.

An allegation in a bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, that the debts of the corporation exceeded its capital in a certain amount, follows the words of the statute, and is sufficient.

A bill in equity brought under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, alleged a judgment recovered against the corporation July 14, 1868, and that the execution was returned unsatisfied September 12, 1868. The bill was filed June 6, 1873. *Held*, on demurrer, that the bill did not disclose such unreasonable delay or laches as to deprive the plaintiff of his right to the relief given by the statute.

A bill in equity was signed "A. B. by his solicitor C. D.," and contained no allegation that C. D. was authorized to sign it. *Held*, a sufficient signing.

An allegation in a bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, that the certificates required by the Gen. Sts. c. 61, § 10, had not been filed after the annual meetings held in 1865, 1866, and 1867, sufficiently alleges that annual meetings were held in 1865, 1866, and 1867.

The right to maintain a bill in equity to enforce the liability of the officers of a corporation, under the St. of 1862, c. 218, which had vested before the passage of the St. of 1870, c. 224, is not taken away by the latter act, although the bill is not filed until after its passage.

To a bill which contains three distinct causes of action a demurrer for want of equity cannot be sustained by matter which is a defence to only one of the causes of action.

THE FIRST CASE was a bill in equity filed June 3, 1870, by two judgment creditors of a corporation, against the officers and stockholders thereof, but not joining the corporation as a party defendant. The bill did not purport to be in behalf of the plaintiffs and all the other creditors of the corporation, but alleged "that the plaintiffs are the only creditors of said company known to the plaintiffs."

The grounds upon which the defendants were sought to be made liable are stated in the opinion of the court. Certain of the defendants demurred and the case was reserved on bill and demurrer by *Chapman*, C. J., for the consideration of the full court.

P. H. Sears, for the defendants.

L. M. Child & H. B. Crandall, for the plaintiffs.

MORTON, J. This is a bill in equity against the officers and the stockholders of the Salamanca Oil and Refining Company, alleged to be a manufacturing corporation established under the Gen. Sts. c. 61.

The plaintiffs seek to hold such of the defendants as are officers personally liable, upon the ground that they did not file in the clerk's office of the city of Boston the certificates required by the St. of 1862, c. 210, and also upon the ground that they signed the certificate required by the Gen. Sts. c. 61, § 8, knowing it to be false. They seek to hold the stockholders personally liable, upon the ground that the capital was never fully paid in.

We are of opinion that the demurrer must be sustained for several reasons :

1. The corporation should be made a party defendant to the suit. St. 1862, c. 218, § 4.
2. The plaintiffs' bill should be in behalf of themselves and all other creditors of the corporation."

The statute above cited gives the plaintiffs their only remedy, which is to bring a bill in equity in behalf of themselves and all other creditors of the corporation against it and the stockholders,

or officers who are liable, for the recovery of the sums due to themselves and such other creditors. *Moore v. Reynolds*, 109 Mass. 473. The allegation that there are no other creditors known to the plaintiffs is not sufficient to excuse them from bringing their suit as required by the statute.

3. The bill is multifarious. It embraces in one suit distinct and independent matters, against several parties, who have no common interest in the distinct matter. There are two classes of defendants, the officers and the stockholders. The grounds of liability alleged against them respectively are entirely distinct, and depend upon facts wholly independent of each other. The case of *Cambridge Water Works v. Somerville Dyeing & Bleaching Company*, 14 Gray, 193, is decisive of the point that these two claims cannot be joined in one suit. Until a bill with proper parties is presented we do not deem it necessary, if proper, to consider the other causes of demurrer. *Demurrer sustained.*

THE SECOND CASE was a bill in equity filed June 6, 1873, by the same plaintiffs in behalf of themselves and all other creditors of the defendant corporation against said corporation and the officers thereof.

The bill alleged that the plaintiffs had on June 25, 1868, recovered judgment for a sum stated in an action at law against said corporation in a suit begun February 21, 1868; that July 14, 1868, execution issued on said judgment; that a demand was made thereon July 22, 1868, upon said corporation and the officers thereof; that for the space of thirty days next after said demand the corporation neglected to pay the amount due on the execution, and also neglected to exhibit to the officer real or personal estate of said corporation subject to be taken on said execution sufficient to satisfy said execution or any part thereof; that the execution was returned unsatisfied September 12, 1868, and that the amount of the judgment was still due.

The bill then alleged "that the said Salamanca Oil and Refining Company was organized on or about April 1, 1865, as a manufacturing corporation under the provisions of the Gen. Sts. c. 61, at Boston, and at a meeting held April 12, 1865, the defendants were elected and became officers of said corporation;" and that "the defendants did accept the offices to which they

were respectively elected, and did continue to hold the same to and including February 21, 1868 ; and the plaintiffs are informed and believe that the said defendants were all the officers of said corporation during the time above alleged ; and that at said meeting the said corporation was established in said Boston, and for the purpose of purchasing, holding, disposing of and working petroleum oil lands, and manufacturing oil."

The bill further alleged that the last instalment of the capital stock of the corporation was paid in on or before April 14, 1865, and that the president and directors, with the treasurer and clerk did not make or cause to be recorded in the registry of deeds for the county of Suffolk, at any time from April 14, 1865, to and including July 31, 1868, a certificate signed and sworn to by the president, treasurer, clerk and a majority of the directors of said corporation, stating the amount of capital so fixed and paid in ; that on February 21, 1868, the debts of the corporation exceeded its capital in the sum of \$5366.66 ; that the defendants did not within thirty days after the date of the annual meeting held April 12, 1865, or of the annual meeting held in June, 1866, or of the annual meeting held in June, 1867, deposit with the clerk of the city of Boston, in which said corporation was established, any certificate signed and sworn to by the president and a majority of the directors of said corporation, stating the date of said annual meeting next preceding, the amount of capital stock paid in, the name of and number of shares held by each stockholder, the amount vested in real estate and in personal estate, the amounts of property owed by and debts due to the corporation, and the amount, as nearly as could be ascertained, of existing demands against the corporation, all as ascertained and exhibited at the date of said annual meetings as required by law ; nor have any such certificates been deposited with said clerk at any time since either of said meetings ; that the debt of the corporation for which the plaintiffs recovered said judgment was contracted July 31, 1866.

The bill was signed "Chester Pope, Albertus Richards, by their solicitors A. J. Waterman, H. Burr Crandall."

Certain of the defendants demurred on the grounds stated in the opinion of the court. The case was reserved on the bill and demurrers by *Morton, J.*, for the consideration of the full court.

P. H. Sears, for the defendants.

L. M. Child & H. B. Crandall, for the plaintiffs.

MORTON, J. 1. The first ground of demurrer, that the bill does not allege that the corporation was legally organized, cannot be sustained. It sufficiently alleges that the corporation was organized and established in Boston as a manufacturing corporation under the provisions of the Gen. Sts. c. 61. It is not necessary to allege in detail that all the preliminary steps were taken, but that is matter of evidence.

2. The second ground of demurrer is that the bill is multifarious. The bill seeks to hold the defendants, who are officers of the corporation, liable to the plaintiffs for the amount of a judgment recovered against the corporation. It alleges that they are liable upon three grounds: first, because they did not after the payment of the last instalment of the capital stock, make and record the certificate required by the Gen. Sts. c. 60, § 18; second, because they did not within thirty days after the date of the annual meetings make and file the certificate setting forth the condition of the corporation, required by the St. of 1862, c. 210, and third, because the debts of the corporation exceeded its capital stock at the time of the commencement of the plaintiff's suit against the corporation.

For each of these causes the defendants are made by statute jointly and severally liable to the plaintiff. St. 1862, c. 210, § 1. St. 1862, c. 218, § 1. St. 1863, c. 246. All the defendants are under the same liability and have a common interest. The case is not like *Cambridge Water Works v. Somerville Dyeing and Bleaching Company*, 14 Gray, 193, where the liability of some of the defendants were as directors and of others as stockholders, and the bill was held to be multifarious. The same point was held in the former suit brought by these plaintiffs. *Pope v. Leonard*, ante, p. 286.

In these cases there was not a joint liability nor a common interest of the defendants. In the case at bar the plaintiffs seek to enforce a single debt against the defendants, who have a common interest and are under the same liability to pay it in whole or in part. There is no reason why three separate suits should be brought, where the whole matter can be determined in one suit without confusion and without prejudice to the defendants

If the bill be sustained upon either ground, the same parties will be liable to the same amount, for the same cause of action, to the plaintiffs, or to any creditors who may intervene. We are therefore of opinion that the bill is not multifarious. *Robinson v. Guild*, 12 Met. 323.

3. There are sufficient allegations that the annual meetings were held in 1865 and 1866 and 1867; and the averment that the debts of the corporation exceeded its capital follows the words of the statute and is sufficient.

4. The bill does not disclose such unreasonable delay or laches as deprives the plaintiffs of their right to the relief which the statute gives them.

5. The plaintiffs' right to maintain this bill is not affected by the St. of 1870, c. 224, as that statute saves all rights acquired and liabilities incurred under laws existing at the time of its passage.

6. The objection that the bill is not properly signed cannot be sustained. *Burns v. Lynde*, 6 Allen, 305.

7. The only other ground urged in support of the demurrer is, that the bill does not allege that the works of the corporation are established in Boston. If this be so, the objection will not sustain a demurrer to the whole bill for want of equity. If it be true, as contended for by the defendants, that in order to hold them liable under the Gen. Sts. c. 60, § 18, it is necessary to aver and prove a failure to record the required certificate in the county where the manufactory of the corporation is established, the neglect to make this averment affects only one of the grounds upon which the plaintiffs' bill proceeds. The other parts of the bill state a case which entitles them to relief upon the other two grounds relied on.

Demurrer overruled.

WILLIAM SOMERS *vs.* ROBERT WRIGHT.

Suffolk. March 31. — June 20, 1874. AMES & DEVENS, JJ., absent.

A. agreed in writing under seal to sell by warranty deed a lot of land to **B.** for a certain sum payable in lumber "at current retail prices." The land was subsequently conveyed, a mortgage upon it still existing, and an agreement in writing under seal was made between **A.** and **B.** reciting the conveyance of the land subject to a mortgage, "which mortgage was according to previous agreement to have been discharged prior to said conveyance." **A.** also covenanted to discharge the mortgage before a certain day, and it was agreed that **B.** should not pay the lumber agreed upon as the price, above the amount of the mortgage, computed at the current retail price of the lumber delivered. **A.** did not discharge the mortgage, and **B.** paid it to prevent foreclosure. *Held*, that **B.** in an action for breach of the second contract was entitled to recover the loss of profits which would have accrued by the delivery of the lumber, and that the measure of damages was the difference between the wholesale and the retail price of the lumber.

Where the measure of damages is the plaintiff's loss of profits in having to pay cash when he is entitled to pay in a particular kind of goods at retail prices, evidence of the profits of any particular dealer in such goods is incompetent.

When a part of the consideration for the purchase of a house conveyed by **A.** to **B.** was the agreement of **B. & Co.** to deliver a quantity of lumber to **C.**; and **A.** agreed to discharge a mortgage on the house before a certain day, a refusal by **B. & Co.** before said day to perform their agreement is no excuse for a failure on the part of **A.** to perform his, although **B. & Co.** were the parties beneficially interested in the house.

The vendor of land agreed to pay off a mortgage at a time certain, the vendee retaining by agreement a part of the consideration until the mortgage was discharged; the vendor failed to discharge the mortgage at the time agreed upon, and the vendee paid the amount due with interest thereon some months subsequent to the time at which the vendor agreed to discharge it. *Held*, that vendee was not entitled to recover the interest paid which accrued after the date at which the vendor agreed to discharge the mortgage.

CONTRACT to recover damages for breach of the following agreement signed and sealed by the plaintiff and the defendant: "This agreement, dated the ninth day of December, 1869, by and between William Somers and Robert Wright, both of Boston, in the County of Suffolk and Commonwealth of Massachusetts, witnesseth, that whereas said Wright has this day conveyed to said Somers, by deed of warranty, a certain lot of land on Windsor Street, in said Boston, subject to a mortgage to secure the sum of five thousand dollars, which mortgage was, according to previous agreement, to have been discharged prior to said conveyance as aforesaid. Now, therefore, said Wright, in consid-

115 292
150 254

eration of one dollar and divers other considerations to him paid by said Somers, covenants and agrees with said Somers that he will discharge said mortgage of \$5000 before the first day of April, 1870, and will save harmless therefrom said Somers and his heirs ; and it is mutually agreed and understood between the said parties hereto, that said Somers shall not pay the lumber agreed upon as the price and consideration of said conveyance of real estate above the sum of \$5000, computed at the current retail price of the different kinds of lumber delivered, until said mortgage of \$5000 is discharged, and the property is entirely free from any incumbrance ; but said Somers agrees to deliver lumber according to the order of said Wright, to the limit above mentioned."

The declaration, after setting forth the above contract, averred that the conveyance was in pursuance of a previous agreement in writing between the plaintiff and the defendant whereby the plaintiff was to purchase and the defendant to sell said lot of land for \$5600, to be paid by the plaintiff in lumber at current retail prices ; that there was a mortgage of \$5000 on the estate, which the defendant did not discharge upon April 1, 1870, according to the agreement, nor at any time thereafter, and that the plaintiff was obliged to pay the amount when due, together with one year's interest thereon, in order to save his estate from foreclosure. The declaration also averred readiness on the part of the plaintiff to deliver lumber to the amount of \$5000, at current retail prices ; that the plaintiff was compelled to pay the mortgage and interest in cash, whereby he was deprived of the profit upon the sale of \$5000 worth of lumber at current retail prices.

At the trial in the Superior Court, before *Putnam, J.*, the jury returned a verdict for the plaintiff, and the defendant alleged exceptions in substance as follows :

It appeared in evidence that on or about December 9, 1869, the plaintiff and the defendant executed the agreement set forth in the declaration ; that there had been a previous agreement between them under seal with reference to the same subject matter, dated November 1, 1869, by which the defendant agreed to convey and the plaintiff to purchase the estate mentioned in the second agreement for the sum of \$10,600 in lumber, at current retail prices ; that the defendant executed to the plaintiff a warranty

deed, and gave him possession of the house and land mentioned in said agreement, subject to a mortgage of five thousand dollars, as set forth in the declaration and agreement; that on or about the same time, and as a part of the same transaction, William Somers & Company, a firm composed of the plaintiff and others, executed and delivered to Luther Farwell a due bill or note for \$5600, payable in lumber; that Farwell, prior to and up to the time of the execution of said agreement and the delivery of said deed, held a second mortgage upon said house and land, and that this due bill was given to Farwell as a consideration for the discharge of said mortgage, which was due at this time; that this was done at the request of the defendant, and that the due bill was a part of the consideration of the deed from the defendant to the plaintiff; that William Somers & Company were the parties beneficially interested in said agreement, and that William Somers held the premises conveyed in said deed for the benefit of or in trust for William Somers & Company; that the defendant did not pay said mortgage nor the interest accruing thereon, but that the plaintiff or William Somers & Company paid the interest on the same at 7½ per cent. from September 2, 1869, to August 20, 1870, amounting to \$362.50, and then paid the principal. The presiding judge ruled that the plaintiff could recover for the loss of profits as claimed in his declaration, and the defendant excepted.

The defendant then called Joseph Goodnow, who testified that there was the least profit upon spruce lumber, and put to him this question: "Take it in the winter of 1869 and '70, between December 1 and April 1, what would be the fair net profits on spruce lumber?" This question was objected to by the plaintiff's counsel and excluded by the court, on the ground that the net profits of any particular dealer or dealers was not evidence tending to show what the loss of profits by the plaintiff was. The defendant's counsel then stated that he proposed to show by men dealing in lumber, having wharves and of long experience in the business, what the net profits on certain kinds of lumber were. The court excluded this offer, and the defendant excepted. The court ruled, however, that as the defendant would have the privilege of selecting the lumber which yielded the least profit, the evidence might be confined to spruce lumber, and that the defendant might show by these witnesses what the

difference between the wholesale and retail price of spruce lumber was at the time, and the defendant accordingly examined Goodnow and the other witnesses upon this point, and the court ruled that the measure of damages would be the difference between the wholesale and retail price of spruce lumber, what the plaintiff could obtain for that amount of lumber at wholesale and what was a fair retail price for it, to which ruling the defendant excepted.

The defendant was examined, and testified that the deed from him to the plaintiff, the contract declared upon, and the due bill for \$5600 were all delivered at the same time, and on or about December 15, 1870, when the deed was recorded, and that Luther Farwell took the due bill in his name, as collateral for Wright's indebtedness to him, and that at various times afterwards Somers & Co. delivered to Farwell, to be used on houses Wright was building, and to various other parties, lumber to the amount of about \$1000.

He further testified that on February 23, 1871, he took the following order, signed by the defendant, to Somers & Co., and then indorsed it, leaving it with them and taking a receipt for it: "Boston, Feb. 22, 1870, — Messrs. Wm. Somers & Co. Dear Sirs, Please send me such lumber as may be selected by Mr. Emerson, or ordered by Mr. Robert Wright, to be sent to my houses on Ball Street, on Shawmut Avenue, (and nowhere else,) to an amount not exceeding one thousand dollars, to apply on your due bill of December 10, 1869, to the amount of \$5,600, payable to me in lumber, Luther Farwell;" that the Mr. Emerson named in said order was furnishing labor for Wright on the Ball Street houses, the title to the land standing in Farwell's name as collateral for advances made by him to Wright, and he offered to show that immediately after the delivery of said order to Somers & Co. and at various times thereafter before April 1, 1871, he demanded of said Somers & Co. lumber for said Ball Street houses and elsewhere, which they refused to deliver, with the exception of about two hundred dollars' worth which was delivered at the Ball Street houses, and about two hundred and eighty dollars' worth delivered at East Boston immediately after the order was delivered. The plaintiff's counsel objected to this evidence, and any evidence tending to show that all the lumber had not

been delivered under the \$5600 order payable in lumber, and that if any default on their part in this respect existed they were answerable to Farwell therefor and not to the defendant. The defendant contended that there was nothing to show that it was given in satisfaction thereof, and that it was a question for the jury whether said paper was given to Farwell in satisfaction of the plaintiff's obligation under said contract, upon the whole evidence and under proper instructions from the court. The defendant was asked by the court: "I understand you to say that this order for \$5600 was given at the same time the deed was delivered, and at the same time the agreement in the suit was delivered?" The defendant answered, "Yes, sir; Mr. Farwell was to hold that for my benefit?" The court then ruled that the question whether all the lumber under the due bill to Farwell had been delivered was immaterial in this suit, and that a refusal on the part of the plaintiff to deliver lumber on the request of Wright thereafter would not be such a breach of his obligation as the defendant could avail himself of in defence of this suit, the defendant excepting.

The case was submitted to the jury to find the amount of damage occasioned by the loss of profits on the amount of \$5000 worth of lumber, the court instructing the jury on this branch of the case as explanatory of the rule of damages, which it had before laid down, as follows, to which no additional exception was taken, except as to the ruling in relation to interest.

"The next question is, what is the plaintiff entitled to recover? If this were a cash transaction, he would be entitled to recover the \$5000 and interest. But it was not a cash transaction. It was to be paid in lumber, and he was to keep back this \$5000 worth of lumber until the mortgage was paid off. So that, the mortgage not having been paid off, he has got his \$5000 in lumber. Therefore he cannot recover the \$5000 in cash; he can only recover the loss of profits, from the fact that the lumber was to be put in to the defendant at a fair retail price. So that his loss upon the transaction has been simply the difference between what that lumber cost him at wholesale, and what was a fair retail price for it, whatever that difference may have been, that he is entitled to recover, in addition to the \$362.50 and interest.

"There have been several witnesses brought, on the one side and the other, — all the witnesses agree, substantially, who say that a fair retail price would have been from twenty-two to twenty-four dollars a thousand. I believe there is no dispute, substantially, between the witnesses on that point. Therefore it may be fair to take twenty-three dollars a thousand as the retail price, — dividing the difference between twenty-two dollars and twenty-four dollars, which, upon the whole evidence, coming from the defendant's own witnesses as well as the plaintiff's, was a fair retail price for the lumber at the time. The only question, then, is, what that lumber cost Somers & Co., and the difference between that cost, and what he had promised to sell it for, would be his loss. And that depends upon what was the market value, at wholesale, of spruce lumber at that time, because all parties agree that it shall rest upon the basis of spruce lumber, that being, I believe, the lowest priced lumber in the market. Therefore you will take the evidence upon that point, and the difference between the wholesale and retail price, of course, will be the loss. Whatever you find the loss to be, the plaintiff is entitled to interest on that sum, from the date of the writ. Take, then, the interest paid, three hundred and sixty-two dollars, with interest upon that sum from the date of the writ; take the loss of profit, whatever you may find it to be, with interest upon that sum from the date of the writ, October 7, 1871, add the two sums together, and your verdict will be for the plaintiff, for the gross amount."

The jury found for the plaintiff, that the loss of profits was \$823.62, and that the damage suffered by him on account of interest paid by him, was \$398.09, and the defendant excepted.

N. Morse, for the defendant.

M. Williams, Jr., for the plaintiff.

COLT, J. By the terms of the purchase the plaintiff had the right to pay in lumber "at current retail prices" for the estate which the defendant conveyed to him. There was no time named for the delivery of the lumber, and the consideration for the deed was due when the conveyance was made. The property was subject to a mortgage for \$5000, which the defendant agreed to discharge before the first of April following, giving the plaintiff the right to withhold lumber to the amount of the incumbrance until it was removed, and the plaintiff at the same time giving to one

Farwell a due bill of the firm of which he was a member, payable in lumber on demand, for the balance of the consideration. The defendant did not obtain a discharge of the mortgage as agreed, and the plaintiff paid the same when due with one year's interest to August 20, in order to save his estate from foreclosure.

This action is to recover the profits which would have accrued to the plaintiff by the delivery of \$5000 worth of lumber at retail prices instead of cash, with the interest paid on that sum.

It was contended that the plaintiff could not under this agreement and declaration recover for loss of profits. But the agreement, as applied to the subject matter, and the relations of the parties under another contract expressly referred to, clearly shows that the loss of profits claimed is the loss which must necessarily and directly arise from its breach, and which must have been contemplated by the parties when the contract was made. Profits of this description may be recovered, although as a general rule the profits of a future transaction are regarded as an element too remote to be taken into account in the estimate of damages. *Fox v. Harding*, 7 Cush. 516. *Masterton v. Brooklyn*, 7 Hill, 61.

The defendant then offered to show the net profits realized by one of his witnesses who was a lumber dealer, on sales of lumber made by him during the time in question. This was excluded as being too remote in its tendency to show the plaintiff's actual loss of profits, and no exception properly lies to its exclusion. The profits of any one particular dealer would not be a fair criterion of the plaintiff's loss.

The ruling that the measure of damages would be the difference between the wholesale and retail price of lumber, or the difference between what the plaintiff could obtain for it at wholesale and at retail, as afterwards explained in the judge's charge, must be construed to have required the jury to find what the plaintiff lost by being deprived of an opportunity to sell at retail prices. This depended on the market value of such lumber at wholesale. The instructions taken together do not necessarily imply, as the defendant contends, that the jury must find the difference between what the plaintiff paid for lumber when he bought at wholesale and what he sold for at retail, but rather that they must find the difference on sales made at wholesale and at retail.

There was no error in the ruling that a refusal to deliver lumber upon the due bill given to Farwell by the firm would not be such a breach of the plaintiff's agreement as would excuse the defendant from the performance of his obligation to take up the mortgage. The due bill was given at the request of the defendant and as part of the consideration for the deed to him. Farwell held it as collateral security and by good legal title. The obligation assumed to Farwell was a discharge to that extent of the defendant's claim on the plaintiff. A failure to deliver to Farwell or his order would be a breach of the contract of the firm for which they might be responsible to him, but it would afford no defence in an action at law between the parties to this contract, notwithstanding the equitable considerations suggested.

But the ruling of the court as to the recovery of interest which accrued on the mortgage after the first of April is erroneous. The plaintiff took immediate possession of the property upon the delivery of the deed. The whole consideration was then due, except so far as it was postponed by the agreement in regard to the mortgage. That agreement was broken on the first of April, and the plaintiff's rights were fixed. The payment of the mortgage in cash was one mode of paying the balance of the consideration then due. But the plaintiff would have no claim on the defendant for interest which accrued after that date. He is indemnified if he recovers his loss of profits and the interest on the mortgage to April first,—that amount of interest being so much in excess of the consideration agreed on for the deed. To this extent the defendant's exceptions are sustained, unless the plaintiff chooses to remit the excess and take judgment for the reduced amount.

Ordered accordingly.

ALBERT RUSSELL & another vs. MICHAEL M. BARRY.

Suffolk. March 4. — June 22, 1874. WELLS & ENDICOTT, JJ., absent.

A written order for the delivery of lumber to be used in building the house of the drawer, and which he promises to pay for "when the house is completed," becomes due when the house is substantially finished by any one, although the drawee knew that the person, to whom the order requested him to deliver the lumber, was building the house under a contract, and it is not completed according to the terms of the contract.

The objection that evidence is not properly admissible under the pleadings must be made at the trial, and it is too late to raise it for the first time in this court.

Evidence of a contemporaneous oral agreement varying the terms of a written order for the delivery of goods is inadmissible.

In an action on a written agreement signed by the defendant, whereby money became due to the plaintiff on the completion of a house, then building for the defendant by a third person, evidence is admissible that after the making of the agreement and before the money became due the plaintiff borrowed a sum of money of the defendant, and in consideration of the loan agreed to finish the house within a certain time if the third person did not, and if the house was not finished that he would return the agreement, if there is evidence that neither the plaintiff nor the third person finished the house within the time specified.

CONTRACT by the members of the firm of A. Russell & Co. to recover the price of lumber furnished on the following order, signed by the defendant: "Messrs. A. Russell & Co., Please deliver Mr. John McDonald lumber for my house on Codman Street, and I will be responsible for the payment of the same when the house is completed; said sum not to exceed five hundred dollars. M. M. Barry." The answer denied that the lumber was furnished on the order, that the house had been completed by McDonald or by any one else; and alleged that the lumber was not to be paid for by the defendant unless said house was completed by McDonald according to his contract.

The defendant also filed a note of the plaintiffs in set-off which was admitted by the plaintiffs. At the trial in the Superior Court before Lord, J., the jury found a verdict for the plaintiffs, and the case was reported to this court substantially as follows:

The plaintiffs' evidence tended to show that the order was signed by the defendant, and that the plaintiffs furnished the lumber to the amount of the order, and that it went to the defendant's house, and that the house was completed before bringing the action. On cross-examination the plaintiff, Russell, ad-

mitted that at the time the order was signed he read the contract between McDonald and the defendant for building the house. The contract was then put into the case. It provided among other things that the house was to be finished before December 1, 1871, and that the work was to be done in a workmanlike manner.

The defendant, in his opening, offered to prove that at the time the order was signed by him, the plaintiffs agreed to finish the house according to the contract between him and McDonald if the latter should fail to do so; that before January 2, 1872, McDonald ceased working on the house, leaving it unfinished; that the plaintiff, Russell, on January 2, 1872, requested the defendant to loan him on said order three hundred dollars, saying they had then furnished five hundred dollars' worth of lumber for the house, but the defendant declined to pay anything on the order. That Russell then said they must have some money to pay a note coming due that day at the bank, and requested the defendant to lend the plaintiffs three hundred and fifty dollars for thirty days on their note, promising that if the defendant would do so, he would immediately see McDonald and get him to complete the house, and if he would not, then that the plaintiffs would themselves complete it in thirty days, and if neither they nor McDonald should finish it in thirty days, then the plaintiffs would return the order to the defendant and also pay their said note; that on these conditions and promise the defendant loaned to the plaintiffs three hundred and fifty dollars on their note, but that neither McDonald nor the plaintiffs did any more work on the house, and at the expiration of thirty days the defendant demanded payment of the note and a return of the order, but the plaintiffs refused to do either; that the house remained unfinished for two or three months afterwards, when the defendant laid a part of the floors, finished the stairways and painted the house inside and out one coat, and did other work, and that then the house was not completed according to said contract.

The presiding judge ruled that inasmuch as it is conceded that the house was substantially finished, although not done in the workmanlike manner which the contract between the parties may have called for, the rights of the parties would not be affected by any of the proffered evidence, and that the plaintiffs were entitled to recover the difference between the amount of the order and

the note, and the case is reported for the determination of the Supreme Judicial Court. Judgment to be entered on the verdict, if the ruling was right, otherwise a new trial to be ordered.

C. W. Turner, for the plaintiffs. The evidence offered in regard to a subsequent agreement of the plaintiffs to finish the house if McDonald did not, or to return the order, tended to show an agreement to answer for McDonald's default, and was inadmissible because not in writing. *Curtis v. Brown*, 5 Cush. 488. This evidence was also incompetent because it enlarged the note given by the plaintiffs at the same time, on the same consideration and declared on in set-off. *Howe v. Walker*, 4 Gray, 318. The evidence, if admissible, did not establish a defence to the action. It was not such an agreement as could be pleaded in release, because it was conditional and embraced other matters, and the damages for a breach of it would not necessarily be commensurate with the amount of the order. *Foster v. Purdy*, 5 Met. 442. If the evidence of a subsequent agreement tended to establish a defence it was a defence not set up in the answer, was matter of avoidance and was not admissible under the pleadings. *Mulry v. Mohawk Valley Insurance Company*, 5 Gray, 541. *Cushman v. Davis*, 3 Allen, 99. *Hawes v. Ryder*, 100 Mass. 216. In *Burnett v. Smith*, 4 Gray, 50, the facts were agreed, whereas in the case at bar they are in dispute, and the plaintiffs had no opportunity to make this objection to the defence at the trial.

N. C. Berry, for the defendant.

AMES, J. It appears that McDonald had bound himself by a contract to build a house for the defendant, but was not able upon his own credit to obtain all the lumber necessary for that purpose. The defendant therefore, in order to remove that difficulty, by his written order requested the plaintiffs to deliver lumber to McDonald, for the purposes of his contract, to an amount not exceeding five hundred dollars: and promised to be responsible for the payment therefor "when the house is completed." Upon receiving this written order, the plaintiffs delivered the lumber accordingly, and it has been made use of in building the defendant's house. The reference to the completion of the house has no effect except to fix the time when the order should become payable. The house having been substantially finished, a right of action thereupon accrued to the plaintiffs. It is

not made a condition of the order that the house was to be completed by McDonald, and in this respect the case closely resembles *Cook v. Wolfendale*, 105 Mass. 401. Upon the completion of the house by any agency, the order became payable.

With regard to the grounds of defence suggested by the defendant's counsel in his opening to the jury, it is now objected that they are in the nature of a confession and avoidance, not indicated by the terms of the answer, and for that reason not open to the defendant. If this objection had been taken at the trial in the Superior Court, the defendant would have had an opportunity to move for leave to amend his answer, and we cannot know that that court, in the exercise of its discretion, might not have allowed the motion. As the objection does not appear to have been taken at that stage of the case, we think it comes too late, and that the matter is not a mere question of pleading.

The alleged oral agreement, contemporaneous with the signature of the order, and making it conditional on the completion of the house by the plaintiffs, if McDonald should fail to complete it himself, was not admissible, under the general rule that a written contract is not to be modified, or varied by parol evidence. And as to the subsequent promise to the effect that the plaintiffs would see McDonald immediately, "and get him to finish the house, and, if he would not, that they would complete it themselves," it is manifest that if that were the whole of their undertaking, it would be a mere promise to be responsible for the debt or default of another, and under the statute of frauds would be of no binding force. Such a promise would not support an action by the defendant against them, nor would it be of any avail to him as a defence in their action against him. *King v. Welcome*, 5 Gray, 41. But the defendant's offer of proof goes much farther than this, and suggests an additional element in the agreement which gives it a materially different aspect.

He avers that before the house was finished, and of course before anything had become due to the plaintiffs upon the order, they being in pressing and immediate want of money applied to him, not as creditors but as borrowers, for a loan of three hundred and fifty dollars, and that one of the conditions of this loan was that if the house were not finished either by McDonald or themselves within thirty days, they would give back to him the

written order upon which this suit is brought. The loan of the money was a sufficient consideration in law for such a promise. It does not appear from the report that it had at that time become certain that McDonald would not be able to finish the building himself, and the terms of the alleged new agreement seem to indicate an expectation on the plaintiffs' part that he would complete his contract. If for the sake of obtaining the loan at a time of urgent necessity, they were willing to agree to release the defendant absolutely from his liability, (which would be the effect of returning the order to him,) and to take upon themselves the chance that McDonald, by finishing the building, should put himself in a position to pay them the amount due upon the order, we do not see why the defendant may not rely upon this agreement as a defence to the suit. A promise to return the order to the defendant on certain conditions, and on sufficient consideration, is not a mere collateral undertaking, but may fairly operate as a release or defeasance, if those conditions should be fulfilled. *Foster v. Purdy*, 5 Met. 442. To this extent therefore we consider the evidence offered by the defendant to have been competent, and capable of affecting the rights of the parties. As it was otherwise ruled in the court below, the verdict must be set aside, and a

New trial ordered.

JOHN C. HOADLEY *vs.* NORTHERN TRANSPORTATION COMPANY.

Suffolk. March 3. — June 22, 1874. WELLS & ENDICOTT, JJ., absent.

A common carrier may by an express contract exempt himself from liability for loss happening without his fault.

If the law of the place where a contract signed only by the carrier, is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought.

A common carrier who negligently delays to send forward goods delivered to him for transportation is not liable for an injury to the goods by a peril excepted in the contract of carriage, happening without his fault, while the goods are in his custody at the place where they were delivered to him, although the goods would not have been exposed to the peril but for such delay.

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TORT for the conversion of a steam-engine delivered to the defendant for carriage under a bill of lading, containing an exception of losses by fire, and destroyed by fire at the place of the delivery to the carrier, while in his custody.

At the trial before *Devens, J.*, the jury found for the plaintiff, and in answer to questions put to them by the presiding judge stated that they found for the plaintiff upon the ground that he did not assent to the exception against losses by fire in the bill of lading, and also upon the ground that the defendant negligently omitted to forward the engine. The defendant alleged exceptions to certain rulings of the presiding judge, which with the facts of the case appear in the opinion of the court.

D. S. Richardson, for the defendant.

E. Merwin, for the plaintiff.

COLT, J. The plaintiff seeks to recover in tort against the defendant as a common carrier for the loss of a steam-engine which it had undertaken to transport from Chicago, Illinois, and deliver to him at Lawrence in this state. The engine was destroyed at Chicago in the great fire of 1871, and one question at the trial was, whether by the terms of the contract of transportation the defendant was liable for this loss.

The plaintiff put in the bill of lading received by his agent at Chicago of the defendant at the time the property was delivered for transportation. It is in the usual form, and the terms and conditions are expressed in the body of the paper in a way not calculated to escape attention. In one clause it exempts the defendant from all liability for loss or damage by fire; in another from all liability "for loss or damage on any article or property whatever by fire while in transit or while in depots or warehouses or places of transshipment," and further provides that the delivery of the bill of lading shall be conclusive evidence of assent to its terms.

It was assumed by both parties as now settled that a common carrier may by special contract avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without his own fault. Such is the declared law of this Commonwealth, and the Illinois cases produced at the trial assume that the same rule prevails there. An express contract, once established, is in both states effectual

to limit the carrier's liability. But the plaintiff contended that by the law of Illinois, as declared in the courts of that state, the mere receipt, without objection, of a bill of lading which limits the carrier's common law liability for loss by fire, would not raise a presumption that its terms were assented to, but such assent, if relied on, must be shown by other and additional evidence. The jury have found this to be the law of that state, under instructions not objected to, and we are not required to say whether there was sufficient evidence to warrant the finding. *Adams Express Company v. Haynes*, 42 Ill. 89. *American Express Company v. Schier*, 55 Ill. 140, 150. *Illinois Central Railroad v. Frankenberg*, 54 Ill. 88, 98. The court ruled that this law of Illinois must govern the case, and that under it the jury could not find that the mere receipt of the bill of lading would be evidence of assent to its terms.

The law of this Commonwealth differs from the law of Illinois as thus found. In *Grace v. Adams*, 100 Mass. 505, decided by this court on an agreed statement of facts, it was held that a bill of lading or shipping receipt, taken by a consignor without dissent at the time of the delivery of the property for transportation, by the terms of which the carrier stipulates against such liability, would exempt the carrier when the loss was not caused by his own negligence, on the ground that such acceptance would authorize him to infer assent, and amount to evidence of the contract between the parties. The defendant contends that the case is to be tried by the law of this Commonwealth.

It is a general rule that personal contracts must have the same interpretation and binding force in all countries which they have in the place where made. The contract is presumed to have been entered into with reference to the law of that place. If formalities and solemnities are there required to give validity to it, the requirement must be shown to have been observed. But the law of the place where the action is brought, by the same general rule, regulates the remedy and all the incidents of the remedy upon it. The law of the former place determines the right; the law of the latter controls the admission of evidence and prescribes the modes of proof by which the terms of the contract are made known to the court, as well as the form of the action by which it is enforced. Thus in a suit in Connecticut against the indorser on a note

made and indorsed in New York, it was held that parol evidence of a special agreement different from that implied by law would be received in defence, although by the law of the latter state no agreement different from that which the law implies from a blank indorsement could be proved by parol. *Downer v. Chesebrough*, 36 Conn. 39. And upon the same principle it has been held that a contract valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails unless it is put in writing as required. *Leroux v. Brown*, 12 C. B. 801. So assumpsit was held to lie in New York on an undertaking in Wisconsin contained in a writing having a scrawl and no seal affixed to the defendant's name, although in the latter state it had in pleadings and in evidence the effect of a seal. *Le Roy v. Beard*, 8 How. 451. The statute of limitations for the same reasons affects only the remedy, and has no extra-territorial force.

It is not always indeed easy to determine whether the rule of law sought to be applied touches the validity of the contract or only the remedy upon it. In the opinion of the court, the rule of law laid down in Illinois and here relied on by the plaintiff affects the remedy only, and ought not to control the courts of this Commonwealth. The nature and validity of the special contract set up is the same in both states. It is only a difference in the mode of proof. A presumption of fact in one state is held legally sufficient to prove assent to the special contract relied on to support the defence. In the other state it is held not to be sufficient. It is as if proof of the contract depended upon the testimony of a witness competent in one place and incompetent in the other. The instructions given at the trial upon this point did not conform to the view of the law above stated, in which, upon more full consideration, we all concur.

The court further instructed the jury against objection that the defendant would be liable notwithstanding the exemption in the receipt, if it negligently detained the engine on the wharf after it ought to have been sent on, so that it was exposed to the fire and destroyed. The verdict was for the plaintiff on both grounds, and the correctness of this ruling is also called in question. The defendant insists that the negligence alleged cannot be treated in law as the proximate cause of the loss. In actions

of this description the injury complained of must be shown to be the direct consequence of the defendant's negligence. This is the only practical rule which can be adopted by courts in the administration of justice. It is not enough that the act charged may constitute one of a series of antecedent events without which, as the result proves, the damage would not have happened. The legal damages which follow any wrong are only such as, according to common experience and the usual course of events, might reasonably be anticipated. The defendant's liability extends only to natural and probable consequences.

Applying these rules to the case at bar, it is plain that the destruction of the goods by fire in the calamity which happened could not reasonably be anticipated as a consequence of the wrongful detention of them on the wharf. The delay did not destroy the property, and there was no connection between the fire and the detention.

In several cases against carriers very like the one at bar, where the question was whether the loss was chargeable to the defendant's negligence or was due to a peril from which he was by law exempt, the law as thus stated has been applied. *Denny v. New York Central Railroad*, 13 Gray, 481. *Morrison v. Davis*, 20 Penn. St. 171. *Railroad Co. v. Reeves*, 10 Wallace, 176. The authority of these cases is not affected by the ground upon which the exemption was claimed. It is the same whether it arises from the common law, is secured by special contract, or results from the changed responsibility which takes place when the carrier becomes a warehouseman. *McDonald v. Snelling*, 14 Allen, 290. *Lane v. Atlantic Works*, 111 Mass. 136.

Exceptions sustained.

GEORGE MCBRIDE vs. HENRY S. LITTLE & another.

Suffolk. March 19, — June 23, 1874. AMES & DEVENS, JJ., absent.

A creditor, who has advanced the money for the composition of an insolvent with his creditors, is not entitled to an injunction restraining the prosecution of an action at law, brought by another creditor against the insolvent, for the balance of his debt after the payment of the composition, in the absence of fraud or collusion between said creditor and the insolvent.

An injunction will not be granted to restrain a judgment in a suit at law after verdict, if the party seeking it could by proper diligence have protected his rights in that suit.

BILL IN EQUITY for an injunction against Henry S. Little and James Brooks. The case was heard on bill and demurrer by *Morton, J.*, who reserved it for the consideration of the full court. The facts of the case appear in the opinion of the court.

J. F. Pickering & I. J. Cutter, for the defendant Little.

N. Richardson, for the plaintiff, contended that when there is a composition, it is a fraud in any one creditor who is a party to sue the insolvent to collect the balance of his original claim, and the other creditors, or either of them, may sustain a bill to prevent it, and referred to *Chit. Con.* (10th Am. ed.) 758, 759, and cases cited; *Steinman v. Magnus*, 11 East, 390; *Boothbey v. Sowden*, 3 Camp. 175; *Mackenzie v. Mackenzie*, 16 Ves. 372; *Cranley v. Hillary*, 2 M. & S. 120.

MORTON, J. This is a bill to enjoin the defendant Little from prosecuting to judgment a suit at law which he has commenced against the defendant Brooks, and in which a verdict has been rendered in Little's favor. The ground upon which the plaintiff seeks to maintain it is, that he advanced money to enable Brooks to settle with his creditors, who, including Little, agreed that they would discharge their debts against Brooks upon the receipt of thirty per cent. thereof; that Little held a note of four hundred dollars, which had been discounted, that the plaintiff paid Little the thirty per cent. to enable him to take up and surrender said note, and that Little took it up and did not surrender it, but commenced the suit thereon against Brooks which this bill seeks to enjoin. The bill does not allege that Brooks has not repaid the plaintiff all the advances made by him, and therefore fails to show that the plaintiff has any interest in the question whether Little should have a judgment against Brooks. But if the bill should be amended by adding this allegation, we are of opinion that it could not be maintained. If the plaintiff is a creditor of Brooks, this does not give him such an interest that he can enjoin a suit against Brooks. There is no allegation of collusion between Little and Brooks to defraud the creditors of the latter. The mere fact that a judgment in a suit brought against a debtor will lessen his ability to pay his other debts,

does not create in his other creditors such a legal interest as entitles them to be heard upon the questions involved in the suit or to enjoin its prosecution.

Another objection to this bill is, that it does not appear that the questions raised by it were not, or might not have been, if due diligence was used, litigated in the suit at law.

There being no fraud or collusion, the proper remedy of the plaintiff was, with the consent of Brooks, to try these questions in defence of that suit. An injunction will not be granted to restrain a suit after verdict, if the party seeking it could by proper diligence have protected his rights in that suit. 8 Dan. Ch. Pr. (8d Am. ed.) 1728.

Demurrer sustained.

**NATHANIEL W. CHURCHILL & others vs. GEORGE W. PALMER
& others.**

Suffolk. March 13. — 14, 1874. COLT & ENDICOTT, JJ., absent.

June 18. — 25, 1874. AMES & ENDICOTT, JJ., absent.

The authority given by the Gen. Sts. c. 115, § 6, to the Superior Court to report a case after verdict for determination by this court, extends only to questions of law. The report should be so framed as to state the nature of the case, and the questions of law intended to be reserved, and so much only of the facts or the evidence as may be necessary to present those questions.

The purpose of the St. of 1870, c. 312, providing for the appointment, by the Superior Court in the county of Suffolk, of stenographers, is to afford assistance to the court and the counsel in conducting the trial, and in drawing up reports and bills of exceptions, not that a complete record of all that took place in the court below, whether material or immaterial to the questions of law reserved, should be transmitted to this court.

A report from the Superior Court stated none of the rulings upon the admission and rejection of evidence, and upon the question reserved whether there was any evidence to be submitted to the jury, referred to the stenographer's report annexed, and this report as printed covered nearly two hundred pages, and consisted in greater part of irrelevant and unimportant details of testimony, long cross-examinations affecting only the bias and credibility of witnesses, and interlocutory discussions between the judge and the counsel, through which the rulings of the judge and the portions of the evidence bearing upon the questions of law to be determined, were scattered. *Held*, that the report was so irregular that it must be dismissed.

In an action against A. for a breach of warranty in the sale of goods, the plaintiffs introduced evidence tending to show that they made an agreement for the purchase

for a fixed price with a person representing himself to be an agent of A.; that by the terms of the agreement the goods were to be equal to a sample; that before closing the contract they saw A., who told them that they were buying directly of him and would get their bill direct from him; that no price or other terms were agreed on or mentioned between them and A., who received the price agreed upon by the agent and delivered the goods, but instead of giving a bill direct to the plaintiffs, gave them a bill to a firm of which A. had been a member, but which had ceased to exist, and a former clerk of this firm made out a bill of the goods from this firm to the plaintiffs, A. representing that this would make no difference. *Held*, that it was competent for the jury to find that A. adopted the contract of sale made by the agent, and that if so, A. could not repudiate the warranty, which was an essential part of the contract. *Held, also*, that the manner in which the bills were made out was open to explanation, and did not conclusively show that the plaintiffs bought of the agent.

CONTRACT on a warranty in the sale of a lot of kid gloves. Trial in the Superior Court before *Rockwell, J.*, who made the following report:

"The pleadings and prior record of the case referred to. Defendants A. T. Hall, F. A. Hall and J. F. Macomber alone defended at this trial.

"The plaintiffs introduced evidence, documentary and oral; and this and the examination, and cross-examination of witnesses, together with the proof offered by the plaintiffs and rejected by the court, and their exceptions thereto, and the evidence introduced by the defendants in the course of the plaintiffs' case, with the plaintiffs' objections and exceptions thereto, all appear in the notes and report of the same made by the official stenographer of this court, which is filed herewith, and adopted as true, and made a part hereof, the same as if incorporated herein as a statement of the facts.

The papers in the bankruptcy proceedings in case of Wm. H. Perley may be referred to in the original or certified copies by either party. They had been referred to in the examination of Mr. Thompson, who was to get and produce them; and they are to be treated as in the case. The counsel for the defendants, upon the close of the plaintiffs' case, made certain requests, which appear in said stenographer's minutes aforesaid; and, upon inquiry, said he should rest his defence there, and introduce no more evidence.

"The counsel for the plaintiffs objected to the case being taken from the jury, and to the court's ordering a verdict for the de-

defendants. In an oral presentation of his claims in matters of law and fact, he contended that the court should submit the case to the jury with appropriate instructions in matters of law, and that it was the province of the jury alone to pass upon the evidence, and find the facts; that there were several aspects or theories presented by the evidence, which, as the jury might find the facts to be, would entitle the plaintiffs to a verdict against one or more, or all of the defendants now defending, either upon the ground of warranty or fraud, or because no title was given to the property by the defendants or either of them, or for the whole or a portion of the money paid by the plaintiffs, upon a count for money had and received, or money paid.

“Among other claims or points, made in an oral discussion, covering the whole case in all the aspects of the evidence, the plaintiffs’ counsel presented certain specific requests or propositions of law in writing, which, so far as they are material, are annexed hereto in copy, and are referred to. The court declined so to rule, and refused to grant them, ordering a verdict for the defendants aforesaid, as now defending, without allowing an argument to the jury, or submitting the case to them with remarks, and an opinion expressed, as appears in said stenographer’s report, so far as material to this report, and which is referred to. The counsel for the plaintiffs inquired if any question was made as to whether Mr. Hall had the money in his hands at the time of the demand; and if there was, he would like to add that fact. The court said that he did not think there was any question on that point, and said if he were to rule upon that, he should say that the evidence proved that. The counsel for the defendants made no admission about it and declined to do so, and said the point must stand upon the evidence. The jury returned a verdict for the defendants, as directed by the court, and the plaintiffs excepted to the refusals, directions of, and course pursued by the court. No specific or other objections to the pleadings were made by the counsel for the defendants or referred to by the court other than as appears by said report of the stenographer. And the plaintiffs’ counsel has filed a notice or application in regard to the same, which is referred to.

“The case is reported after verdict to the Supreme Judicial Court, for their determination and direction upon the evidence,

exceptions of the plaintiffs and facts reported. If the presiding judge was in error, the verdict is to be set aside, and a new trial granted." The nature of the stenographer's report is stated in the opinion of the court.

A. A. Ranney, for the plaintiffs, read the report, and stated that it would not be necessary to read the evidence, as much of it was not material, and that in his brief he had referred to such parts of the evidence as he deemed essential to an understanding of the points of law. [GRAY, C. J. As you have admitted that much of the evidence reported is not material, the court first desires to hear you on the question why the case has been brought before us in this extraordinary form, with this mass of undigested testimony.] It was not deemed possible for the respective counsel in the case to agree upon what evidence was material, and the only way seemed to be to report the whole evidence, and for the respective counsel to refer to such portions of it as they considered material. At any rate, the judge of the Superior Court has seen fit to send up the report in this form. The statute allows a case to be sent to this court on a report. The judge ruled that the plaintiffs were not entitled to recover upon the evidence introduced by them. To this ruling the plaintiffs excepted. For the purpose of presenting the questions of law which arise, the evidence must be reported to this court. The manner of reporting it is the act of the judge of the Superior Court, and not the act of the counsel.

G. A. Somerby, for the defendants, was not called upon.

THE COURT then suggested that the case should stand over for a day, and that the counsel should see if they could agree upon an abridgment of the testimony on the coming in of the court.

On the next day the counsel for the plaintiffs stated that he had no further suggestions to offer.

GRAY, C. J. The authority given by statute to the Superior Court to make reports to this court extends only to questions of law. A report, like a bill of exceptions, should be so framed by the presiding judge, or by the counsel with his approval, as to state the nature of the case, and the questions of law intended to be reserved, and so much only of the facts or the evidence as may be necessary to present those questions to this court. The decision of the jury or the court below upon questions of fact or the weight of evidence is not open to revision here.

The purpose of the St. of 1870, c. 312,* providing for the appointment by the Superior Court in this county of stenographers to take reports of the evidence introduced and the rulings made and instructions given, is to afford assistance to the court and the counsel in conducting the trial, and in drawing up reports and bills of exceptions; not that a complete record of all that took place in the court below, whether material or immaterial to the understanding of the questions of law reserved, should be transmitted to this court.

The report signed by the presiding judge in the present case states none of the rulings upon the admission and rejection of evidence, but merely refers for them to the entire record of the stenographer, through which they are scattered. The remaining question reserved is whether there was any evidence to be submitted to the jury upon the principal issues in the case. The stenographer's record, as printed, covers nearly two hundred pages, and consists, in greater part, of irrelevant and unimportant details of testimony, long cross-examinations affecting only the bias and credibility of witnesses, and interlocutory discussions between the judge and the counsel; and leaves it to this court to sift out from this large volume of worthless matter the several rulings of the judge and the comparatively small portions of the

* The material provisions of this act, which is entitled "An act for the preservation of evidence in certain cases in Suffolk County," are as follows:

"SECTION 1. The judges of the Superior Court, or a majority of them, shall appoint two stenographers to serve as hereinafter provided, at the terms of said court held for civil business within and for the county of Suffolk, who shall be sworn officers of said court, and who shall each receive an annual salary of two thousand dollars, to be paid by the said county of Suffolk.

"SECTION 2. Whenever in the trial of any action in said court for said county, both parties to the same shall agree in writing that a stenographic report of the evidence, or of the charge of the presiding judge, or of any part of the proceedings, shall be taken, or whenever, upon the application of either party to an action, the presiding judge shall deem it advisable that a stenographic report of any part of the proceedings shall be taken, it shall be the duty of the stenographers so appointed to cause full stenographic notes to be taken of such proceedings, or any part thereof which may be so required; and it shall further be the duty of the said stenographers to furnish to either party to such action, upon request, a transcript of such part of the notes so taken as may be required."

evidence which have any bearing upon the questions of law to be determined.

Such a manner of reporting a case, while it puts the parties to needless expense in the preparation of copies, fails to present with adequate clearness and precision the legal questions upon which this court is to pass. The record now before us affords so extraordinary an example of irregularity in this respect, that it cannot, consistently with a due regard for the orderly and intelligent administration of justice, be entertained in its present shape. It will be open to the plaintiffs to apply to the judge who presided in the Superior Court for a report in proper form of the questions of law which were reserved at the trial.

This question of practice being an important one to the rights of parties in this and other cases, opportunity was given to the counsel to be heard upon the subject, it has been deliberately considered during the adjournment, and the opinion now announced is the unanimous judgment of the court.

Report dismissed.

The case subsequently came before the court on a report of *Rockwell, J.*, in substance as follows, so far as it relates to the questions decided :

The suit is brought to recover either the money paid by the plaintiffs to the defendants, or damages for breach of contract and warranty in the sale and purchase of seven cases of kid gloves.

The plaintiffs introduced William H. Perley as a witness, but contending that, as he was a defendant, though defaulted, they being obliged to use him, would not be bound by his testimony, if it was contradicted by other testimony, or not believed; and from his testimony,* it appeared that Rogers Bros. & Co. of

* The St. of 1869, c. 425, § 1, provides that: "The party producing a witness before any court, as well criminal as all others, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, shall not be allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony; but before such last mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statements, and if so allowed to explain them."

Naples, through John Munroe & Co., at Paris, in the early spring of 1870, consigned for sale several cases of kid gloves to the defendant Andrew T. Hall, which had been originally designed and intended for Bigelow, Peyser & Co. of Boston, then pecuniarily embarrassed, and who for years had been glove importers and dealers; that the defendants F. A. Hall and John F. Macomber were copartners, and had their place of business in the same office with said Andrew T. Hall, but were not connected in business with him; that Macomber, as partner of F. A. Hall, in April, 1870, in behalf of Andrew T. Hall, verbally agreed with the defendant Perley, who for years had been a copartner of Bigelow, Peyser & Co., and was then doing business solely as glove dealer, under the name of Bigelow, Peyser & Co., after an examination by said Perley of two of said cases of gloves, which were perfect in every respect, to sell him eleven of said cases of gloves, at six dollars per dozen, to be perfect in every respect, equal if not better than the two cases examined, to be paid for, cash on delivery, two of the cases to be delivered and paid for on or before May 10, 1870, and the remaining cases on or before September 1, 1870, and in mean time, before delivering all said cases of gloves, Andrew T. Hall was to retain possession of said gloves. Perley then knew that the gloves had been originally designed and intended for said Bigelow, Peyser & Co.

The plaintiffs introduced evidence tending to show that they constituted the firm of N. W. Churchill & Co. at the time of the transaction in question; that they bought of Perley, in the last of April or first of May, 1870, two cases of kid gloves, which were delivered to them billed in the name of Bigelow, Peyser & Co., and paid for by them at the price of seven dollars a dozen; that subsequently they entered into negotiations with Perley for the sale and purchase of nine cases more; that the said two cases were bought by sample and specifications, and answered the contract; that in negotiating the sale of the other nine, Perley represented that he was not the owner, but was selling them for somebody else, a responsible party, whom he refused to and did not name; that he agreed to sell them to the plaintiffs, by sample and specifications, which were given to them and which they were to answer, and they were to be, when delivered, as good

as, if not better than the other two cases previously sold and delivered as aforesaid, and which were of high quality and perfect, the price to be seven dollars a dozen, and the goods delivered at any time within four months, which would be about the first day of September, 1870, with payment on delivery; that they knew Perley was not responsible, and would not have relied on him; and after the agreement had been made, or the plaintiff Churchill had concluded in his own mind to take them, and the terms settled between them, insisted that before they would buy them they must know of whom they were buying; that said Perley then, about ten days before September 1, told them that Andrew T. Hall, old Honesty himself, was the owner, and he was selling for him, which was satisfactory to the plaintiffs; but that N. W. Churchill, one of the plaintiffs, for the purpose of assuring himself, went to see A. T. Hall, and this interview occurred, to wit; as testified to by the plaintiff Churchill:

"I went to his office, and inquired for A. T. Hall. I never saw the man before. He was pointed out to me, and came along and spoke to me very politely. I told him I had come to see about the lot of gloves that Mr. Perley had something to do with, and had talked to me about. He said to me, 'Those gloves are sold, sir.' I said to him, 'Perhaps I am the party who has bought them. My name is Churchill.' 'Oh, yes,' said he, 'that is the party, that is all right.' I told him I was ready to take the goods on the 1st of September. That was the time that was assigned for the delivery of the goods. I said I should be ready to take them; he said, Very well; he would go to work and have the goods entered, and take them out as soon as possible, and deliver them to me; and he said in the mean time that there were some of them in New York; he would have to send to New York and get them here. I told him I would like to have him do so as soon as possible; that we had got ready to take them, and wanted the goods; he said he would do it; and everything was satisfactory. I said to him then, 'Who do I buy these gloves of?' He said, 'You buy them of me.' 'Do I get a bill from you?' 'Yes, you get a bill direct from me.' That is about all that was said to Andrew T. Hall at that time, that I remember."

That Churchill had a second interview with said Hall, which he testified to as follows, to wit: "A. T. Hall was there, and his brother, Frank Hall. I went down and told him I came after the bill of the gloves, and wanted to know just how much to draw a check for. He turned to his brother, and said, 'Make a bill of those goods to Mr. Churchill.' Mr. Hall turned round, and said, 'We cannot make a bill to Churchill; we must bill these goods to Bigelow, Peyser & Co.' Andrew T. Hall said to him, 'You have had the management of this whole affair; you may fix it up to suit yourself,' or words to that effect. Then I said to Mr. Hall, 'Is it going to make any difference to me whether these goods are billed direct from you, or through Bigelow, Peyser & Co.?' 'Not the slightest,' he said. Then I took this bill and carried it to Perley's office. McBrian was there. He was formerly connected with Perley; but I did not know what his connection was then. I handed him that bill; and I said, 'There is the bill of those goods; and you had better copy that bill, except changing the names.' He did so; and I went up-stairs, and Mr. Dam drew a check for the amount. I took the check, and McBrian and I went down to the office. I passed the check to Frank Hall, and he receipted Bigelow, Peyser & Co.'s bill, and McBrian receipted my bill. Then some one took that check, either McBrian or Frank Hall, and went into the bank with it. Then I had some conversation afterwards with Macomber about the delivery of the goods. The goods were in his office. Then I said to him, 'We want these goods this afternoon. It is past your office hours; will you wait here?' He said, 'Oh, yes, we will wait until you send for them;' but he wanted me to send as soon as I could. That when he went to Macomber's office with the bill, he told what had been done and what Mr. Hall said, and told him he had better keep that bill."

That in none of these interviews was anything said about, or intimated, that the defendants had sold the gloves to Bigelow, Peyser & Co., or to Perley.

That the plaintiffs had had some of the same kind of gloves before, that were damaged, and in one of these interviews, he thinks the first, after the conversation with said Hall, he had some talk with Macomber, in which he asked him, "What if these goods are damaged?" He answered, "You must look to

the parties you are buying them of." And that, as they had just been told it was Andrew T. Hall, this was satisfactory to them ; that the check was dated September 3, 1870, drawn on the Bank of the Metropolis, against funds payable to the order of A. T. Hall, and was paid, and came back in course of business, paid, with said Hall's indorsement on it ; that the check was delivered about two o'clock, P. M. ; that the defendants had promised to have the goods sent to them directly from the custom-house, to save two cartage expenses ; but they were not, but taken to the office occupied by A. T. Hall and Hall & Macomber ; that the plaintiffs did not examine, or have an opportunity to see and examine the goods, before delivery, except the samples, and were not asked and did not ask for leave to do so ; that the plaintiffs, after delivering the check, went to their own office, drew an order directed to A. T. Hall or Hall & Macomber, sent it by a teamster, who was directed, and did go to the defendants' office with it, and obtained seven cases of kid gloves on it there, and carried and delivered them to the plaintiffs' office, directly after said payment.

That the plaintiffs, as they testified, did not know, and had not been told, of any prior sale or bargain between Hall and said Perley, or Bigelow, Peyser & Co., and no reason was given why F. A. Hall was to, or did, make out a bill to Bigelow, Peyser & Co., or in their name, instead of directly to the plaintiffs ; that one of the plaintiffs, Dam, knew, or had heard of Perley being a bankrupt at the time ; that the gloves delivered were in cases, packed in cartoons and in boxes lined with zinc ; that upon the delivery of the gloves, the boxes were opened directly on the same day, and all of them, without the exception of a single case, were found badly spotted and damaged, not answering the samples and specifications, and the contract and warranty aforesaid.

Evidence was also introduced tending to show an offer to return the goods to the defendant A. T. Hall, and a refusal on his part to receive them.

It appeared that, at the time in question, there was an established custom or usage to sell cases of gloves by sample, among and known to the trade, and that importers of gloves were accustomed to have samples and specifications of gloves sent in advance of the cases in bulk, to sell by, and that this was the cus-

tomary and usual mode of sale when gloves were sold in cases or bulk, and no opportunity afforded for examination.

The plaintiffs introduced evidence showing that after Perley stated that A. T. Hall was the owner of the goods, and Churchill went to him, the plaintiffs had nothing to do personally with Perley, but dealt entirely in relation to the gloves with A. T. Hall, or Hall & Macomber; that A. T. Hall, at the time of the demand and offer to return the goods, held the said check undrawn, and continued to hold the funds thereafter, for aught that appeared; that Perley came into the plaintiffs' office and saw the gloves the week next following September 3, and was told by the plaintiffs that they had offered the gloves back to Mr. Hall, and had demanded back the money.

The plaintiffs called and examined Perley, and his evidence in chief was, in addition to that already stated, that his attention was called to some cases of gloves by A. T. Hall and Macomber; that he was shown some samples by them in their office; that he was solicited to buy them; that Macomber went with him and Palmer to the custom-house, and showed them two cases, which they examined and found to be of a good quality, and perfect in every respect; that it was stated by Macomber that the others were and should be when delivered, as good as these, if not better, and perfect in every respect; that they did not see, and were not shown the others; that they were not there, they having come, or were coming, in different steamers; that in April, he negotiated a trade for some ten or eleven cases, at six dollars a dozen, two cases to be taken in ten days, and the balance by the first day of September; that he took the two cases seen, billed to him in the name of Bigelow, Peyser & Co., paid for them at the price of six dollars a dozen, and these he sold and delivered to the plaintiff at the price of seven dollars a dozen, and billed them in the name of Bigelow, Peyser & Co.; that the rest were to be at same price, to be kept by Hall and delivered at any time within four months, and be like the samples and specifications given him, and equal, if not better, than the two cases seen, and perfect in every respect, when delivered; that he did not see the others; that he told Macomber or Hall that he should take them, and likewise, that he was going to dispose of them, as he did not wish them to compete with his goods in the market, and wished

to control them, and thought he knew a party who would buy them ; that they gave him samples and specifications of them ; that after selling and delivering the said two cases to the plaintiffs, he negotiated with them for the sale of nine cases more, and gave them the specifications which Macomber had furnished him, told Macomber that he wanted them to show, and did show them, to Churchill, and finally, in June, he thought he concluded the trade with the plaintiffs, verbally, by the samples and specifications given him by the defendants, agreeing that the rest, when delivered, should be as good as, if not better than the said two cases, and perfect in every respect, using about the same language as Macomber used to him, the price to be seven dollars a dozen, cash ; that after he was in bankruptcy, the plaintiff Churchill came to him direct, and asked him about the goods, and he told him that they belonged really to A. T. Hall, and that it dropped there ; that from that time forward, the plaintiffs did not deal with him, and he did not see Churchill, or Hall, or the other defendants about them after that time ; that he sent some word to Hall, by McBrian, which he was proceeding to state, but did not, on defendants' objecting to his doing so ; that he had nothing to do with the matter after that, in any way ; that the goods were never delivered to him, and he never paid or received any money on account of them ; that defendants never paid or offered him any portion of the money received from the plaintiffs, nor the difference of one dollar a dozen between the price which he was to pay and the price to be paid by the plaintiffs ; that he was not in town on the last day of August, or September 1 or September 3 ; that on the following Monday he saw the goods, and the plaintiffs told him that they had taken them Saturday, got them of Hall ; was called in to look at them, and saw them in this bad condition ; that samples of the whole were given to him when he bargained for them ; that he knew nothing about the bill given by defendants running to Bigelow, Peyser & Co., at the time, and never knew of it until he found it among his papers at the office, a long time afterwards ; that he never took delivery of the goods, and there was at the time no Bigelow, Peyser & Co., and no one was doing business in that name ; that during the summer, shortly after he had sold these two cases, he sent to Hall to have one or two cases sent up to his office, and, on examination, would

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The plaintiffs called and examined Perley, and his evidence in chief was, in addition to that already stated, that his attention was called to some cases of gloves by A. T. Hall and Macomber; that he was shown some samples by them in their office; that he was solicited to buy them; that Macomber went with him and Palmer to the custom-house, and showed them two cases, which they examined and found to be of a good quality, and perfect in every respect; that it was stated by Macomber that the others were and should be when delivered, as good as these, if not better, and perfect in every respect; that they did not see, and were not shown the others; that they were not there, they having come, or were coming, in different steamers; that in April, he negotiated a trade for some ten or eleven cases, at six dollars a dozen, two cases to be taken in ten days, and the balance by the first day of September; that he took the two cases seen, billed to him in the name of Bigelow, Peyser & Co., paid for them at the price of six dollars a dozen, and these he sold and delivered to the plaintiff at the price of seven dollars a dozen, and billed them in the name of Bigelow, Peyser & Co.; that the rest were to be at same price, to be kept by Hall and delivered at any time within four months, and be like the samples and specifications given him, and equal, if not better, than the cases seen, and perfect in every respect, when delivered; that he did not see the others; that he told Macomber or Hall to take them, and likewise, that he was going to deliver them, as he did wish them to compete with his goods in the market.

to control them, and thought he knew a party who would buy them ; that they gave him samples and specifications of them ; that after selling and delivering the said two cases to the plaintiffs, he negotiated with them for the sale of nine cases more, and gave them the specifications which Macomber had furnished him, told Macomber that he wanted them to show, and did show them, to Churchill, and finally, in June, he thought he concluded the trade with the plaintiffs, verbally, by the samples and specifications given him by the defendants, agreeing that the rest, when delivered, should be as good as, if not better than the said two cases, and perfect in every respect, using about the same language as Macomber used to him, the price to be seven dollars a dozen, cash ; that after he was in bankruptcy, the plaintiff Churchill came to him direct, and asked him about the goods, and he told him that they belonged really to A. T. Hall, and that it dropped there ; that from that time forward, the plaintiffs did not deal with him, and he did not see Churchill, or Hall, or the other defendants about them after that time ; that he sent some word to Hall, by McBrian, which he was proceeding to state, but did not, on defendants' objecting to his doing so ; that he had nothing to do with the matter after that, in any way ; that the goods were never delivered to him, and he never paid or received any money on account of them ; that defendants never paid or offered him any portion of the money received from the plaintiffs, nor the difference of one dollar a dozen between the price which he was to pay and the price to be paid by the plaintiffs ; that he was not in town on the last day of August, or September 1 or September 3 ; that on the following Monday he saw the goods, and the plaintiffs told him that they had taken them Saturday, got them of Hall ; was called in to look at them, and saw them in this bad condition ; that samples of the whole were given to him when he bargained for them ; that he knew nothing about the bill given by defendants running to Bigelow, Peyser & Co., at the time, and never knew of it until he found it among his papers at the office a long time afterwards ; that he never took delivery of the goods ; that at the time no Bigelow, Peyser & Co., and no one in that name ; that during the summer, when he saw these two cases, he sent to Hall to have them, and, on examination, would

pay for them ; that they objected, and he did not get them ; that in August or September, he judged that they might be damaged, as he had sold, along in June, some goods of his own at the custom-house, of the same class, but they proved to be bad ; that after seeing the goods on said Monday, he did not go to see the defendants about them ; that he had notice of the offer to return the goods, and of the demand to and of Hall ; that he (Churchill) was dealing with Hall, and he supposed he had no claim on him whatever.

On cross-examination, he stated that from April 25, 1870, up to the time when this suit was brought, he did not communicate with A. T. Hall, except that he sent verbal messages down to him by McBrian ; that A. T. Hall never told him to sell these gloves, nor to sell them to anybody, and to warrant them, to his knowledge ; that he was not the agent of F. A. Hall, or of Macomber ; that, if he sold the gloves, he sold them on his own account ; all he wanted was his commission, one dollar a dozen ; that he had no money to get them himself, and had got to look between these two parties to get them ; that in using the word commission, he meant the difference in price between what he paid Hall and what Churchill was paying him ; that he did not mean that A. T. Hall was going to give him a commission for selling them.

He testified that he knew nothing about the bill given Bigelow, Peyser & Co., dated Sept. 1, 1870 ; never knew it was made out ; never authorized it in any way, shape, or in any form ; never knew there was any such a transaction, nor about the bill, until long afterwards.

L. B. Thompson testified for the plaintiffs, that he was assistant clerk in the United States Bankruptcy Court ; that a petition was filed by a creditor against Wm. H. Perley, July 7, 1870, and proceedings had thereon, and an adjudication made and warrant issued on July 23, 1870 ; an assignee was appointed October 1, 1870.

At the close of the plaintiffs' testimony, the defendants put in no evidence, and contended that the plaintiffs could not recover on their declaration, and rested their defence there. The plaintiffs' counsel contended that the evidence was for the jury ; that it tended to prove either that defendants sold the gloves to the

plaintiffs with a contract and warranty not answered; or that, if there was a bargain for a sale to Perley, in the name of Bigelow, Peyser & Co., it was not carried out, but abandoned; and that the defendants assumed and adopted the sale to the plaintiffs made by Perley, and carried it out as their own; that no title passed to the plaintiffs, on account of the bankruptcy proceedings, if there was any bargain and sale to Perley; that the plaintiffs were either entitled to recover damages for breach of contract or warranty, or the money and funds paid in whole or in part.

Upon the defendants' motion and request, the presiding judge held and ruled, as matter of law, that there was no case made out under the pleadings, and refused to submit the evidence to the jury, directing a verdict for the defendants. No specific objection was made or named to the declaration; but the defendants' counsel contended, and the court ruled generally, that the plaintiffs could not recover upon the pleadings and the evidence.

A. A. Ranney, for the plaintiffs.

G. A. Somerby, for the defendants.

MORTON, J. There was evidence on which it would be competent for the jury to find a verdict against A. T. Hall upon the ground of a warranty of the goods sold. It tended to show that the plaintiffs negotiated a purchase of the goods with Perley, who represented himself to be the agent of Hall; that a part of the contract was that the goods should be equal to the sample; that before closing the contract the plaintiffs called on Hall, who told them that they were buying of him and would get their bill direct from him. No price or other terms of sale were agreed on or mentioned between the plaintiffs and Hall, but he received the price fixed by Perley and carried out the contract made by him. It was competent for the jury to find that Hall adopted the contract of sale made by Perley as his agent. If so, he could not repudiate the warranty, which was an essential part of the contract.

The mode in which the bills of parcels were afterwards made out tended to contradict the plaintiffs' testimony, but this was open to explanation, and did not conclusively show that the plaintiffs bought of Perley. We think the evidence should have been submitted to the jury. As there must be a new trial, it is un-

necessary to consider whether there was evidence for the jury upon the count charging a fraudulent conspiracy of the three defendants.

Verdict set aside.

SAMUEL W. CREECH, JR. *vs.* JOHN M. BYRON.

Suffolk. March 12. — June 26, 1874. COLT & ENDICOTT, JJ., absent.

In an action on a note by an indorsee, who took it after maturity, parol evidence is admissible in defence to show that after the giving of the note the parties thereto orally agreed that a bill of sale, under seal, and purporting to be an absolute conveyance of personal property made to the payee by the maker contemporaneously with the note, should be considered as a mortgage and stand as a security for the note, and that the payee of the note sold the property and indorsed only a part of the proceeds upon the note, although the sale and indorsement were before the plaintiff took the note.

CONTRACT upon a promissory note, signed by the defendant, payable to Samuel Despeaux, and indorsed to the plaintiff.

At the trial in the Superior Court, before *Putnam, J.*, without a jury, judgment was ordered for the plaintiff, and the defendant alleged exceptions in substance as follows :

The plaintiff produced the note, and the defendant admitted the execution of it and the indorsement to the plaintiff. The defence was that the payee of the note had security for it, to wit, a mortgage made to the payee by the defendant, of a horse, wagon and harness, which property the payee had sold, before the transfer of this note, and credit for which had not been given.

It was conceded that the plaintiff had taken the note after its maturity, and the court found that he took it in good faith, and for a valuable consideration.

The defendant then offered in evidence a conveyance under seal of the property referred to, signed by himself and purporting to be an absolute bill of sale of the same to the said payee, and offered evidence tending to show that it was given at the time the note was made ; and offered to show, that subsequently to its execution and delivery, the parties orally agreed that it should be treated only as a pledge or mortgage, and that the property should be held as collateral to the note ; that the note not being paid at maturity, the payee took possession of the property and

sold it without foreclosure, first notifying the defendant of his intention to sell, and indorsed only part of the proceeds of the sale upon the note. It was admitted that this sale and indorsement were made before the plaintiff took the note.

The court ruled that the evidence offered by the defendant was not admissible. The defendant excepted to this ruling.

G. W. Park & G. F. Piper, for the defendant.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

DEVENS, J. The evidence offered by the defendant was competent. By it he did not seek to invalidate the title conveyed by the absolute bill of sale, which was the case in *Harper v. Ross*, 10 Allen, 332; but on the contrary, recognized the validity of the instrument and insisted that the proceeds of the resale of the property transferred thereby were by agreement made subsequently to the execution thereof to be applied upon the note in suit. An absolute bill of sale of certain personal property was made by the defendant to the payee at the time he signed this note, and no consideration therefor appears other than that which may be inferred from the fact that these two acts were contemporaneous; and it was competent to show in an action upon the note that it was agreed subsequently that this property should be held for the payment of the note, and that, in pursuance of it, the payee sold the property and assumed to apply the proceeds upon it. This was simply evidence of the consideration for the bill of sale and of the mode in which that consideration was to be paid, and even if the agreement that the property or its proceeds should be held for the payment of the note was made subsequently to the execution of the bill of sale, so long as the consideration for that remained unpaid, the parties were entitled to make it. If acting under it the payee of the note sold the property and assumed to apply the proceeds thereon, the defendant is entitled to show if he can that he failed to apply the whole proceeds, and what was the amount actually received by him in defence to an action brought by the present plaintiff who was a purchaser after the time of this agreement and sale, and after the maturity of the note.

The evidence offered did not tend to alter or vary the legal effect of the instrument, so far as it transferred the property either as between the parties to it or those claiming derivatively under

it, but tended to show the real character of the entire transaction as bearing upon the question whether or how far the note could properly be enforced by a third person, who took it subject to all such defences as might have been made against it, if it had remained the property of the payee. *Howard v. Odell*, 1 Allen, 85. It should therefore have been admitted.

Exceptions sustained.

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JAMES W. HORNE & wife vs. WILLIAM MEAKIN & another.

Suffolk. March 4. — June 26, 1874. WELLS & ENDICOTT, JJ., absent.

Under the Gen. Sts. c. 129, § 41, an amendment may be allowed at any time before final judgment.

If during the trial of a cause the court rules that the plaintiff cannot recover on his declaration, and allows him to amend, and suggests that the trial proceed and that the amendment be filed thereafter, and no objection is made to this course, it is too late to object at the argument in this court that the amendment was not filed until after the verdict.

It is not a violation of the Gen. Sts. c. 84, relating to the observance of the Lord's day, for a husband and wife to hire a horse and wagon to attend the funeral of the husband's brother-in-law.

It is the duty of a livery stable-keeper to provide a horse suitable for the purpose for which it is let, and on the question of his liability for an injury caused by the horse's running away it is immaterial that he did not know that the horse was unsuitable.

When a stable-keeper lets a horse to A., knowing that it is to be used by A.'s son to take his family to a funeral, he is liable to the son and any member of the son's family, for an injury caused by the unsuitableness of the horse for the purpose for which it was hired.

When an accident is caused in part by the fault of a horse unsuitable for the purpose for which it is let, and in part by a defect in the highway, the stable-keeper who let the horse will be liable for the damage to the parties injured.

If a person hires of a stable-keeper and by mistake takes a horse not intended for him, and the stable-keeper, knowing that he has taken the horse, and the purpose for which he intended to use it, does not make a reasonable effort to notify him of his mistake, he will be liable for any damage caused by the unsuitableness of the horse for the purpose for which it was used.

TORT with a count in contract to recover damages for an injury to the female plaintiff, by being thrown from the defendants' carriage. Trial in the Superior Court before *Putnam, J.*, who allowed a bill of exceptions in substance as follows :

The case was submitted to the jury only upon the amended count in tort hereafter mentioned. It appeared in evidence that on Saturday, June 29, 1872, the father of James Horne, one of the plaintiffs, who lived in Canton, went to the defendants, who keep a livery stable in Canton, and engaged a horse and carriage for his son, to be used in a funeral procession for the next day. The deceased was the husband of a sister of the plaintiff, James. The plaintiffs, their child, and its grandmother rode in the carriage on Sunday from the house to the graveyard, and, on their return home, after stopping on the way at the house of a friend to get a glass of water, the horse became frightened at some object and ran away. The carriage was broken, and the female plaintiff was thrown out and injured. Notice was thereupon sent to one of the defendants, who came and took home his horse and carriage.

The father testified that as agent of his son, who had requested him to hire a horse for him to go to the funeral, he went to the defendants' stable and engaged a horse for his son, kind and gentle, to go in a funeral procession with his family on the next day, Sunday.

The plaintiff James testified that he did not send his father to these defendants to engage the team. The father testified further that he went on Sunday to the stable and got the team, which was delivered to him by one of the defendants', the same one of whom he had engaged the horse and carriage, and the same team which he had engaged the day previous, and drove it to his son's house, when his son took it and went with his family to the funeral; that the man told him the horse was good and gentle, and would stand without hitching. The plaintiff, James, testified that on the way home the horse became frightened from some cause unknown to him, and ran at great speed across two railroad tracks, and the carriage then upset and threw them out; that he was used to driving a horse, and exercised due care. The plaintiffs also offered evidence tending to show that the horse had run away the day previous and on other occasions before and after the accident, that he was easily frightened, and would run away apparently without any reason, and that he was not a suitable horse to be let for the purpose indicated. The plaintiffs also offered evidence of the insecurity of the carriage.

The defendants offered evidence conflicting with that of the plaintiffs, and also tending to show that they had contracted with the father on Saturday, for a horse for him, but not for his son, and a different horse from the one which the plaintiffs had ; that the father came on Sunday and asked for the horse which had been engaged, and while they were harnessing him, the father took a horse and carriage standing in the yard, which had been engaged by another person, supposing that it was the one intended for him, and without the knowledge or consent of the defendants, or any of their servants ; that when the horse engaged by the father was got ready, they brought him out, and found that the father had driven off with the wrong horse. The defendants offered further evidence tending to show that the horse which the father took was kind and gentle, and also suitable for the purpose, and had been often driven by ladies ; that the carriage had just been repaired ; and this was the first time it had been out of the stable since its repair, and that it was in good order, and suitable for the purpose, and contended that the immediate cause of the overturning of the vehicle, was owing to the unevenness of the highway, or to the want of skill and proper care of plaintiffs, and through no fault of the defendants, or their horse, or carriage. There was also some evidence tending to show that the horse was frightened by a dog, and that the female plaintiff also took hold of the reins and her husband's arm, and that the horse was not properly managed.

After the plaintiffs' evidence was in, the court ruled at the request of the defendants, that the plaintiffs could not maintain their action on the original count in contract, or the count in tort ; that they could recover in tort, on a count properly framed, and that the plaintiffs might amend their count in tort upon proper terms in conformity with this opinion.

The court intimated the form in which the amended declaration should be drawn, which was substantially as it was afterwards drawn, and, as it would take time to draw such an amendment, the court suggested that the trial had better proceed, and the amendment might be afterwards filed. No objection or exception was taken to this by the counsel for the defendants. The amended count was however in fact not filed or shown to the defendants' counsel, until the day after the verdict.

The court instructed the jury, upon the whole evidence, that, the defendants being public stable-keepers in the town of Canton, if the plaintiff, James W. Horne, hired of them, through his father, a horse and carriage for the purpose of taking himself and his family to the funeral, they were bound to furnish him with a horse and carriage reasonably safe for such a purpose ; that if the horse was not a safe horse, but was accustomed to run away without any apparent cause, and the plaintiff was himself a careful driver, and exercised due care on this occasion, and the accident would not have happened except for the fault of the horse in the particular named, the plaintiff could recover in this action, upon the amended count which was to be filed, for the injury occasioned to his wife. To these instructions, and to others given in explanation of them to the jury, no exception was taken.

The defendants then requested the court to rule : 1. That the accident occurring on the Lord's day, the plaintiffs could not recover. The court declined so to rule.

2. That the plaintiffs to recover, must show that the horse was not a suitable one to be let under the circumstances. [And, if the jury find he was unsuitable, the plaintiffs cannot recover unless they prove that the defendants knew the horse was thus unsuitable.] The court gave all of this ruling but the portion in brackets, but declined to give that part, and ruled that whether the defendants knew or not that the horse was unsuitable, was immaterial, and of no consequence under the amended count.

3. That if the jury find that the horse was let to the father, and the credit given to him, the plaintiffs cannot recover damages in this action. The court so ruled, and added the words, " unless the jury find it was hired by the father for the use of the son, and that the defendants knew that it was to be used by the son to take his wife and family to the funeral."

4. If the jury find that the highway was defective, and this was the principal cause of the accident, and the accident occurred through no fault of the defendants, the plaintiffs cannot recover against the defendants. The court so ruled with the addition of the words, " or of the horse," after the words, " no fault of the defendants."

5. That upon the evidence disclosed in this case, the plaintiffs cannot recover on the count in tort. The court so ruled, but

ruled, that the plaintiffs might recover upon the amended count in tort.

6. If the jury find that the horse started by being suddenly frightened by a dog, or that the accident happened by any defect in the railroad tracks or highway, the plaintiffs cannot recover. The court gave this ruling with the addition of the words, "And through no viciousness of the horse" after the word "highway."

7. If the jury find that the father took the horse designed for another, or without the consent of the plaintiffs, they cannot recover. The court so ruled, but added the words, "Unless the jury find that the defendants knew of the mistake, and could have notified the plaintiffs of the mistake and did not do so."

There was no evidence in the case that the defendants did or did not notify the plaintiffs, or of any effort to notify the father, who lived in the village.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions to the rulings and refusals to rule, so far as they conflict with the rulings asked for.

J. Nickerson, for the defendants.

S. J. Thomas, for the plaintiffs.

DEVENS, J. The objection made by the defendants that the amended count upon which the plaintiffs seek to recover was not filed until after verdict, and therefore that the plaintiffs cannot maintain their verdict, cannot be sustained. It was arranged, without objection by the defendants, when it was found that some amendment of the plaintiffs' declaration was necessary, that such amendment should be made and filed thereafter, and the trial proceeded. Upon the declaration as it was to be amended, and upon the issue to be raised thereby, the presiding judge charged and the jury passed. From the instructions of the court as they appear upon the bill of exceptions, it is evident that when they were given it was fully understood that the amendment had not been in point of fact filed, and no exception was taken by the defendants to thus proceeding without the declaration. It is entirely competent for the court to permit amendments even after verdict, taking care that none are thus allowed by the filing of which the just rights of parties can be injuriously affected; and in the present case it is not shown or suggested that the amendment, as filed by permission of the court, presents any issue except

that which had been passed upon by the jury. Gen. Sts. c. 129, § 41. *Emery v. Osgood*, 1 Allen, 244.

The exceptions alleged to the instructions must also be overruled. 1. The fact that the accident occurred on the Lord's day did not necessarily prevent the plaintiffs from recovering, and it was not a violation of the Lord's day act for the husband to hire a horse for the purpose of attending the funeral of his brother-in-law, accompanied by his wife, nor for her so to attend.

2. It was the duty of the defendants to furnish a suitable horse for the purpose for which it was hired, and a part of their contract that they would do so. If they have negligently furnished one which was unsuitable, and injury has been occasioned thereby, it is not a defence that they did not know that the horse was unsuitable.

3. It was also correctly ruled that if the contract was made by the father for his son, and the purpose for which the horse was to be used by the son (that of taking his wife and family to the funeral of his brother-in-law) was known to the defendants, then upon proof of other necessary facts, an action of tort might be maintained for the injury to the wife.

4. The addition made by the judge to the fourth request was necessary, in order that the jury should understand that the defendants were to be held responsible for damages arising from the unsuitableness of the horse, in accordance with his ruling which the defendants have objected to by their second exception.

5. The fifth request is disposed of by what has been already said as to the right of the judge to permit the amended count to be filed.

6. If the court considered that the tendency of the sixth instruction as requested was to draw the attention of the jury from the point upon which the case seemed to rest, it was proper, after giving it, to add, "and through no viciousness of the horse," as even if the injury was occasioned by the combined causes of the viciousness of the horse, and sudden fright or the defective way, the defendants would be responsible.

7. The last instruction requested was properly modified by the judge. It appears by the bill of exceptions that the parties lived in the same village. Even if the father took the horse by mistake, yet if the defendants knew of the mistake, and

could with reasonable effort have notified the plaintiffs of it, and failed to do so, it must be inferred that they assented to any responsibility they might be subjected to, if injury was occasioned by the fact that the horse taken was unsuitable for the purpose for which one had been hired.

Exceptions overruled.

GEORGE B. NICHOLS & others vs. J. GREGORY SMITH
& others.

Suffolk. March 12. — June 26, 1874. COLT & ENDICOTT, JJ., absent.

Evidence that wool was delivered at the station of a common carrier, in sacks marked with the name and address of the owners, whose place of business was in Boston, and with the initial of the agent who had purchased it; that the weights and numbers were upon all the sacks; that previous shipments had been made by the same agent at the same place to the same principals, during the same season; and that when said agent delivered this wool he piled it in one part of the building, pointed it out to the defendants' agent, and said, "That pile of wool is for Boston," is evidence of a delivery to the carrier for shipment to the principals at Boston.

In an action against the receivers of a railroad for the loss of goods by fire, while in the defendants' freight house, evidence that the freight house was filled with wool in sacks, and paper stock in a ragged condition scattered loosely upon the floor; that some kind of oil was stored there, a portion of which had leaked out upon the floor; that much of the glass was broken out of the windows at one end of the building; that the most inflammable materials were stored in that end; that a locomotive engine passed over the track, twenty-five or thirty feet from said windows, about fifteen minutes before the fire was discovered, and that the fire caught at that end of the building, is evidence to be submitted to the jury of a want of ordinary care on the part of the defendants as warehousemen.

CONTRACT against the receivers and managers of the Vermont Central Railroad, to recover damages for the loss of a quantity of wool destroyed by fire in a depot of a railroad, admitted to be under the control and management of the defendants as common carriers.

At the trial in the Superior Court before *Rockwell, J.*, the defendants requested the court to instruct the jury that there was no evidence upon which a verdict for the plaintiff could be found which request was refused, and the case was submitted to the jury on general instructions as to the duty of common carriers

and warehousemen ; which were not otherwise excepted to. The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions to the above refusal to rule. The bill of exceptions stated the evidence in full. The nature of it appears in the opinion of the court.

A. Russ, for the defendants.

W. Gaston & E. O. Shepard, for the plaintiffs.

DEVENS, J. This is an action for damages on account of the loss of a quantity of wool destroyed by fire in a freight station of a railroad admitted to have been under the control and management of the defendants as common carriers. The plaintiffs sought to recover upon two counts in their declaration : in the first of which it was alleged that the defendants received the wool at Middlebury, Vermont, as common carriers, with directions to convey the same to Boston, and that while in their care as such carriers the same was destroyed by fire ; the second set forth that the defendants received the wool as warehousemen, and by reason of want of ordinary care upon their part the same was while in their custody destroyed by fire.

At the trial the cause was submitted to the jury upon general instructions as to the liabilities of common carriers and warehousemen, which were not objected to ; and the only questions presented for our consideration are, whether there was any evidence of any direction to the defendants to ship the wool, under the count by which it was sought to charge them as common carriers, and whether there was any evidence of negligence under the count by which it was sought to charge the defendants with liability as warehousemen ; and upon both counts we are of opinion that there was evidence sufficient to entitle the plaintiffs to go to the jury.

The bill of exceptions shows that in order to prove that the defendants received the goods as common carriers, the plaintiffs offered evidence that the wool was delivered at the station of the defendants at Middlebury by their agent to the defendants' agent, packed in bags, all which were marked in stencil in large letters with the firm name of the plaintiffs and their place of business, " Nichols, Parker & Dupee, Boston," and that they were further marked with an initial indicating who had purchased the same for them ; that the weights and numbers

were upon all the sacks ; that previous shipments had been made by the same agent at the same place to his principals during the same season ; and that the agent who delivered the wool piled it in one part of the building, pointed it out to defendants' agent, and said, " That pile of wool is for Boston." It is true, as the defendants claim, that mere authority to ship to Boston is not sufficient, and there must be either by acts or words a direction so to do. *Watts v. Boston & Lowell Railroad*, 106 Mass. 466. Such was the instruction given, and this evidence was sufficient to require the case to be submitted to the jury upon this point.

Upon the second count, there was evidence that the freight-house was filled with wool in sacks ; that paper stock in a ragged state was scattered loosely upon the floor ; that some kind of oil or kerosene was stored there, a portion of which had leaked out upon the floor ; that much of the glass was broken out of the windows ; that a locomotive engine and train passed over the track, which was twenty-five or thirty feet from those windows, about fifteen minutes before the fire was discovered, and that the fire caught at the end nearest the broken windows, where the most inflammable materials were. We think this furnished evidence for the jury that the fire was caused by the sparks from the locomotive engine which had just passed ; and further, that there was evidence for the jury of negligence on the part of the defendants in permitting the windows of the building to remain broken in the immediate vicinity of passing engines, while the contents of the building next the windows were of so inflammable a character.

Exceptions overruled.



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LYMAN MASON, executor, *vs.* CHARLES H. LEWIS & another.

Middlesex. June 18, 1874. AMES & ENDICOTT, JJ., absent.

A probate appeal may be taken from the final decree of a single justice to the full court at any time within thirty days ; but if it is taken before the expiration of thirty days, the full court has cognizance of it in ten days after it is taken.

If an appeal is taken from the decree of the probate court on matters of fact, and at a hearing before a single justice of this court the appellant does not appear and is defaulted and the decree affirmed, and he thereupon appeals to the full court, no evidence having been taken before the single justice, and no report made of the hearing before him, his decree cannot be revised in matter of fact.

On an appeal from the decree of a single justice to the full court in a case in equity or probate, this court cannot order evidence to be taken when none was taken and reported before the single justice.

APPEAL from a decree of the probate court, granting to the appellee, as executor of the will of John Lewis, leave to sell real estate for the payment of debts. The reasons of appeal related to matters of fact only, not appearing on the record. The appeal was set down for hearing before *Devens*, J., on May 23, 1874, when the appellants, not appearing, were defaulted, and the decree of the probate court affirmed. The appellants on May 26 appealed to the full court, and immediately entered their appeal here.

C. S. Lincoln, for the appellee, contended that nothing was open for revision, and moved to dismiss the appeal.

A. R. Brown & E. A. Alger, for the appellants, relied on the original reasons of appeal; contended that the appeal was not before the full court until the expiration of thirty days from the decree of the single justice; and moved that, if necessary, a commissioner might be appointed by the full court to take and report the evidence in the case.

GRAY, C. J. By the Gen. Sts. c. 117, § 14, probate appeals are to have the same rights as to hearing and determination as cases in equity. The Gen. Sts. c. 113, § 8, allow an appeal in equity to be claimed from the final decree of a single justice to the full court at any time within thirty days. But no statute provides that, when once claimed and entered, it shall not be heard by the full court for thirty days. The practice has been, in accordance with the St. of 1864, c. 111, as soon as an appeal is claimed of record, to enter it forthwith in the full court, and to treat it as before the court in ten days after it is taken. It is admitted that ten days have elapsed in this case. The full court therefore has cognizance of the appeal.

The decree of the single justice was rendered upon the default of the appellants. No error of law appears upon the record. No evidence was taken before the single justice, and no report requested or made of the hearing before him. There is nothing before us therefore by which his decree can be revised in matter of fact. *Wright v. Wright*, 13 Allen, 207. *Ross v. Harper*, 99 Mass. 175. *Smith v. Townsend*, 109 Mass. 500.

The application for the appointment of a commissioner to take evidence comes too late. It should have been made before the hearing by a single justice. The full court cannot order evidence to be taken, except in special cases of accident or mistake, when "further evidence" is required, in addition to evidence duly taken and reported before a single justice. Gen. Sts. c. 113, § 21. 35th Rule in Chancery, 104 Mass. 574.

Decree affirmed.

INHABITANTS OF HANSON *vs.* INHABITANTS OF SOUTH SCITUATE.

Plymouth. March 7. — June 26, 1874. WELLS & ENDICOTT, JJ.,
absent.

The town record kept pursuant to the Sts. of 1863, cc. 65, 229, of the soldiers who composed the town's quota of the troops furnished by the Commonwealth to the United States, is competent evidence of the enlistment of one of such soldiers and of payment of bounty to him.

A general order of the Governor of the State is competent evidence of a call for troops under an act of Congress, and of the assignment of quotas to the towns under the call.

A certificate of discharge from the military service of the United States is admissible in evidence to show that a soldier was honorably discharged, and indorsements on the certificate, stating that the soldier had deserted, which indorsements were made without the consent of the soldier and after the certificate was delivered to him, will not affect its admissibility.

The entry on the muster roll of a company that a member thereof has deserted is not conclusive evidence of the truth of the charge.

Intentional absence from military service without leave, does not of itself constitute the crime of wilful desertion; there must be in addition the intention not to return to the service.

The "wilful desertion" referred to in the St. of 1865, c. 230, § 3, is the "desertion" defined by the Articles of War, U. S. St. 1806, c. 20, art. 20.

A certificate from a public officer that certain facts appear from the records of his office, but which does not profess to be a transcript of the record, is not competent evidence of such facts.

CONTRACT to recover for expenses incurred by the plaintiff town in supporting as paupers William O. Thomas and his family, who were alleged, at the time said expenses were incurred, to have had their settlement in the defendant town, under the St. of 1865,

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c. 230.* Trial in the Superior Court before *Pitman*, J., who, after a verdict for the plaintiff, reported the case for the consideration of this court, in substance as follows :

* The St. of 1865, c. 230, is as follows:

"SECT. 1. Any person who shall have been duly enlisted and mustered into the military or naval service of the United States, as a part of the quota of any city or town in this Commonwealth, under any call of the President of the United States, during the recent civil war, and who shall have continued in such service for a term not less than one year, or who shall have died or become disabled from wounds or disease received or contracted while engaged in such service, or while a prisoner in the hands of the enemy, and the wife or widow and minor children of such person, shall be deemed thereby to have acquired a settlement in such city or town; and all the rights, duties, and liabilities pertaining to such a settlement, as set forth in chapters sixty-nine and seventy, and in section forty-nine of chapter seventy-one of the General Statutes, shall attach thereto: *provided*, such person was, at the time of his enlistment, of the age of twenty-one years, an inhabitant of said city or town, and had resided therein for six months next previous to the time of his being mustered into said service."

"SECT. 2. Any person enlisted, mustered, and serving as a part of the quota of any city or town as set forth in the first section of this act, but who shall not be entitled to a settlement therein by reason of the want of age, or residence required by said section, shall, nevertheless, be entitled for himself, his wife or widow, and minor children, to relief and support in such city or town, if at any time they should fall into distress therein, or stand in need of such relief or support; and such city or town shall not send such person, nor his wife or widow, nor his minor children, to any state almshouse, nor remove them to any other place, nor recover the expenses of their relief or support from any other city or town, nor receive the same from the Commonwealth; and if any city or town shall cause any such person so entitled to relief therein to be sent to any state almshouse, or removed to any other place, such city or town shall be liable, in an action of tort, for all expenses of their relief and support thereafter incurred in such almshouse, or by any other city or town. But, otherwise than as above provided, said city or town shall not be liable to any other city or town, nor to the Commonwealth, for the expenses of any relief or support furnished to such person, or to his wife, widow, or minor children, in such other place or in any state almshouse."

"SECT. 3. The provisions of this act shall not apply to any person who shall have enlisted and received a bounty for such enlistment in more than one town, unless the second enlistment was made after an honorable discharge from the first term of service, nor to any person who shall have been guilty of wilful desertion, or who shall have left the service otherwise than by reason of disability or an honorable discharge."

The main question at issue was the settlement of the pauper Thomas. Among other proof offered to establish its case, the plaintiff was permitted to introduce, against the exceptions of the defendant, the record of the defendant town, kept under the provisions of the Sts. of 1863, *cc.* 65, 229, showing the enlistment of Thomas, as part of the quota of the defendant town, on August 9, 1862, for three years, and the payment to him of bounty by said town; also, under exception, the General Order No. 26, dated July 7, 1862, of the Governor, calling for troops, and assigning quotas; also the discharge of Thomas from the service of the United States. The discharge was dated June 2, 1865, and stated that "no objection to his being reënlisted is known to exist." On the margin of the paper, in red ink, was the following: "The Adjutant General U. S. A. reports this soldier to have deserted April 6, 1863. The charge has not at this date been reversed. 2d Auditor's Office, Sept. 6, 1871."

It appeared that the red ink writing in the margin had been added after the discharge had been originally granted, and in the possession of Thomas, and upon its return to Washington upon a pension application. The defendant objected to the admission of the paper, but it was allowed.

The defendant contended that Thomas had no military settlement, because he had been guilty of "wilful desertion," and in support of this, offered the certificate, a copy of which appears in the margin,* and also a duly certified copy of the muster-roll

* "WAR DEPARTMENT, Adjutant General's Office, Washington, July 2, 1870. It appears from the Records of this office, that William O. Thomas, Private of Company "G," Thirty-ninth Regiment Massachusetts Infantry Volunteers, enlisted at South Scituate, Massachusetts, on the ninth day of August, one thousand eight hundred and sixty-two, and mustered into service at Camp Stanton, Boxford, Massachusetts, on the second day of September, one thousand eight hundred and sixty-two, for three years.

"Received furlough for eight days from February twenty-fourth to March fourth, one thousand eight hundred and sixty-three. Was a deserter from March fourth to June fourth, one thousand eight hundred and sixty-three. Mustered out of service on the second day of July, one thousand eight hundred and sixty-five. THOMAS M. VINCENT, *Assistant Adjutant General*.

"Be it known that Thomas M. Vincent, who has signed the foregoing certificate is an Assistant Adjutant General of the Army of the United States,

of the company to which Thomas belonged, from February 28, 1863, to April 30, 1863. On this paper Thomas was reported as a deserter. The presiding judge refused to admit the certificate of the assistant adjutant general, but admitted the copy of the muster-roll.

It appeared in evidence that Thomas came home upon a furlough of eight days, granted February 24, 1863, on account of the alleged sickness of his wife. On April 13, he was arrested at his home by a deputy sheriff, as a deserter, upon the authority of a letter from his colonel; from thence he was taken to Surgeon General Dale, then to Fort Independence, afterwards to the convalescent camp at Alexandria, and rejoined his regiment June 4, serving therein until discharged. It did not appear that he was ever tried for desertion or any other offence.

The circumstances under which he remained at home, and his motives, were in controversy. The plaintiff offered evidence tending to show that he received an extension furlough from Surgeon General Dale on account of physical disability, and that he was taken to Boston about the time it expired; that he had made application through his attending physician for another extension, and that when taken to Surgeon General Dale he was examined and told by Dale that he was wrongfully arrested, and that he was not fit to go back to duty, and that in point of fact the soldier was in such a physical condition as to be entirely unfit to return. The defendant offered evidence to the contrary, tending to show that he had overstayed his furlough, that his sickness was feigned, and that he had wilfully deserted his duty.

The articles of war were introduced; and Thomas testified that they were read to him, and that he understood them.

The defendant asked the court to rule that intentional absence, without leave, from military service, constituted wilful desertion; that the muster-roll in evidence furnished conclusive

and the legal custodian of the records of the Adjutant General's office, and that to his attestation as such full faith and credit are and ought to be given.

"In testimony whereof I, William W. Belknap, Secretary of War, have hereunto set my hand and caused the Seal of the Department of War of [Seal.] the United States of America to be affixed on this second day of July, one thousand eight hundred and seventy.

"WM. W. BELKNAP, *Secretary of War.*"

evidence of desertion. But the presiding judge declined so to rule, and instructed the jury as follows: "That mere absence without leave is not sufficient to constitute the offence; that if Thomas had an extension furlough, which he believed gave him liberty to remain at home, up to the time of his arrest, and remained at home under such belief, it is immaterial to this issue whether the furlough was regularly or irregularly granted; that if he remained at home independently of the furlough, and in violation of military regulations, with an honest belief that his state of health unfitted him for military duty, and with an intention to return to that duty as soon as he deemed himself able, then it would not be wilful desertion; that to constitute this offence there must have been the intent, in known violation of his duty, to quit or abandon the service permanently, or at least for some indefinite time; that the muster-roll and the entry thereon did not furnish conclusive evidence of wilful desertion, but was merely evidence to be weighed with other evidence in the case."

If there was error in the admission or rejection of evidence, or in the other refusals or rulings, prejudicial to the defendant, the verdict may be set aside, otherwise, judgment on the verdict.

J. B. Harris, for the plaintiff.

P. Simmons & B. W. Harris, (*P. E. Tucker* with them,) for the defendant.

DEVENS, J. This action was brought under the St. of 1865, c. 230, which was repealed by the St. of 1870, c. 392. As, however, by the latter statute "acts done and proceedings commenced" are excepted from its operation, the present action is not affected thereby, it having been commenced some months previous to the passage of the repealing statute. It presents the question whether the pauper Thomas, for the expense of the support of whom the action was brought, had acquired under the earlier statute, in the defendant town, what is sometimes called a military settlement.

The record of the defendant town kept in pursuance of the Sts. of 1863, cc. 65, 229, was of the nature of a public record, and therefore competent evidence of what was required to be contained in it, and the general order of the Governor of the Commonwealth was also competent evidence of the call for troops under

the acts of Congress, and the assignment of its quota to the defendant town, although that this call was made and quotas were assigned to all the towns, were historical facts recognized by the terms of the St. of 1865, c. 230. *Wayland v. Ware*, 104 Mass. 46.

The certificate of discharge was also competent for the purpose of showing that Thomas did not leave the service otherwise than by reason of an honorable discharge. The defendant did not ask for any ruling as to the effect to be given to the indorsements upon it subsequently made at the office of the Adjutant General of the Army of the United States; but objected generally to its admissibility apparently for any purpose. What effect was given to these by the presiding judge is not shown by the exceptions; but its admissibility was not affected by indorsements, which, without the consent of the soldier, had subsequently been placed upon it.

In *Fitchburg v. Lunenburg*, 102 Mass. 358, reported since this cause was tried, it was held that a certificate in due form from the proper military officer of an honorable discharge from the military service of the United States was conclusive evidence of the cause and manner of leaving the service by a soldier, and that evidence, which in that case had been offered of the soldier's previous absence from duty and of his arrest for desertion, unaccompanied by any evidence that he had been convicted or sentenced therefor, was incompetent, and rightly rejected. Under this decision much of the evidence which was admitted for the defendant was immaterial, and it remains only to be seen whether it was in any way prejudiced as to the true issue of the case by the refusal to give the instructions requested, or to receive such other evidence as was offered.

The defendant requested the court to rule that the rolls admitted were conclusive evidence of desertion. Upon the muster-roll, which is made every two months, the reasons and time of absence of each soldier are required to be entered, (Articles of War, Art. 13, U. S. St. of 1806, c. 20,) and entry of the word "deserted" by the commanding officer of the company, who is then to account for all the men of his command, against the name of the soldier, is in the nature of a charge against such soldier of the crime of desertion; but it is not an adjudication that he is

guilty of the offence, which, as it is one of the gravest offences known to the military law, can be made only by a court martial. The court, therefore, in permitting this evidence of the entry upon the muster-roll to be weighed with the other evidence in the case upon the question of wilful desertion, gave it a consideration at least as great as that to which it was entitled.

The defendant also requested the court to instruct the jury that intentional absence without leave from the military service constituted wilful desertion. Upon this point the instructions were correct. By the Articles of War, *supra*, there are defined the two offences of desertion (Article 20) and absence without leave, (Article 21,) which are treated by the punishments prescribed as offences of very different grades. By the use of the term "wilful," the Legislature did not, in our opinion, intend to do anything more than to mark and emphasize that distinction. Mere absence without leave does not constitute the offence of desertion under the Articles of War, or of "wilful" desertion. When committed by a soldier it is a violation of duty, but as it is accompanied always by an intention to return and to submit himself necessarily to punishment, if it has been incurred, it is a very different offence from that of abandoning the service permanently or for some indefinite time, unaccompanied by an intent to return, which constitutes desertion. In the instruction of the presiding judge this distinction was clearly and accurately pointed out.

The certificate from the Adjutant General's Office, signed by one of the assistant adjutants general, of what appeared from the records of that office, did not profess to be a transcript of the records, but was simply a statement of what the certifying officer, under whose hand it was, deemed to be shown by them; and was rightly rejected, even if otherwise competent, for the reason that it was clearly possible that the officer might have been mistaken as to the true conclusions to be drawn from the records. *Oakes v. Hill*, 14 Pick. 442. *Robbins v. Townsend*, 20 Pick. 845.

Exceptions overruled.

115 343.
153 543.

MONITOR MUTUAL FIRE INSURANCE COMPANY vs. JAMES N. BUFFUM.

Suffolk. June 22, — 27, 1874.

If a person accepts a policy of insurance without dissent, the law presumes that he knows and assents to its contents.

A., the agent of an insurance company to solicit risks, obtained for B. a policy of insurance from said company, paying for it a cash premium and executing and depositing a premium note, in the name of B. The policy recited that B. had paid a cash premium and given a deposit note of like amount; B. received the policy without reading it, and had no knowledge of the execution of the note by the agent. *Held*, that the acceptance of the policy by B. was a ratification of the act of the agent in executing the note; and that the fact, known to B., that the agent was the agent of the company to solicit risks would not prevent his acting for B. in executing the premium notes.

CONTRACT on four promissory notes given as premium notes, under four policies of insurance. At the trial in the Superior Court before *Pitman*, J., the case was after verdict for the defendant reported to this court in substance as follows:

The defendant denied the making of the notes, which were signed "James N. Buffum, per John H. Bubier."

The several policies were offered in evidence and were of the same general tenor. Each policy recited that the insured had paid a cash premium and given a deposit note for a like amount. It appeared that the by-laws of the company authorized the taking of a deposit note for the same amount as the cash premium, and that such was the practice of the company.

The plaintiff then proved the issue of the policies; that they were procured through said John H. Bubier, the person executing the notes in question; that he made the cash payments provided for in the policies at the same time that he signed the notes; that the policies were delivered by Bubier to the defendant, and were never cancelled or surrendered, but remained in full force until after the insolvency of the company and the appointment of a receiver. The said Bubier was agent of the plaintiff for the city of Lynn for the purpose of soliciting risks, but for no other purpose, deducting fifteen per cent. as his commission for all cash premiums, by an arrangement with the company.

Upon this evidence the plaintiff rested. The defendant then testified that being importuned by Bubier to allow him to get the

JUNE, 1874.

insured, he assented, and told Bubier he might do so, in some good company, and that when Bubier brought him the policies he paid him the several cash premiums; that he took the policies and put them in his desk, but that he never read them until after this suit; that he never authorized Bubier in any way to sign these notes or any notes whatever, nor ever knew of their being signed, or that there were any notes given.

The plaintiff did not claim to control this evidence of the defendant; but contended that the defendant, by taking the policy under the circumstances above recited, ratified the act of Bubier, and was estopped to dispute the execution or validity of the notes. But the court ruled otherwise and directed a verdict for the defendant, which was rendered accordingly.

If the ruling of the court at the trial was right, judgment is to be entered on the verdict; but if the plaintiff's view of the law is correct the verdict is to be set aside and judgment entered for the plaintiff for the amount of the notes and interest.

S. Morton & J. Willard, for the defendant, to the point that there was no subsequent ratification by the defendant of Bubier's unauthorized act in signing the notes, cited *Combs v. Scott*, 12 Allen, 493, 496; *Hoxie v. Home Insurance Company*, 32 Conn. 34; *Nickerson v. Darrow*, 5 Allen, 419.

W. G. Colburn, for the plaintiff.

WELLS, J. The question in this case is simply whether the notes, given to the plaintiff, in the name and behalf of the defendant, became his notes, either by previous authority to Bubier, or by subsequent ratification.

Upon the defendant's own testimony in the case it appears that he told Bubier that he might procure insurance for him in some good company. Bubier, acting within the scope of this authority, did procure certain policies of insurance for him, giving the notes in question as deposit notes for a part of the premium, in accordance with the by-laws and practice of the insurance company. The defendant received the policies from Bubier, paid him the premium, put the policies in his desk, and retained them for four of the five years they had to run. The policies required their consideration, the payment of a certain sum as cash premium, and the giving of a deposit note of like amount and of like tenor.

The defendant having thus accepted the policies and held them as contracts binding upon the insurance company, must be taken to hold them according to the terms which they express. In the absence of fraud he is conclusively presumed to assent to those terms. He cannot be permitted to qualify his contract or his relations to the subject matter of it, by asserting and proving that he never read the writing and was ignorant of its contents. If he would bind the other party he must be bound himself. *Grace v. Adams*, 100 Mass. 505. The same principle applies to this case. By accepting the policies which expressly recite the corresponding obligation entered into on his part, the defendant adopted the act of Bubier in assuming that obligation for him as part of the transaction.

The fact, known to the defendant, that Bubier was agent of the plaintiff for the purpose of soliciting risks, would not prevent his acting for the defendant in executing the premium notes, if expressly authorized thereto ; and subsequent ratification is equivalent to such express authority.

By the terms of the report "if the plaintiff's view of the law is correct the verdict is to be set aside, and judgment entered for the plaintiff for the amount of the notes and interest." The plaintiff's view of the law, as stated in the report, is that the defendant by accepting the policy "ratified the act of Bubier and was estopped to dispute the execution or validity of the notes." Estoppel is technical, and does not accurately describe the defendant's condition. But as there is no fact open which ought to be submitted to a jury ; and as upon the facts stated in the report the defendant must be conclusively presumed to have adopted the act of Bubier in giving the notes upon which the policies were based, the same result must follow as if it were an estoppel.

Judgment for the plaintiff.

SAMUEL P. CUMMINGS *vs.* FRANCIS W. BIRD.

Suffolk. April 1. — June 27, 1874. COLT & ENDICOTT, JJ., absent.

A right of action for libel does not survive by force of the Gen. Sts. c. 127, § 1, even if the party injured lost thereby a valuable office.

TORT for libel. At the trial in this court before *Colt, J.*, the case was reserved for the consideration of the full court on the pleadings and evidence. The plaintiff afterwards died, and his administratrix sought to come in and maintain the suit, and offered to show that the intestate lost two offices in consequence of the alleged libel.

C. Cowley, for the plaintiff.

W. Gaston & W. Colburn, for the defendant.

DEVENS, J. The original plaintiff having deceased at the time of the argument of this cause, and the administratrix having now come in, it is first to be determined whether the suit, which is for a libel upon him, has abated by his death. The rule of the common law is that actions of tort for misfeasance or malfeasance do not survive, and if this action does so in this Commonwealth it is by virtue of Gen. Sts. c. 127, § 1.* The ground taken by the counsel for the administratrix is, that as actions for damage done to real or personal estate survive, and as it is alleged that the plaintiff lost a lucrative employment by reason of the charges made in the alleged libel, the action may be maintained as for damage done to his estate. This argument cannot avail. In *Walters v. Nettleton*, 5 Cush. 544, it was decided that an action for libel did not survive against the administrator of the defendant, and in *Nettleton v. Dinehart*, 5 Cush. 543, it was further held that an action for malicious prosecution did not survive in favor of the administrator of the plaintiff. In the latter case the same argument as that used by the plaintiff here would have been equally pertinent, as the plaintiff had been subjected, as he alleged,

* The Gen. Sts. c. 127, § 1, provide that: "In addition to the actions which survive by the common law, the following shall also survive: actions of replevin, of tort for assault, battery, imprisonment or other damage, to the person; for goods taken and carried away or converted by defendant to his own use; or for damage done to real or personal estate; and actions against sheriffs for malfeasance or nonfeasance of themselves or their deputies."

to a malicious prosecution, which must of necessity have occasioned him cost and expense and thus operated to diminish his estate. These cases are decisive of the present, and it would be a forced construction to give the provision of the statute such an extent as that claimed. The causes of action which survive are those, the effect of which has been to occasion injury to some specific property, either personal or real, which belonged to the deceased.

Suit abated by death of plaintiff.

MIDDLESEX RAILROAD COMPANY vs. BOSTON & CHELSEA RAILROAD COMPANY.

Suffolk. March 10, 11. — June 27, 1874. COLT & ENDICOTT, JJ., absent.

A contract by which a horse-railroad corporation transfers the entire control of its road with all its franchises, receiving in return only a fixed rent paid in the form of a dividend to its stockholders, is *ultra vires*, and void.

The lessee of a horse-railroad cannot recover of the lessor for the expense of renewing the road, except in a suit upon the contract of lease, and if this contract is *ultra vires*, no action can be maintained in any form.

B., a corporation owning a horse-railroad, made a contract with A., by which the latter was to construct and run the road, paying a rent to B., of \$5600 a year, which was equal to eight per cent. on one half of its shares of stock, the other shares being deferred stock and receiving no dividend therefrom. All the net earnings above \$11,200 a year were to be divided between A. and B. It was also agreed that if any of the materials used in the construction of the road should be worn out or become unfit for use, and the track should require to be renewed, and the cost of renewal in any one year should exceed \$1000, the expense should be paid from a sinking fund, to be set apart, one half by each of the parties, from the surplus income after a dividend of eight per cent. should be paid upon all the stock of A., "or if said fund shall not be sufficient, then the same shall be provided in such a way as may be found equitable." B. assigned the contract to C., and by a contract between A. and C., A. assented to the assignment and relinquished all claim under the contract to any participation in the profits or earnings of the demised road, and also agreed to cancel six hundred shares of its stock, and to reduce its capital to the sum of one hundred and ten thousand dollars. C. agreed to pay A. \$8800 a year instead of \$5600. To secure this arrangement the shareholders of the deferred stock of A. paid to C. \$20,000, and C. guaranteed a dividend of eight per cent. to the stockholders of A. In an action by C. against A., to recover the expense of renewals of the road, *held*, that no action would lie.

CONTRACT to recover one half of the expense of certain renewals of structures incurred by the plaintiff under a contract

... with the Malden & Melrose
... by the latter to the plaintiff.
... J., who reserved it for the con-
... in substance as follows :
... a contract was entered into between
... part and the Malden & Melrose Rail-
... second part, the material portions of which

... That the said party of the first part hereby agrees to
... the railroad tracks in the cities of Chelsea and Charles-
... and according to the contract and specifi-
... this day entered into between said party of the first part
... M. M. Hodgman; and also to construct stables and car-houses
... according to the plans and specifications submitted therefor, on
... of Broadway and Eleanor Streets; the work on said
... to be commenced forthwith; the construction thereof com-
... according to said specifications; and said stables and car-
... houses to be erected ready for running on or before the first day
... of November next."

"Fifth. Said party of the second part hereby agrees to pay to
the party of the first part on the first days of October and April,
commencing on the first day of October, A. D. 1859, in each and
every year during the said term for which the above grant is
made, one half part of the rent herein reserved and agreed to be
annually paid. The rent shall be at the rate of five thousand six
hundred dollars per annum, and shall continue at this rate until
the net earnings of the cars employed by the said party of the
second part and running between Chelsea and Boston amount to
the sum of \$11,200 per annum. All the net earnings over and
above said sum shall be equally divided between the two parties
hereto, semi-annually, and paid as above provided. It is agreed
by the parties hereto that the expenses of operating said road and
running the cars between Chelsea and Boston, and keeping the
in repair, shall be calculated from the number of horses
employed, estimating the cost of each horse at one hundred and
fifty-five cents per day, and allowing that each horse can travel
thirteen miles a day for 313 days in each year; and to the cost
thus ascertained the toll paid the Chelsea Bridge Corporation
shall be added, to make up the whole expense of operating."

"Seventh. Said party of the second part agrees to furnish proper cars, horses, stock and other articles suitable for operating said railroad and running cars between Chelsea and Boston; that it will run cars as aforesaid as frequently as the public convenience requires, except when prevented by unavoidable casualties; and will keep said railroad, together with such portions of the streets and bridges, respectively, as shall be occupied by the tracks of said railroad, in good and proper order and repair; and keep and perform all the agreements between the Salem Turnpike and Chelsea Bridge Corporation and the party of the first part, to be kept and performed by said party of the first part; provided, however, that if any of the materials used in the construction of the road shall be worn out or become unfit for use, and the track shall be required to be renewed, and the cost of such renewal properly assessed, on any one year, shall exceed one thousand dollars, then the expense thereof shall be defrayed from a sinking fund, to be set apart, one half by each of the parties hereto, from the surplus increase, after eight per cent. shall have been divided upon all the stock of said party of the first part; which fund shall be equal to one per cent. a year upon the capital of said party of the first part, and shall be invested in the stock of said Boston & Chelsea Railroad Company; or if said fund shall not be sufficient, then the same shall be provided in such a way as may be found equitable."

On April 16, 1863, the plaintiff and the defendant entered into the following contract:

"Whereas the Malden & Melrose Railroad Company did on the day of A. D. 1862, assign the annexed contract to the Middlesex Railroad Company; and whereas the said Middlesex Railroad Company did on that day enter upon and take possession of the property in said contract demised, and have from that time until the date of these presents operated said railroad and paid to the Boston & Chelsea Railroad Company the rent in and by said contract provided:

"Now, therefore, in consideration of the premises, and of one dollar to it paid by the said Middlesex Railroad Company, the said Boston and Chelsea Railroad Company doth hereby assent to said assignment, and agrees that the said Middlesex Railroad Company may hold said demised property, or may underlet the

same or any part thereof. Provided, however, that the said Middlesex Railroad Company shall do and perform all the agreements and covenants in said contract contained and to be performed by the said Malden & Melrose Railroad Company (save as the same are hereinafter altered) from and after the said 31st day of March, A. D. 1862. It being expressly agreed that the said Middlesex Railroad Company shall not be liable to make good or pay anything for any breach of contract aforesaid, made or suffered by the said Malden & Melrose Railroad Company prior to the said 31st day of March, A. D. 1862. The said Boston & Chelsea Railroad Company doth also further agree that it will abandon, and hereby doth waive and relinquish, all claim under the said contract to any and all participation in the profits or earnings of the railroad or property in said contract demised or growing out of the operation thereof. And the said Boston & Chelsea Railroad Company doth further agree to cancel six hundred shares of its capital stock and reduce the capital stock of said company to the sum of one hundred and ten thousand dollars divided into two thousand and two hundred shares.

“And the Middlesex Railroad Company, in consideration of the premises, doth agree to pay the said Boston & Chelsea Railroad Company, in the place of five thousand six hundred named in the said contract, the sum of eighty-eight hundred dollars per annum in semi-annual payments, first payment to be made on the first day of October next.

“And the said Middlesex Railroad Company doth agree that its clerk shall sign, upon presentation, a statement written on the face of each certificate of the above named stock of said Boston & Chelsea Railroad Company in the following words: ‘Entitled to a semi-annual dividend of two dollars a share, payable by the Middlesex Railroad Company on the first days of April and October, subject to the provisions of the lease assigned to and the contract with said Railroad Company.’”

The award of a referee was made part of the report. From this it appeared that the materials used in the construction of the defendant's road wore out and became unfit for use, and that certain sums were expended by the plaintiff in making repairs or renewals, and the amount properly assessed in each year was stated. The referee also found that there was no sinking fund

raised to defray the expense of such renewals, nor any profits from which such sinking fund could have been raised ; that the capital stock of the defendant corporation consisted of 2800 shares at \$50 per share, until the rent to be paid to said defendant was raised from \$5600 to \$8800 per annum ; and that when the rent was so raised, the number of said shares was reduced to 2200.

It was also agreed, if admissible, that certain holders of the deferred stock of the defendant company, which at that time had no market value, at or about the time of the making of the contract of April 16, agreed with the plaintiff that if it would pay the rent of \$8800 named in said contract whereby eight hundred shares of the deferred stock were made preferred with a guaranteed eight per cent. dividend, that they would pay to the plaintiff \$25 per share, and that this was paid to the amount of \$20,000 ; but there was no agreement in regard to the money on the part of the defendant, and none of it was paid by the defendant.

T. P. Proctor & L. M. Child, for the plaintiff.

C. E. Hubbard & W. Emery, for the defendant.

WELLS, J. The contracts, by which the road and franchises of the defendant corporation were transferred in the first instance to the Malden & Melrose Railroad Company, and afterwards to the plaintiff corporation, were *ultra vires*, and invalid. *Richardson v. Sibley*, 11 Allen, 65. They are not merely contracts by which another party is employed to operate the road in behalf and under the direction and control of the corporation owning the franchise, receiving a share of the profits as compensation. The entire control of the road with all its franchises is transferred, the corporation owning it receiving in return only a fixed rent, payable in the form of a dividend to its stockholders.

It is urged however, that this suit is not brought upon the contract itself ; but upon a liability for certain expenditures made by the plaintiff for the use and benefit of the defendant, upon its road, and by its procurement.

We do not see how the plaintiff could recover for those expenditures in implied assumpsit, upon all the facts of the case, independently of the written contracts. Being in the actual and exclusive occupation of the road, and running it with and as its own, the cost of repairs and renovation of the track must be regarded as expenses incidental to such use and to be paid from

the gross receipts. In order to recover anything from the defendant, especially in order to recover in the form in which this claim is prosecuted, resort must necessarily be had to the written agreements.

We incline to the opinion that no suit can be maintained, either at law or in equity, on account of the claim which is made in this case, or any part of it, unless such suit is founded upon the written contracts; and that those being *ultra vires*, the plaintiff has no remedy in either form.

Upon the contracts themselves we come to the same result. By the original agreement with the Malden & Melrose Railroad Company the rent to be paid to the defendant was \$5600 per annum, which was equal to eight per cent. on one half of its shares of stock; the other shares receiving no dividend therefrom, and being therefore called "deferred stock." Whenever the profits or net earnings should be such as to cover that sum and an equal sum to be retained by the lessee, to wit, in all \$11,200, the surplus was to be equally divided between the two corporations. The cost of renewals, which were to be made by the lessee, if they should exceed \$1000 in any one year, was to be defrayed from a sinking fund, to be set apart, one half by each of the parties, from such surplus income "after eight per cent. shall have been divided upon all the stock of said party of the first part; which fund shall be equal to one per cent. a year upon the capital of said party of the first part," to wit, the Boston & Chelsea Railroad Company, "or if said fund shall not be sufficient, then the same shall be provided in such a way as may be found equitable."

The agreement between the plaintiff and the defendant, by which the latter assented to the assignment of the lease to the plaintiff, provided that the Boston & Chelsea Railroad Company should abandon, waive and relinquish "all claim under said contract to any and all participation in the profits or earnings of the railroad or property in said contract demised, or growing out of the operation thereof." It was further provided that one half of the "deferred stock" of the Boston & Chelsea Railroad Company should be cancelled, and that the absolute rent to be paid should be increased to \$8800, thus securing dividends of eight per cent. per annum upon the whole remaining shares of its capital stock.

To secure the adoption of this arrangement the shareholders of the "deferred stock" paid to the Middlesex Railroad Company the sum of \$20,000, and that corporation was required to indorse upon all the certificates of stock of the Boston and Chelsea Railroad Company a stipulation entitling them to annual dividends to the amount of eight per cent. to be paid by the Middlesex Railroad Company.

This arrangement necessarily defeated that for a sinking fund, from which, primarily, the expenditures were to be repaid; because the sources from which that fund was to be derived no longer remained. There is no stipulation for repayment in any other mode, except in case the fund so provided shall not be sufficient. In that event alone "the same shall be provided in such a way as may be found equitable."

The express agreement of the parties has not only made the accumulation of such a fund impossible, but has provided that the whole rent to be paid shall be absorbed in dividends payable by the Middlesex Railroad Company directly to the shareholders of the Boston & Chelsea Railroad Company, and that the latter corporation should relinquish all right and claim to any further share of the earnings of its road; thus relieving the former corporation from accounting for the separate earnings of the leased road and leaving the latter corporation no means of making or providing for such repayment.

The plaintiff does not show us, and we are unable to see in what way it would be equitable to require the defendant to provide for any part of the expenditures in question. Consequently there must be

Judgment for the defendant.

MARY A. DRINAN, administratrix, vs. REBECCA A. NICHOLS & another.

Suffolk. March 24. — June 27, 1874. AMES & DEVENS, JJ., absent

A. executed a mortgage of real estate with a power of sale to B., and subsequently conveyed the equity of redemption to C. The mortgage note was deposited in a bank, and on two occasions, as the interest came due, notices were sent to A., who

collected the amount of C. and paid it to the bank. When the next instalment of interest was due, A. received the money of C., but did not pay it to the bank or to the mortgagee. When C. was informed that A. had not paid the interest, he sent word to the mortgagee's attorney that if A. did not pay the interest, he would. After this, and without giving notice to C., B. sold the estate, in good faith and in exact conformity to the provisions of the mortgage, to D., who acted in good faith and was the highest bidder at the sale. After D. had signed an agreement of purchase, but before the deed was executed to D., a bill in equity to redeem was brought by C. against B. and D. *Held*, that although A. was not the agent of B., and had not any authority to represent or act for him, when after a reasonable time it became evident that A. would not pay, notice should have been given to C., and that the bill could be maintained.

BILL IN EQUITY brought by the plaintiff as administratrix of the estate of Michael Drinan, against Rebecca A. Nichols and Clark R. Moore, to redeem an estate sold by the defendant Nichols to the defendant Moore under a power of sale contained in a mortgage made by John T. Pope to said Nichols; which estate had, after the execution of said mortgage, been conveyed by Pope to said Michael Drinan, subject to said mortgage.

The case was heard before Ames, J., who reserved it for the consideration of the full court upon the bill, answers and the following report:

"It appeared that the condition of the mortgage described in the plaintiff's bill of complaint had been broken by a failure to pay the semi-annual interest which became due July 18, 1873, and has remained unpaid ever since. I find also that the sale made in pursuance of the power was made in good faith and in exact conformity to the provisions of the mortgage deed; that Clark R. Moore was the highest bidder at the sale, which was for \$4600; that he acted in entire good faith, and claims the benefit of his purchase; and that he signed, at the time of the sale, a written memorandum or agreement of purchase. The value of the estate at the time of the sale was proved to be at least \$6200. No deed of conveyance to the purchaser Moore has yet been executed, the completion of the bargain having been interrupted by the filing of the plaintiff's bill. The plaintiff offers in her bill to pay all arrears upon the mortgage, with interest, and to indemnify the mortgagee for all the expenses incidental to or incurred in the advertising and selling of the property.

"It also appeared that the mortgage and note were made and executed by John T. Pope, who owned the equity of redemption,

and who conveyed the estate, subject to the mortgage, to Michael Drinan, who was the plaintiff's husband, and died intestate ; that the note for some time past had been deposited at a bank in Boston for the promisee ; and that the notices calling for the payment of interest as it became due were issued from the bank, addressed to said Pope ; and that the plaintiff had twice paid the amount of the semi-annual interest into the hands of Pope, to be by him paid to the bank. But I do not find that Pope was the agent of, or had any authority to represent or act for, the mortgagee. It appeared that after receiving from the bank the notice that interest had become due, Pope called upon the plaintiff, and she paid the money into his hands, with the expectation on her part and upon the understanding that he should at once pay it at the bank, or to the mortgagee. About the first day of September last, she became aware that Pope had not made the payment, and sent him a message to attend to the matter, which he promised to do without delay. She also sent a messenger to the office of the mortgagee's attorney, which messenger reported to the plaintiff that he had left word that if Pope did not make the payment, she would pay it herself on notice. A student in that attorney's office testified that the messenger came there twice, and said that Pope had received the money and would make the payment ; but the witness had no recollection that any notice was agreed to be sent to the plaintiff."

The bill alleged that the plaintiff received notice from the attorney of Nichols, some time after the maturity of the interest, that the same had not been paid to the said Nichols, and that the plaintiff went immediately to the office of the said attorney, and stated to him the fact of payment to Pope, and requested the said attorney to inform her at once if Pope should not pay over said amount to him or to Nichols ; that Pope was immediately seen in regard to it, and that he faithfully promised to pay the amount over at once ; that the plaintiff did not hear from said attorney, and supposed Pope had paid the interest as promised ; that she heard nothing further of the matter until she heard that the property had been sold the day before.

The answer of the defendant Nichols admitted that Drinan became the owner and died seised of the estate ; and that the defendant received the interest on the mortgage from Pope or the

plaintiff until June, 1873, when notice that interest was due was sent by the bank to Pope; and denied, upon information and belief, that the plaintiff requested the defendants' attorney to inform her if Pope should fail to pay him, the said attorney, the interest due.

The answer of the defendant Moore alleged ignorance of the matter of the request, and averred that he was the highest bidder at the auction, and entitled to the property.

E. Avery & G. M. Hobbs, for the plaintiff.

R. D. Smith & M. M. Weston, for the defendants.

ENDICOTT, J. It appears by the report that John T. Pope, being the owner of the estate, made and executed the mortgage and note to the defendant Nichols, and afterwards conveyed the equity to Michael Drinan, the plaintiff's husband, who died intestate, leaving minor children. The note had been for some time deposited in a bank in Boston for the payee, and notices calling for the payment of interest as it became due were issued from the bank addressed to Pope. The plaintiff had twice paid the semi-annual interest to Pope on notice from him, and he had paid the same to the bank. The interest falling due July 18, 1873, a similar notice was issued by the bank to Pope, who called upon the plaintiff for the same, which she paid to him with the understanding that he would at once pay it to the bank or the mortgagee. This Pope did not do. On September 1, the plaintiff, learning he had neglected to pay it, sent him a message to attend to the matter, which he promised to do. It also appears that she sent word to the mortgagee's attorney that she had paid the money to Pope, and that if he did not pay it over, she would, upon notice. It is alleged in the bill and not denied by the answer, and appears by the report, that the plaintiff informed the attorney of the defendant Nichols that Pope had received the money and would make the payment; but the defendants' witness had no recollection that it was agreed that notice should be sent to the plaintiff if he did not.

After this the mortgagee advertised the estate for sale according to the form prescribed in the mortgage, and it was sold by public auction September 30, to one Moore. It is not claimed by the defendants that the plaintiff had actual notice of the intended sale.

The report finds that the mortgagee acted in good faith, and in strict compliance with the conditions imposed in terms by the power of sale. Although the mortgagee acted in good faith, and did all she supposed she was legally required to do in conforming to the terms imposed by the power, we do not think that acting as a trustee for sale, and her attorney knowing the position of the plaintiff, she paid proper regard to the interest and rights of her principal, the mortgagor, under whose power she undertook to make the sale.

Admitting, as the case finds, that Pope was not her agent, and had no authority to act for or to represent her, still she or her attorney well knew that through him the notices were sent, and the interest money paid by the plaintiff, and had notice, before she attempted to execute the power of sale, that the money to pay the interest due July 18 had been actually paid by the plaintiff to Pope for her, was in his hands, and that he had promised the plaintiff to pay it over. Whether upon these facts notice was agreed to be sent to the plaintiff if Pope failed to pay, is immaterial. The mortgagee knew that the plaintiff, as administrator of her husband's estate, intending to protect the interests of his minor children, had actually paid the money through the accustomed channel, and expected it would be paid by Pope to the mortgagee. With such knowledge of the position and expectation of the plaintiff, a proper execution of the power, and a due regard to the rights and interest of the mortgagor or those having his estate in the premises, required of the mortgagee, when after a reasonable time it became evident that Pope would not pay, that notice should be given to the plaintiff, and a bare compliance with the terms of the power was not sufficient. *Montague v. Dawes*, 14 Allen, 369. *Dyer v. Shurtleff*, 112 Mass. .

The sale is therefore liable to be set aside in equity, no deed having been delivered, and the plaintiff is entitled to redeem upon terms equitable to all parties.

No question was made at the hearing of the right of the plaintiff to redeem. All formal objections on that point are taken to have been waived, and the question has therefore been considered on its merits.

Decree accordingly.

JOSEPH A. HARWOOD & another *vs.* DAVID WILEY & another.

Suffolk. March 3. — June 27, 1874. WELLS & ENDICOTT, JJ., absent.

Under the Gen. Sta. c. 124, § 13, one who is arrested on an execution in favor of a plaintiff who resides in the county where the arrest is made, and who has an attorney who lives in that county, may give notice of his intention to take the poor debtor's oath, to the attorney who made the writ upon which he was arrested, although such attorney does not reside in that county.

CONTRACT by Joseph A. Harwood and Nahum Harwood against David Wiley and Warren Wiley, on a recognizance entered into by the defendants, conditioned that David Wiley, who had been arrested on August 17, 1872, upon an execution issued on a judgment in favor of the plaintiffs, should, within thirty days from the time of the arrest, deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the time and place and abide the final order thereon.

The following notice was on August 19, 1872, served in Middlesex County on the officer making the arrest, the officer's return setting forth that neither the judgment creditor nor his attorney was within the officer's precinct, or having a last and usual place of abode therein known to the officer: "D. Wiley of Wakefield, Middlesex County, debtor, arrested on execution in your favor, desires to take the oath for the relief of poor debtors, and the 22d day of August, 1872, at four o'clock, in the afternoon, and the office of the subscriber, No. 172 Main Street, in Woburn; in said county of Middlesex, are appointed the time and place for the examination of said debtor. Dated at Woburn, August 17, 1872. Parker L. Converse, Trial Justice."

On September 9, 1872, a similar notice, signed by the same justice, and dated September 6, 1872, appointing the same place and four o'clock in the afternoon of September 13, as the place and time for the examination of the debtor, was served at Boston, in the county of Suffolk, on G. W. Morse, described in the officer's return as one of the attorneys of the judgment creditors.

The debtor appeared before said Converse at the times mentioned in the two notices, and the oath was administered to him on each of said times by said Converse.

The plaintiffs were described in the writ in the original action as having their usual place of business in Boston ; but the plaintiff, Joseph A. Harwood, lived in Middlesex County, and Nahum Harwood in Worcester County. Their counsel were George W. Morse and John H. Hardy. The former lived in Norfolk County, and the latter in Middlesex County, and both had their usual place of business in Boston. The writ in the original action was made by Morse. The plaintiffs did not appear at either examination of the poor debtor, either by themselves or by their counsel.

On the above facts the Superior Court ordered judgment for the defendants, and the plaintiffs appealed to this court.

G. W. Morse & J. H. Hardy, for the plaintiffs.

W. P. Harding, for the defendants.

DEVENS, J. It is unnecessary to consider whether the first notice in the present case, upon the return of which the debtor was discharged, was or was not sufficient. If it was so, the issuing of the second notice and the discharge thereon were superfluous acts which in no way invalidated the discharge already granted ; and if it was not, we are of opinion that the second notice was properly served, and that the discharge thereon was valid. Claiming the first notice to have been insufficient, the defendant objects to the service of the second, upon the ground that it was not served upon the plaintiff or his attorney having his residence in Middlesex County, and this is the only objection made to it. The second notice was not issued nor served until the expiration of seven days from the date of service of the first, and the proceedings of the magistrate under it were completed within thirty days from the date of the arrest. The requirements in reference to the service of notice are to be found in the Gen. Sts. c. 124, § 13, where it is first provided generally that service shall be made upon the plaintiff or creditor, his agent or attorney, and that where more than one person is plaintiff or creditor, or there is more than one agent or attorney, service upon one shall be sufficient. This general provision is, however, subsequently limited by requiring that where the plaintiff is not a resident of the county wherein the arrest was made, the notice shall then be served upon the attorney if he resides or has his usual place of business therein. This provision was held in

Putnam v. Williams, 2 Allen, 73, to be imperative, and to require absolutely that in such case service should be made upon the attorney. When, however, neither the plaintiff nor the attorney resides within the county, and the attorney has no usual place of business therein, the notice may be served upon the officer who made the arrest; but it was held in *Way v. Carlisle*, 13 Allen, 398, that such provision was not imperative, and the notice might then be served upon the plaintiff, creditor, his agent or attorney, residing in any county, qualifying certain expressions of Mr. Justice Dewey in *Putnam v. Williams*, *supra*, which would seem to indicate that service upon the plaintiff was by statute limited to the case of a plaintiff resident within the county where the arrest was made. While, however, the general provision that service shall be made upon the plaintiff or creditor is limited by the requirement which prescribes that where the plaintiff is a non-resident of the county and has an attorney residing or having his usual place of business therein, service must be made upon the attorney, there is no corresponding limitation of the general authority given to serve the notice upon the attorney; and even if the plaintiff resides within the county and the attorney without, the service upon the latter is still sufficient. There is an obvious reason why this distinction might well be made: the creditor, if at a distance and without the county, could not fairly be called upon to attend the hearing upon the debtor's application if he had intrusted the care of his claim to an agent or attorney residing within the county; while on the other hand the agent or attorney having the actual charge of the claim would usually be selected with reference to his vicinity, or his capacity to attend the hearing to which a debtor would be entitled, and might be expected to be always prepared for it.

By another provision of the same section we have been considering, the person who makes the writ may always be regarded as the attorney of the plaintiff or creditor when an arrest is made thereon. The writ was made by Morse, upon whom the service was made, and although one of the plaintiffs resided within the county where the arrest was made, the service of the notice might still be made upon Morse, as it may in all cases be made upon the agent or attorney. Nor was the debtor to be affected by the fact that Morse had a partner who resided in the county of Middlesex.

He was the person whom the debtor was entitled by the statute to regard as the attorney, and service upon him, although out of the county where he resided, was sufficient. *Carroll v. Rogers*, 4 Allen, 70. Even if he had ceased to be the attorney of the plaintiff, the positive provisions of the law would still entitle the debtor to treat him as such for this purpose. *Willard v. Gage*, 103 Mass. 354.

Judgment for defendants.

CHARLES J. KERSHAW & another vs. LUTHER A. WRIGHT & another.

Suffolk. March 6. — June 27, 1874. WELLS & ENDICOTT, JJ., absent.

On the issue whether a usage exists in a city to inspect a certain kind of provisions, evidence that the rules of a chamber of commerce, having the power given to it by its act of incorporation to appoint an inspector of provisions, and one of the purposes of which was declared to be "to establish and maintain uniformity in the commercial usages of the city," said nothing about the kind of provisions in question, while they provided for the inspection of many other kinds, is admissible to show the non-existence of the alleged usage.

An objection to the admission of part of a deposition, that the form of an interrogatory does not give notice of the substance of the answer thereto, so as to permit cross-examination thereon, cannot be taken on argument in this court when the entire deposition is not before the court.

On the issue whether an alleged commercial usage exists, a witness may be asked to describe how, under the usages in force, a transaction like the one in question would be conducted by all the parties thereto, from its inception to its conclusion.

On the issue whether a broker buying a certain kind of provisions was in fault in not having the provisions inspected, the answer of a witness, asked to describe the usages in such a case, that "the responsibility of putting up the provisions right, rests with the packer," is not an opinion on a matter of law, but is a mode of stating, as a matter of fact, that the broker in such a case depends upon the packer, and the answer is admissible.

A witness who is engaged in the business of packing and forwarding hams, may properly be asked as an expert if in his opinion there was danger that a certain lot of hams, shipped in a specified condition would not arrive at their destination in as good condition as when shipped; and may answer that they could not, in consequence of the condition of the weather when they were shipped.

An exception to a question to a witness will not be considered, which does not show how the question was answered, nor that the answer was in some way unfavorable to the party excepting.

CONTRACT to recover money alleged to have been paid to the firm of Plankinton & Armour in the purchase of hams in the

defendants' behalf, and for commissions and charges in making such purchase.

At the trial in the Superior Court, before *Putnam, J.*, the jury returned a verdict for the plaintiffs, and the defendants alleged exceptions in substance as follows :

The defendants telegraphed to the plaintiffs, who were brokers in Milwaukee, Wisconsin, to buy of Plankinton & Armour two hundred barrels of green hams, rubbed in salt, at a limited price, and ship them to Boston. The plaintiffs bought, shipped and paid for the hams, and drew on the defendants for the amount expended by them in executing the defendants' order, with their commissions. The hams arrived in Boston in bad order, and the defendants refused to receive or pay for them.

The defendants introduced evidence tending to prove that the hams were unsound when packed, and were not rubbed in salt as required, and that it was the duty of the plaintiffs, as their agents, to attend to the matter themselves, in examining the goods, or to have some other persons inspect them before receiving or accepting the same, and contended that they did not do their duty, and that if they had done so the defect and improper condition would have been apparent and been discovered, and that they were in fault in this respect, and paid the money wrongfully and without authority, as they did not do their duty in making or having an examination made before accepting the goods.

The defendants offered, and the court admitted evidence, tending to show a usage or custom in Milwaukee, for brokers or commission merchants, in a case like the present, either to examine the goods themselves, or have them examined and inspected by an inspector at the purchasers' expense, before accepting or paying for them, and that the plaintiffs did not do it or have it done in this case, and failed of their duty in that regard. In rebuttal, the plaintiffs denied the existence of such a usage or custom, and controverted by other evidence the proof of the defendants. One of the plaintiffs testified that it was the custom and usage to have cured hams inspected, but not green hams ; that the shipping of green hams in barrels was of recent date. The plaintiffs further contended, and offered evidence tending to show that the hams were in good condition and were rubbed in salt and were properly packed, and that they spoiled in the course of transportation

because of the unusually warm weather, and not because of their improper condition or defective packing when shipped, and also offered evidence that these hams were, in fact, inspected. Among other evidence, the plaintiffs offered, and the court admitted in proof, against the defendants' objection, the act of the State of Wisconsin incorporating the Chamber of Commerce in the city of Milwaukee, and a printed pamphlet, sworn to and identified in the deposition of one of the plaintiffs as the rules and regulations adopted by the said Chamber of Commerce.* It was offered and admitted upon the question of usage and custom alleged by the defendants as aforesaid.

The plaintiffs, on cross-examination of the defendants' witnesses, inquired of them as to the reputation and standing of the firm of Plankinton & Armour, to which the defendants objected.

The plaintiffs, in rebuttal, offered and were allowed to introduce in evidence, against the defendants' objection, the following questions and answers in the deposition of Mr. Plankinton:

"*Int.* 8. State what, under such custom or usage, are the duties of the vendor or packer of hams in relation to the furnishing packing, inspection, and shipping or forwarding thereof.

"*Ans.* It is not the custom, so far as I know, for the broker to send an inspector for green hams; for instance, the broker buys a quantity of hams, cured in pickle; he usually sends an inspector — the inspector that is appointed by the Chamber of Commerce — to examine a sufficient amount to make a full report of the lot; that is, in making this inspection, they open a certain number of barrels out of every hundred — about five out of every hundred — hap-hazard. The broker would have the right to send the inspector to see that the hams sold dry, with or without salt, are sweet, in good condition, and properly cut at the time of delivery.

* The act of incorporation was declared to be a public act, and by section 11, power was given to the corporation "to elect or appoint one or more persons, as it may see fit, to examine, measure, weigh, gauge or inspect flour, grain, provisions, liquor, lumber or any other article of produce or traffic commonly dealt in by the members of said corporation." The preamble of the general rules adopted by the corporation declared its objects to be "to promote just and equitable principles in trade, to correct abuses, to establish and maintain uniformity in the commercial usages of the city." The rules provided for the inspection of many kinds of provisions, but said nothing about green hams.

It is not customary to have this kind of provisions inspected. The broker depends upon the responsibility of the house packing. The reason is, that hams sold green are not sold for consumption, but sold to parties who cure them for consumption. It is customary to have an inspector in all sales of cured meats.

Int. 9. State how, under the usage or custom aforesaid, a transaction for the purchase of hams is conducted by the broker and the packer, from the inception to the conclusion of the transaction, and the time when the duties of each are fully performed.

Ans. The broker comes to the packer to purchase a quantity of hams, and he states how he wants them put up, and when he wants them delivered, and where. Then the packer fills out the instructions that are given to him by the broker, and delivers them according to the instructions. The responsibility of putting the meat up right rests with the packer. It is not the custom here, except with reference to cured meats, that an inspector should be employed. They sometimes may have an inspector to look after green meats, but it is not the custom. With green meats, the broker takes the meats upon the responsibility of the packer.

Int. 27. State whether or not, in your opinion, at the time you executed the order for the hams referred to in your answer to the fourteenth interrogatory, there was danger or hazard in shipping said hams, packed green and rubbed in salt, that they would not arrive in good condition, and what the chances of their arriving in Boston in a like good order and condition as when shipped, if not subjected to extraordinary delays or detention on the voyage.

Ans. To my knowledge, the weather was bad at that time, warm, muggy weather; and there was danger in shipping hams in that condition. They could not at that season of the year, with the weather as it was then, have arrived in Boston in as good order as when shipped from here, even though not subjected to extraordinary delays or detention on the voyage."

A. A. Ranney, for the defendants.

C. R. Train, for the plaintiffs.

DEVENS, J. The present action, which was for the price of provisions bought upon the order of the defendants, by the plaintiffs, as brokers or commission merchants, was defended (the pro-

visions having arrived in a damaged condition and the defendants having declined to receive them) upon the ground that they were not properly prepared for shipment, and that the plaintiffs had neglected their duty in the course of their employment, especially in this, that they had not themselves examined the goods, or caused them to be examined by an inspector at their expense, and evidence was offered tending to show a usage in Milwaukee, where the purchase was made, for brokers or commission merchants so to do before acceptance of the goods or payment therefor.

Upon the question what the mercantile usage was in reference to this at Milwaukee, the act of the State of Wisconsin incorporating the Chamber of Commerce there, and the regulations of the Chamber framed under the act, were competent. One of the objects of this Chamber was "to establish and maintain uniformity in the commercial usages of the city;" and while undoubtedly usages might exist not recognized by this Chamber, the fact that this body of merchants had passed general regulations upon the subject of the inspection of provisions, describing many kinds and qualities, which did not prescribe any inspection of such provisions as those the price of which was the subject of controversy in this case, (which was the use the plaintiffs apparently sought to make of it,) had some tendency to show that the usage claimed by the defendants was not in existence there; and although these rules were adopted three years before the transaction in question, there was no evidence that they were not in full force at the time.

The defendants also object to that portion of the 8th answer in Plankington's deposition, which concerns the usage as to the duty of the broker, as not responsive to the interrogatory, which was as to the duty of the vendor or packer in such sales, upon the ground that, no notice being given by this interrogatory that the inquiry related to any such subject, they had no opportunity to cross-examine upon it. The answer, however, in this matter seems to have related directly to that which was the subject of controversy between the parties, and it was competent for the presiding judge in his discretion to admit it. It may be that a full examination of the whole deposition, which is not before us, showed that the attention of the defendants was fully called to the subject matter of it by other interrogatories, and certainly

the usage as to what was to be done by the broker was closely connected with the usage as to the duties of the vendor or packer.

Nor do we think the 9th interrogatory to the same witness, or the answer thereto, objectionable. It is an inquiry substantially how, under the usage of Milwaukee, a transaction for a purchase such as this was is there conducted, from its inception to its conclusion, by the broker and packer, and what acts constitute a full performance by each of his duty under that usage. It calls directly for a statement of all the acts which each one does in such a transaction, and not for any opinion upon the usage. The statement of the answer to which the defendants especially object, "the responsibility of putting up the meat right rests with the packer," is not, as contended for by the defendants, an opinion on matter of law, but a mode of stating, as a matter of fact, that, whether he may properly do so or not, the broker in this respect depends upon the packer.

In answer to the claim of the defendants that the provisions were not properly prepared for shipment, it was competent for the plaintiffs to show that they were so, and that the damage was occasioned by another cause, the weather, of which the defendants took the risk when they ordered them to be sent by the plaintiffs. The witness was a person engaged in the trade in the course of which these goods were bought, and must be considered as having that general knowledge upon the subject which results from experience in it. It was therefore competent to inquire of him what would be likely to be the effect of the weather upon provisions packed as these were directed to be. There is a large class of facts in regard to which judgment or opinion is all that can be expressed; *Commonwealth v. Dorsey*, 103 Mass. 412, and cases cited; and the judgment of a man whose business was that of a dealer in the articles as to which inquiry was made, was proper to be considered by the jury.

Whether, on cross-examination of the defendants' witnesses, the plaintiffs should have been permitted to inquire as to the reputation and standing of Plankington & Armour, of whom the plaintiffs bought, need not be considered, as the exceptions do not show what replies were made to such inquiries, or that they could have been in any way unfavorable to the defendants. *Fuller v.*

Ruby, 10 Gray, 285. *Hackett v. King*, 8 Allen, 144. *Burke v. Savage*, 13 Allen, 408. *Hobart v. Plymouth*, 100 Mass. 159.

Exceptions overruled.



JOHN L. EMMONS, guardian, *vs.* DANIEL SCUDDER & others.

Suffolk. March 10. — June 27, 1874. COLT & ENDICOTT, JJ., absent.

If a tenant after the expiration of his lease continues in possession under a new agreement, express or implied, for a lease, he becomes a tenant at will until the lease is executed; and evidence that the tenant underlet part of the building which was not let to him by the former lease but was included in the new agreement, and that he received rent therefor, and paid rent at the rate stipulated under the new agreement, is evidence of an entry by him under the new agreement, even though the rent was paid under protest; and the fact that the landlord agreed to repair the building and failed to do so would not, after an entry by the tenant, justify him in changing the character of the tenancy from a tenancy at will to one at sufferance.

A threat by a lessor to eject a tenant unless he will pay a sum demanded as rent is not such duress as will enable the tenant to recover back the rent, although a greater sum is demanded than is due, and the tenant pays it under protest.

CONTRACT on an account annexed for rent of store No. 54 and 56 Broad Street, Boston, from October 1, 1869, to January 1, 1870, and for the taxes assessed by the city of Boston on said store, May 1, 1869.

At the trial in the Superior Court before *Putnam, J.*, the jury found a verdict for the plaintiff, and the defendants alleged exceptions in substance as follows:

It appeared in evidence that the store in question was formerly owned by George Odin, who died in 1866, and that on his decease it descended to his niece, Harriet L. Odin, a minor, of whom the plaintiff was duly appointed guardian.

On July 1, 1864, Odin leased to the defendants, for the period of five years, the lower floor of the premises and cellar under the same, numbered 56 Broad Street, for the rent of \$500 per year, the lessees being exempt from paying taxes, and restricted from underletting. The lessees took possession of said premises, and remained therein during the term of said lease, and afterwards to October 28.

During the term of said lease and subsequently, the defendants occupied only the first floor and cellar, numbered 56 Broad Street;

premises above forming part of the same building, but numbered 54 Broad Street, were occupied by D. Leland & Co. as tenants at will of said guardian, until July 1, 1869; and after said July 1, in the manner hereinafter stated.

The premises, in the spring of 1869, were very much out of repair and in bad condition, especially that portion occupied by Leland & Co.

The defendants offered evidence tending to show, that in June, 1869, or some time before the expiration of the written lease to them, that firm and Leland & Co. both had a conversation with the plaintiff in regard to a renewal of their tenancies; that he said he preferred but one tenant of the whole estate, and finally agreed with the defendants that he would put said premises, from top to bottom, in good repair, so that the defendants and Leland & Co. should be pleased therewith, and that he would give to the defendants a written lease of the whole of the premises for the period of five years, from July 1, 1869, (the expiration of the former lease), for the rent of \$1,600 per year, and all taxes, and with a right to underlet, to which agreement said firm assented. The evidence was conflicting as to whether the agreement of the plaintiff was to repair the whole building, or only the portion occupied by the defendants; but, with this exception, it was admitted that such an agreement was made.

After making said agreement, the plaintiff notified Leland & Co. that he had agreed to lease said store to the defendants; and Leland & Co. thereupon, and before July 1, when their rent became due, agreed with the defendants that they would remain in store No. 54 as their tenants and at an advanced rent payable monthly, the defendants agreeing that the premises should be put in repair; and it was in evidence that Leland & Co. remained in the premises, No. 54 Broad Street, after July 1, and paid the defendants one or two months rent therefor, at the advanced rate, but finally refused to pay rent after that because repairs had not been made. The plaintiff after July 1 had never demanded rent of them, or treated them as his tenants, nor did Leland & Co. consider themselves as his tenants.

On or about July 1, 1869, the plaintiff left with the defendants a written lease according to the terms of said agreement, excepting that the clause prohibiting underletting was not erased. Nothing

was said in it about repairs. One of the members of that firm gave the lease a hasty examination, and laid it one side; but neither he nor his firm requested the plaintiff to erase therefrom the printed clause restricting them from underletting, nor ever notified him that said lease was in any way unsatisfactory to them. The lease was never executed. It was in evidence that the plaintiff made repairs and alterations in the lower store, numbered 56 Broad Street, to the satisfaction of the defendants, which were completed about August 1; but, though several times requested by the defendants after July 1, he refused to make repairs on the upper store, contending that he had never agreed to do so.

There was evidence tending to show that on or about October 2, 1869, the plaintiff demanded \$400 of the defendants, it being for one quarter's rent of the whole estate at the advanced rate, which they refused to pay, because the plaintiff had not repaired the premises occupied by Leland & Co. During the conversation between them, the plaintiff said that he had been offered \$1,800 per year for said premises, and that they, the defendants could not remain in said premises, if they did not pay said rent; and thereupon they paid said rent under protest, and continued to occupy the store until October 23, 1869, when they left, having given notice to the plaintiff of their intention so to do on October 18.

The defendants requested the presiding judge to instruct the jury, that if the plaintiff agreed to repair all of said premises, and to give them a lease in writing for a term of years, and failed to keep said agreement in any respect, either failing to repair, or to give them a written lease with the right to underlet, the defendants would not be liable to pay rent after July 1, 1869; that if they held over after the expiration of said old written lease, they were tenants at sufferance, of store No. 56 Broad Street, at the old rate of \$500 per year, and were not bound to give notice in writing of their intention to terminate said tenancy; that under the facts disclosed in the case, the defendants were only liable for rent of store No. 56, at the rate of \$500, for the period of twenty-three days from October 1.

The court, instead of the instructions asked for, gave, upon those points, the following instructions to the jury: "If no new

agreement was made, the defendants would be considered as holding over and would be merely tenants at sufferance, having the right to leave as they did, October 23, 1869, and paying only *pro rata* rent from July 1, 1869, to October 23, 1869, at the rate of the old lease, \$500 per year.

"As the plaintiff contends they were tenants at will, he must satisfy the jury that there was some new agreement, expressed or implied, that the defendants should take the whole premises, at the rate of \$1,600 per year, with privilege to underlet, and that the defendants entered under that agreement, or continued to remain there, after July 1, 1869, under said agreement; that, as the lease was not executed, if they entered under the agreement as contained in the lease, they would be afterwards tenants at will, so long as the lease remained unexecuted, and they would be obliged to pay rent at the rate of \$400 per quarter, and would have no right to leave as they did, in the midst of the quarter, paying rent only to that time; that the evidence that, in point of fact, they did underlet, and accept rent of their tenant, for one or two months, and the other evidence in the case was for the consideration of the jury as bearing on the question whether they entered or remained in possession under said new agreement; that if they entered under this agreement, even if the jury should find that the agreement was to repair the whole building, the failure of the landlord to do so would not justify them in changing the character of the tenancy, from that of a tenancy at will to a tenancy at sufferance; and, though they left in the middle of the quarter, they would be obliged to pay the full quarter's rent; if they chose to enter, under the terms of the new lease, before the repairs agreed upon were all made, they must look to the landlord for indemnity upon his promise, if they were not made."

*N. C. Berry, (J. W. Hubbard with him,) for Scudder and others.
W. P. Blake, for Emmons.*

DEVENS, J. The defendants contend that they were tenants at sufferance only, and as such had a right to quit the premises occupied by them when they saw fit, and that they were liable during the time that they were thus tenants at sufferance only for a *pro rata* rent to be determined by reference to the written lease under which they first entered upon the premises. Upon

this point, the instruction of the judge who presided at the trial was, that in order that they should become tenants at will, and therefore not entitled to quit, except upon notice, the jury must be satisfied that they remained under some new agreement, either expressed or implied, and entered upon the possession of the whole premises which were embraced in the new agreement, as it was alleged, and of which their original tenement was a part. That there was an agreement for a lease of the whole premises at the termination of the defendants' original lease was admitted, and also that the plaintiff received rent after the termination of the original lease from the defendants of the part of the premises not included therein, but which were to be included in the new lease contemplated; and the only questions between the parties were whether there was an entry or remaining in possession under the new agreement, and whether it was agreed by the plaintiff that he should repair the whole premises, or only that portion which, under the original lease, was held by the defendants. The instruction given was in conformity with well settled principles of law. When a party remains in possession of premises at the expiration of his term, and no new agreement is made, he becomes a tenant at sufferance. By the common law he was not liable for rent as such, although liable for the fair value of the premises in an action for use and occupation, and the landlord was entitled to resume possession, or the tenant to quit the premises, at any time. *Merrill v. Bullock*, 105 Mass. 486. By our statute he is made liable for rent, and the provisions of the lease under which he entered may be used in evidence to prove the amount of rent due from him. Gen. Sts. c. 90, § 26. When, however, there is a new contract, either express or which may be fairly implied from the acts of the parties, and the tenant occupies under it, his tenancy becomes a tenancy at will, and can only be terminated by the landlord or tenant in the mode prescribed for that class of estates. In *Delano v. Montague*, 4 Cush. 42, where a tenant was in under a lease and a parol agreement was made between him and the landlord for a lease of the premises for a year additional on the same terms as the written lease, but, before the written lease had expired, the tenant notified the landlord that he should not remain under the proposed agreement or comply with it, and subsequently remained after

expiration of his lease, it was held that he was a tenant at sufferance only; but the court declined to decide whether if the notice of his abandonment of the parol agreement had not been given previous to the expiration of the written lease he would or would not have been a tenant at will. In *Edwards v. Hale*, 9 Allen, 462, it is said, that while a mere continuance in possession under the old lease makes a party a tenant at sufferance, if there is a new contract shown, either express or inferrible from the dealings of the parties, the estate becomes one at will.

In the present case, rent was paid by the defendants under the new agreement, and received by them from their sub-tenants, and although this payment was under protest, yet it was in a legal sense a voluntary payment. Even if they were threatened with being ejected, it was not such duress as entitled them to make the payment and afterwards to seek to recover it back or escape from any of its other legal consequences. When a party has no chance to be heard, as when there is a warrant of distress against his property, he may pay under protest, and afterwards litigate the question at issue between himself and the party who has thus extorted money from him; but the defendants had, at the time of payment of the rent, the opportunity to litigate the question between them and the plaintiff, and if no such sum as that claimed was due, they could not have been ousted for non-payment. Rent having been demanded and received by the landlord on the basis of the new agreement for the whole premises, he could not afterwards treat the defendants as tenants at sufferance of the portion of the premises they had originally held; and, having the rights, they are under the liabilities of tenants at will, and are not entitled to quit without notice.

The defendants further contend that the fact that the lease was never executed, for which the agreement was made, entitles them to be considered as tenants at sufferance only. But if they continued in possession of the premises originally held, and took possession of the other portion of the premises, which the jury, following the instructions of the court, must have found that they did, under the new agreement, their tenancy was one which could only have existed under that parol agreement. It was not the case of a mere holding of premises after the expiration of an old lease in the absence of a new agreement, which would have been a ten-

ancy at sufferance; and would not become such by a neglect or refusal to give the lease contracted for, if such neglect or refusal were shown. In fact, however, according to the bill of exceptions, the plaintiff proposed a form of a lease which the defendants kept under consideration, and although never executed by the plaintiff, the defendants had made no objection to it at the time they abandoned the premises.

The defendants further object to the ruling that if the defendants entered under the agreement to repair and give a new lease in writing of the whole building, even if the jury should find that the agreement was to repair the whole building, the failure of the landlord to do so would not justify the defendants in changing the character of the tenancy from that of a tenancy at will to a tenancy at sufferance. The presiding judge had previously instructed the jury that the burden of proof was upon the plaintiff to show that the defendants had entered under the new agreement; and the obvious meaning of this instruction is that if the defendants had thus entered, a tenancy at will was created, which would not be converted into a tenancy at sufferance by a failure to make the repairs as agreed; and this was correct. Even if the making of the repairs upon the whole premises was a condition precedent to the acceptance of the new lease by the defendants, yet, by entering upon the premises under the new agreement before this was done, they had made themselves the tenants at will of the plaintiff, and the failure of the plaintiff to perform that which he had agreed to do would be a breach of contract for which they would be entitled to their action, but would not enable them to terminate the tenancy upon which they had entered, or to abandon the premises abruptly as a tenant at sufferance might do, nor would it deprive the plaintiff of his right to demand the rent of the premises which became due by virtue of the agreement under which they had entered. *Leavitt v. Fletcher*, 10 Allen, 119. *Surplice v. Farnsworth*, 7 Man. & G. 576.

In considering what the rent of the estate at will should be, the terms of the parol agreement were properly referred to, and also the fact that the defendants had paid in answer to the demand of the plaintiff for the first quarter at the rate of \$400 per quarter, which was the amount stipulated in that agreement.

Exceptions overruled.

SAMUEL H. L. PIERCE vs. MARY A. KITTREDGE.

Suffolk. March 12. — June 27, 1874. COLT & ENDICOTT, JJ., absent.

An oral acceptance of a bill of exchange is binding upon the acceptor.

A contract to build a house on the land of a married woman, although signed by her husband as well as herself, is a contract in reference to her separate property within the Gen. Sts. c. 108, § 3; and her liability under the contract is a good consideration for her acceptance of an order drawn by the contractor for building the house, upon her jointly with her husband, in favor of a third person, to whom the contractor was indebted.

CONTRACT to recover on an alleged verbal acceptance by the defendant of an order drawn upon her and her husband.

At the trial in the Superior Court, before *Devens*, J., a verdict was ordered for the defendant, and a bill of exceptions in substance as follows was allowed:

It appeared in evidence that prior to the date of the order, the drawers thereof, McGinley & Sherman, had entered into a written agreement to find the materials and build a dwelling-house on land belonging to the defendant. The agreement was signed both by the defendant and her husband. The dwelling-house was built in pursuance of the contract, and was fully paid for as agreed, the defendant making the payment in person. McGinley & Sherman bought lumber of the plaintiff to the amount of the order, which went into the defendant's house, and for which they owed the plaintiff at the time the order was given; and the defendant owed McGinley & Sherman at the date of the order and time of its alleged acceptance more than the amount of the order; and more than the amount of the order was afterwards paid by the defendant to Sherman on a final settlement for the house.

After the evidence of the plaintiff was in, the court ruled that "If the husband and wife made a joint written contract with Sherman & McGinley to do work on the premises of the wife in building a house thereon, and Sherman & McGinley drew an order on the husband and wife in favor of the plaintiff, who had furnished materials for said house, and the plaintiff presented the same to the husband and wife, and the wife in her husband's presence said that the same should be paid, such evidence is not sufficient to sustain the action against the wife, even if she afterwards said to Pierce and others that the order was all right and

should be paid." The plaintiff alleged exceptions to the above ruling.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

C. H. Fleming, for the defendant. The case finds that the consideration of the order was a contract which the plaintiff made with McGinley & Sherman, and not by virtue of any contract with the defendant, and, as the owner of separate real estate, the defendant made no express agreement to make the debt a charge upon it. The defendant was a mere surety, and accepted the order for the accommodation of another, without consideration received by her, as she owed the plaintiff nothing, not having contracted with him; and the accepting of the order was no benefit to the defendant's separate estate; and, therefore, the promise cannot be held to be a contract, in reference to her separate property. *Athol Machine Co. v. Fuller*, 107 Mass. 437. *Willard v. Eastham*, 15 Gray, 328.

AMES, J. It is fully settled by a long course of decisions that, except where otherwise provided by statute, an oral acceptance of a bill of exchange will bind the acceptor. *Lumley v. Palmer*, 2 Stra. 1000. *Powell v. Monnier*, 1 Atk. 611. *Clarke v. Cock*, 4 East, 57. *Fisher v. Beckwith*, 19 Vt. 31. *Barnet v. Smith*, 10 Fost. 256. *Ward v. Allen*, 2 Met. 53. *Exchange Bank v. Rice*, 93 Mass. 288. 3 Kent Com. (12th ed.) 83-6, and cases cited. In some of these decisions the courts express their regret that such a rule should have been established, but they all agree that it is too late to change it.

The defendant, although she was a married woman, had the same right under our statute (with certain limitations which do not affect this case) to enter into any contracts in reference to her separate property or business, as if she were unmarried. Gen. Sts. c. 108, § 3. She may not only incur obligations with regard to property which she already owns, but may bind herself by agreement for the acquisition of property to her separate use. *Ames v. Foster*, 3 Allen, 541. *Chapman v. Foster*, 6 Allen, 136. She may be the highest bidder at an auction sale of real estate, and bind herself to complete the purchase. *Faucett v. Currier*, 109 Mass. 79; *S. C. ante*, 20. Her note given in consideration of real estate conveyed to her separate use is binding upon her. *Stewart v. Jenkins*, 6 Allen, 300. If she should think fit to in-

crease the value and productiveness of her land, by building upon it, she would have a right to do so, and would be bound by any contract she might make for labor or materials for that purpose. *Stewart v. Jenkins, supra*. The fact that her husband joined her in the contract would not enlarge his interest in the estate, or give him any new right in it. It would merely make him responsible with her for the payments that should become due, but the house would still be her house, built for her, on her land; and the contractor who had undertaken to build it would be employed in her business. *Parker v. Kane*, 4 Allen, 346. *Morse v. Mason*, 103 Mass. 560.

The proper implication from the statute is that as to her separate property and business she is virtually a feme sole, and may do whatever she could have done if she were unmarried. *Basford v. Pearson*, 7 Allen, 504. The general power to contract, conferred by the statute, includes the power to make all sub-contracts and incidental arrangements in reference to the general purpose. If she may pay her workmen by promissory notes, it is difficult to see why she may not pay them by accepting their drafts for lumber and materials. In so doing, she would contract "in reference to her separate property or business," within the meaning of the statute.

As to the objection founded upon the alleged want of consideration, her acceptance of the draft was not so much a promise to pay a preëxisting debt of the contractors, as to pay her own debt to them by providing for their debt to the plaintiff. We must assume that the plaintiff relied upon her acceptance, and forbore to seek other remedies against the contractors, which of itself would constitute a sufficient consideration. *Coolidge v. Payson*, 2 Wheat. 66. But independently of this view of the case, if the order were given by the contractors, for a debt due from them, and the defendant accepted it at their request and for their accommodation, she would be bound by the acceptance, and could not object to it for want of consideration. *Walker v. Sherman*, 11 Met. 170. *In re Babcock*, 3 Story, 393. *Grant v. Ellicott*, 7 Wend. 227,

We must hold therefore that the draft was duly accepted, and that the defendant is bound by it, as a contract in reference to her separate property and business. *Exceptions sustained.*

JACOB BANCROFT vs. THE CITY OF BOSTON.

Suffolk. March 13. — June 29, 1874. COLT & ENDICOTT, JJ., absent

The provisions of the St. of 1866, c. 174, do not permit the set-off of benefits in estimating the damages to a land-owner, caused by taking part of his estate for the widening of a street.

Where a street is widened under the provisions of the St. of 1866, c. 174, the whole benefit and advantage to an estate thereon, so far as it is caused by the widening of the street, should be determined for the purposes of an assessment under the provisions of the St. of 1868, c. 276, but an increase in value per foot of the land, owing to a change in form or size of the lot caused by taking part of it for the street, should not be included, as such increase is considered in estimating the damages paid to the owner for the land taken.

A jury in revising an assessment for the betterment to an estate by the widening of a street made under the provisions of the St. of 1868, c. 276, cannot alter the proportional share of the benefit assessed upon the estate in question in common with all the estates benefited and liable to the assessment, unless they find the whole cost of the widening to be less than the amount assessed by the board of aldermen.

PETITION under the St. of 1866, c. 174, for a jury to revise an assessment of betterment made by the board of aldermen of the city of Boston, upon the estate of the petitioner, fronting on Hanover Street, part of which was taken to widen said street. Trial in the Superior Court, before *Putnam, J.*, who after verdict reported the case for the consideration of this court in substance as follows :

There was evidence as to the value of the estate in question, before and after said widening ; also, of the cost of the widening ; and as to the questions what the benefit to the petitioner's estate was, and what the amount of said cost was, that was assessed upon some of the neighboring estates ; a schedule of the whole assessment, as made by the board of aldermen, was put in, and a witness called by the city to show that the apportionment as there made to the different estates assessed, was a fair one. There was evidence tending to show that all small pieces of land in Boston, susceptible of any use for business, were always worth more per foot than large pieces would be in the same locality.

The petitioner contended, " 1. That the benefit or advantage for which an assessment of betterment, in consequence of the widening, is to be made, must not be any such benefit as could be the subject matter of set-off, in estimating the damages of the land-

owner, for the portion of his land taken to widen the street. 2. That the comparison must be made, not between the value of the land as now on a street, and as rear land of the original lot before the widening, but simply between this lot on a narrow and on a wide street. 3. That the mere reduction of the original estate of the petitioner, by the taking of a part thereof to widen said street, to a small parcel of land, and so increasing its value, was not such a benefit of the widening as is within the benefit contemplated by the statutes."

And the petitioner requested the presiding judge so to rule and instruct the jury, which he declined to do, but submitted the case to the jury under such other instructions as he deemed proper, but not in conformity to the instructions asked for.

The board of aldermen determined that the benefit which this estate had received from the widening was \$9000, and assessed the betterment at the sum of \$4500, one half part thereof. The jury determined the benefit to be \$6465, and assessed the betterment at one third thereof, to wit, \$2155. The whole assessment made by the board of aldermen did not exceed the whole cost of the widening of the street.

After the verdict the counsel for the city filed a motion for a new trial on the ground that the verdict was not in conformity to law, for the reason that the jury could not legally find that the petitioner should pay any other proportion of the benefit to said estate than one half thereof. The court overruled this motion, to which the counsel for the city excepted.

If the rulings of the court were right upon the trial, and upon the motion for new trial, the verdict is to stand. If they were incorrect, the case is to be returned to the Superior Court for a new trial.

G. W. Phillips, for the petitioner.

J. P. Healy, for the respondent.

WELLS, J. In this case the street was widened under the provisions of the St. of 1866, c. 174, which do not permit the set-off of benefits in estimating the damages to the land-owner. The value of the whole benefit and advantage to the estate should therefore be determined for the purposes of the assessment under the St. of 1868, c. 276, so far as it was caused by the widening of the street. The first ruling prayed for was erroneous, and properly refused.

The second and third rulings prayed for contain correct propositions which should have been given in some form, though not precisely in that of the prayers. The benefits to be estimated are those which arise from the improvement of the street. Not only the increased facilities of access, the advantage from the opening of a broader and more attractive or convenient thoroughfare in its effect upon the use of the land for the purposes of business or other occupation, but the increased value for the purposes of sale may all be taken into consideration. But so far as an increase of relative value for the purposes of sale results merely from a reduction in the size of the lot, it is not a benefit conferred upon the land by the public improvement. If any consideration of that sort is to be taken into account, it must be in the estimate of damages; not as a set-off, but as affecting the question of the extent of injury to the whole lot by cutting off a part for the street. The same is true of the effect of cutting off the front, and thus bringing forward to the street or nearer to the street that which was before at a greater distance from the street. The effect upon the whole lot, caused by cutting off a part, in view of the advantage or disadvantage to the remainder in respect of its size or form, is always and necessarily an element in the estimate of "damages for land taken." It should not therefore be again included in the estimate of benefits.

The jury determined the benefit to be \$6465, and to their verdict in that particular there appears to be no ground of objection in law. The board of aldermen had adjudged the value of the benefits to be \$9000, and had assessed the petitioner \$4500, or one half the amount thereof; and the report states that "the whole assessment made by the board of aldermen did not exceed the whole cost of widening the street." It must be assumed upon this report that the assessment was of a proportional share upon all the estates benefited and liable to the assessment; and that the cost was so great as to warrant an assessment to the full extent allowed by the statute; to wit, one half the adjudged value of the benefits. When the jury, in revising the judgment of the board of aldermen, determined the benefits to be \$6465, and did not find the whole cost to be less than the amount assessed by the board, the only "proportional share" which could be assessed was one half of the amount so fixed by them as the value of the

benefits. The ratio of one third which they adopted, and any other ratio than one half, would not be a "proportional share"; and was not therefore within the power of the jury.

According to the terms of the report the verdict must be set aside and a *New trial ordered.*



CHARLES C. PRIEST & another vs. ESSEX HAT MANUFACTURING COMPANY & others.

Suffolk. March 20. — June 29, 1874. AMES & DEVENS, JJ., absent.

In a suit in equity under the St. of 1862, c. 218, to enforce the liability of the officers of a manufacturing corporation, proof that the certificate required by § 8 of the Gen. Sts. c. 61, was signed, sworn to and filed in the office of the Secretary of the Commonwealth, by the defendants as officers of the corporation, that the association engaged in business in its corporate name, contracted debts and filed other certificates required by law, also signed by the defendants, declaring the corporate character of the organization, is conclusive, as against the defendants, of the corporate character of the association.

The proceedings under the St. of 1862, c. 218, to enforce the liability of the officers of corporations, must be in strict accordance with the statute, and a return of the execution unsatisfied on the same day on which the demand thereon was made, does not make the officers liable; and it is of no avail to show that the corporation neglected to pay the debt, made no attempt to exhibit property, and had none to exhibit.

BILL IN EQUITY in behalf of the plaintiffs and of all other creditors of the Essex Hat Manufacturing Company, alleged to be a corporation created and organized under the general laws of Massachusetts, against said corporation, and William Cushing, Edward Burrill, Henry Cook, Robert Bayley, Edwin Blood, Thomas E. Cutter and Rufus A. Wills, alleged to be officers thereof.

The case was reserved by *Morton, J.*, on the bill, answers and evidence, for the consideration of the full court. The material facts appear in the opinion.

E. Avery & C. S. Lincoln, for the plaintiffs.

H. W. Paine & R. D. Smith, for the defendants.

WELLS, J. The Essex Hat Manufacturing Company was organized as a corporation under the provisions of the Gen. Sts. c. 61; and the defendants, Cushing, Burrill, Bayley, Wills, Cook

and Blood were elected as its officers. The certificate, required by § 8 of that chapter, signed and sworn to by all said officers except Wills, was filed in the office of the Secretary of the Commonwealth. The association thereupon engaged in business in its corporate name; contracted debts, made the notes, and suffered the judgments set forth in the bill. Other certificates were made declaring the corporate character of the organization, some of which were signed and sworn to by the defendants, Wills and Cutter.

These facts establish sufficiently, and we think conclusively against these defendants, the corporate character of their association. The evidence, offered to control it, tended to show the former existence of some written agreement of association, which had been lost or destroyed; and the defendants relied upon parol proof of its contents to show that it was so defective in form that no corporate existence could be founded upon it; relying upon certain suggestions as to the essential nature and significance of the articles of association as the first step in the formation of such corporations, contained in *Utley v. Union Tool Co.* 11 Gray, 139, *Newcomb v. Reed*, 12 Allen, 362, and *Hawes v. Anglo-Saxon Petroleum Co.* 101 Mass. 385. But we are of opinion that this case is governed rather by *Dooley v. Cheshire Glass Co.* 15 Gray, 494, and *Merrick v. Reynolds Engine & Governor Co.* 101 Mass. 381; and that the defendants are concluded by their affidavits and acts and by the judgment, from disproving the regularity and sufficiency of their original articles of association.

The neglect to comply with the requisitions of the St. of 1862, c. 210, is admitted.

But there appears to be an irregularity in the proceedings by which the plaintiffs seek to enforce against the defendants this liability for the debts of the corporation. The liability exists only as imposed by the statutes, which also prescribe the mode in which alone it may be fixed and enforced. The process must be followed strictly. There must be, in the first place, a judgment against the corporation; in the second, a demand on the execution; thirdly, a neglect for thirty days after demand made on execution to pay the amount due, or to exhibit to the officer real or personal estate of the corporation, subject to be taken on execution, sufficient to satisfy the same; and fourthly, in conse-

quence thereof, a return of the execution unsatisfied. St. of 1862; c. 218, § 3. All these conditions must concur. A return of the execution unsatisfied on the same day with the demand made thereon, for the reason that payment was then refused and no property could be found, does not make the directors liable to be proceeded against under the statute. Section 4 provides that "after the execution shall be so returned, the judgment creditor, or any other creditor, may file a bill in equity, in behalf of himself and all other creditors." This shows conclusively that the return of the execution contemplated by the statute is its return unsatisfied after the neglect of the corporation for the period of thirty days; which alone warrants a return upon which the creditors can proceed against directors or stockholders. One alternative allowed to the corporation is, at any time within the thirty days, to exhibit to the officer property that he may take upon the execution. This implies that the execution is to remain in his hands for that purpose; and before the directors or stockholders can be proceeded against, his return must show default in this respect.

In the present case, the return, having been made on the same day with the first demand, not only fails to show that the execution remained unsatisfied at the end of the thirty days thereafter, but shows affirmatively that the opportunity was not kept open for thirty days for the corporation to exhibit property that might be taken upon it. We think this is a step in the process which must be taken by formal proceedings; and cannot be supplied by proof that the corporation neglected to pay the debt, made no attempt to exhibit property, and had none to exhibit. The omission cannot be regarded as immaterial because it does not affect the equity of the case. The liability does not rest upon equity, but is of strict statute imposition. The remedy is given in equity for the sake of the greater convenience and advantage it affords for adjustment of the various interests of the several parties who may join or be joined as plaintiffs or defendants.

There not having been a strict compliance with all the requirements of the statute, the bill cannot be maintained; and is

Dismissed with costs.

LUCIA M. PEABODY *vs.* THE SCHOOL COMMITTEE OF THE CITY OF BOSTON.

Suffolk. June 17. — June 29, 1874.

Under the provision of the revised charter of the city of Boston, (St. 1854, c. 448, § 24,) that "the board of aldermen, the common council, and the school committee, shall have authority to decide upon all questions relative to the qualifications, elections and returns of their respective members," the decision of the school committee, declaring a seat in the board to be vacant, for want of legal election and qualification, is conclusive, and cannot be revised by this court upon petition for a writ of mandamus, although the school committee states in its record, as the sole reason for its decision, that the petitioner is a woman.

GRAY, C. J. The petitioner having been chosen by the legal voters of one of the wards of the city of Boston, at the annual municipal election in December last, a member of the school committee of the city; and it having been declared by vote and resolution of a majority of the school committee, at a meeting duly held, that she had not been legally elected, that she was legally disqualified, and that her seat was vacant, for the sole reason (as appears by the record of the school committee, as well as by the statement of facts agreed, upon which the case has been submitted by the counsel of the petitioner, and by the city solicitor in behalf of the school committee, to the decision of the court) that she is a woman; she has applied for a writ of mandamus to compel the school committee to admit her to her rights as a member thereof.

Both parties have manifested a desire to obtain the opinion of this court upon the question whether under the laws of the Commonwealth a woman can be a member of a school committee, and have agreed that according to such opinion a peremptory writ of mandamus shall issue, or the petition be dismissed; and the learned counsel on either side have concurred in contending that the court has jurisdiction of the question in this form of proceeding.

But neither the agreement of parties nor the opinion of counsel can justify the court in rendering a judgment, unless it is satisfied that it has been vested by the Constitution and laws of the Commonwealth with jurisdiction over the subject matter to be determined. It is the duty of the court therefore, in the first place, to

consider whether the case stated by the parties is within its jurisdiction. This question is an important one, and has, with the assent of the counsel and the aid of their learned briefs, been considered by all the members of the court, including Justices Ames and Endicott, who did not hear the oral argument at the bar.

The question of jurisdiction depends upon the construction and effect of that section of the revised charter of the city of Boston, which provides that "the board of aldermen, the common council, and the school committee, shall have authority to decide upon all questions relative to the qualifications, elections and returns of their respective members." St. 1854, c. 448, § 24.

To assist us in the interpretation of this provision, we naturally turn to instances of the use of like words, which may be assumed to have been in the mind of the legislature when they framed it.

The Constitution of the Commonwealth declares that "the Senate shall be the final judge of the elections, returns and qualifications of their own members, as pointed out in the Constitution ;" and that "the House of Representatives shall be the judge of the returns, elections and qualifications of its own members, as pointed out in the Constitution." Const. Mass. c. 1, § 2, art. 4 ; § 3, art. 10. It cannot be doubted that either branch of the legislature is thus made the final and exclusive judge of all questions, whether of law or of fact, respecting such elections, returns or qualifications, so far as they are involved in the determination of the right of any person to be a member thereof ; and that while the Constitution, so far as it contains any provisions which are applicable, is to be the guide, the decision of either house upon the question whether any person is or is not entitled to a seat therein cannot be disputed or revised by any court or authority whatever. *Coffin v. Coffin*, 4 Mass. 1, 34, 35. Mass. Election Cases, (ed. 1853,) 8, 10, 28, 30. 1 Kent Com. (12th ed.) 235. The only form in which the justices of this court can properly express any opinion upon that subject is under that clause of the Constitution which authorizes each branch of the legislature, as well as the governor and council, to require it upon important questions of law and on solemn occasions. Const. Mass. c. 3, art. 2. *Opinion of Justices*, 10 Gray, 613.

The Constitution also authorizes the general court "to name and settle annually or provide by fixed laws for the naming and settling all civil officers within the said Commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for." Const. Mass. c. 1, § 1, art. 4. As school committees are not named or provided for in the Constitution, the mode in which they shall be elected or appointed, and the results of such election or appointment ascertained and determined, is thus intrusted to the discretion of the legislature.

The original Constitution of Massachusetts contained no provision authorizing the general court to establish cities. But the increase of population, especially in the town of Boston, made it so inconvenient to regulate municipal affairs in the primary meetings of the inhabitants, that by an amendment of the Constitution in 1820 the general court was expressly authorized to erect and constitute municipal or city governments in any town containing twelve thousand inhabitants. Const. Mass. amendment 2. The same causes thus induced the establishment of organized local governments by delegates chosen by the people, in the more populous municipalities of the Commonwealth, that nearly two centuries before had brought about the election of representatives to the general court, which according to the terms of the charter and the practice upon the first settlement consisted of all the freemen of the Colony. 1 Winthrop's Hist. New England, 128. 1 Mass. Col. Rec. 118. *Commonwealth v. Roxbury*, 9 Gray, 451, 480.

The first city charter of Boston provided for a municipal government, with a mayor as the executive head, and a city council consisting of two branches — the mayor and twelve aldermen, and the common council with four members from each ward. The votes for members of both boards were to be given in ward meetings and returned by the ward officers. It was made the duty of the mayor and aldermen to meet within two days after the election and examine the returns of votes for mayor and aldermen, ascertain and determine the persons chosen, and give notice in writing to them, and, in case of the whole number not being chosen, to issue warrants to the ward officers for a new election. Each person chosen a member of the common council was to be

furnished within two days by the ward officers with a certificate thereof, "which certificate shall be presumptive evidence of the title of such person to a seat in the common council; but such council however shall have authority to decide ultimately upon all questions relative to the qualifications, elections and returns of its members." St. 1821, c. 110, §§ 5-7. Each board, the mayor and aldermen by necessary implication, and the common council by express words, was thus made the judge of the qualifications, elections and returns of its members.

The city charter of Lowell contained similar provisions as to the mayor and aldermen; and, as to the common council, a clause exactly like that in Boston. St. 1836, c. 128, §§ 2, 5, 20. The city charter of Cambridge provided that the board of aldermen and the common council should each be "the final judge of the election and qualifications of its members, and whenever a vacancy shall occur by death, resignation or otherwise, may order a new election." St. 1846, c. 109, §§ 13, 14. The acts establishing the cities of Roxbury, Charlestown, New Bedford, Worcester, Lynn, Newburyport, Springfield, Lawrence and Fall River, all provided that each board should "keep a record of its own proceedings, and judge of the elections of its own members," and that in case of failure of election, or of vacancy, a warrant should be issued for a new election. Sts. 1846, c. 95, § 6; 1847, c. 29, § 6; c. 60, § 6; 1848, c. 32, § 6; 1850, c. 184, § 6; 1851, c. 296, § 6; 1852, c. 94, § 6; 1853, c. 70, § 6; 1854, c. 257, § 6.

The Legislature has thus clearly manifested its intention that in Boston, and in every other city established previously to the passage of the act now before us, the question of the right of any person to a seat in either of the two boards chosen by the people to serve as their representatives in the government of the city, (as in the case of the members of each branch of the legislature of the Commonwealth,) should be at once and finally determined by the body of which such person claims to be a member, so as to enable the organization to be completed, vacancies to be filled up, and the entire body to proceed with a full representation of its constituents to the transaction of its appropriate business, without waiting for the comparatively slow progress of judicial proceedings for the decision of any question of fact or of law upon which such right may depend. And we are not aware of a

single instance, during the half century which has elapsed since the first city government was established, in which the right of a person to a seat in either branch of the council of any city in this Commonwealth has been made the subject of a suit in the ordinary courts of justice.

The school committee of the city of Boston, being more numerous, and charged with the supervision of larger interests, than the school committees of other cities and towns, has been placed by the express words of the revised city charter upon the same footing in this respect as the board of aldermen and the common council. Its decision declaring the petitioner not to be entitled to a seat as a member thereof is therefore equally final.

The statement, upon its record, of the reasons which influenced its action, is not required by law, and cannot confer upon the courts any authority to consider a question which the legislature, in the exercise of the powers vested in it by the Constitution, has made it the duty of the school committee to decide finally and without appeal.

*Petition dismissed.**

G. S. Hale & T. W. Clarke, for the petitioner, in support of the jurisdiction, cited *Conlin v. Aldrich*, 98 Mass. 557; *State v. Wilmington*, 3 Harring. (Del.) 294, 299, 309; *State v. Fitzgerald*, 44 Misso. 425; *State v. Funck*, 17 Iowa, 365; *Ex parte Heath*, 3 Hill, 42, 52; *Rex v. Askew*, 4 Bur. 2186-2188; *Rex v. Mayor, &c. of London*, 9 B. & C. 1, 26, 27; *Attorney General v. Poole*, 4 Myl. & Cr. 17; *Parr v. Attorney General*, 8 Cl. & Fin. 409; 1 Dillon on Munic. Corp. §§ 141 *q seq.*; 2 Ib. §§ 665-667.

J. P. Healy, for the respondents, upon the same point, cited *Howard v. Page*, 6 Mass. 462; *Strong, petitioner*, 20 Pick. 484; *Carpenter v. County Commissioners*, 21 Pick. 258.

* On June 30, the legislature passed an act, entitled "An act to declare women eligible to serve as members of school committees;" providing that "no person shall be deemed to be ineligible to serve upon a school committee by reason of sex;" and to take effect upon its passage. St. 1874, c. 389.

LUCIEN S. SMITH *vs.* ABRAM W. COLLINS & others.

115 388
154 504

Suffolk. March 30. — June 29, 1874. AMES & DEVENS, JJ., absent.

Whether money lent to a member of a firm is advanced upon his credit or upon that of the firm of which he is a member, and whether the individual check of such person given for the loan is so far payment thereof, as to leave the creditor no recourse to the firm, are questions of fact depending upon the intent, understanding and agreement of the parties.

On an exception to a refusal to rule that upon all the evidence the plaintiff had not established his case, the weight of the evidence will not be considered, but only whether there was any evidence to warrant a verdict.

In a suit by A. against alleged copartners, where the issues, whether the alleged partnership in which the individual partners were authorized to borrow money on the credit of the firm existed in fact, and whether the alleged partners represented to A. that it did, are presented together, the separate admissions of the alleged partners, made to third persons, are competent to charge them respectively upon the first, but not upon the second issue; but declarations made to A. are competent upon both issues to charge the person making them.

For the purpose of showing the nature and scope of an alleged partnership, evidence of the common and usual dealings of persons engaged in the same business in the same locality, is competent.

A partnership in the business of buying and selling cattle is a trading partnership, one of the incidents of which is the right to borrow money for the purposes of the business.

Statements made by an alleged partner at the time that a loan is obtained, showing that the money is for the use of the alleged firm, are part of the *res gestæ*, and are competent to charge the other partners in a suit to recover the money lent, if the fact that the several individuals are partners, or that they have so held themselves out to the person making the loan, is established.

An exception to the exclusion of testimony cannot be sustained unless the bill of exceptions shows that the excepting party was necessarily injured by such exclusion.

CONTRACT against Abram W. Collins, Amos M. Drake and Norman F. Newton, to recover the sum of \$7000, and the sum of \$12,000, alleged to have been lent to them as copartners by the plaintiff. Newton made no defence. The defendants Collins and Drake in their answers denied that they were partners with Newton.

At the trial in this court, before Wells, J., the jury found for the plaintiff, and a bill of exceptions was allowed. On a motion for a new trial, the verdict was set aside as to Collins, and so much of the bill of exceptions as bears upon the question of the liability of Drake, is in substance as follows:

The plaintiff contended that the first loan of \$7000 was made to Drake July 30, 1870; and that the second loan of \$12,000 was

made to Newton September 12, 1870. Both loans were made at Albany, in the State of New York. Newton failed in business September 14, 1870.

The plaintiff was a dealer in hogs and cattle, living in Albany, New York. Collins and Drake were dealers in hogs, and occasionally in cattle, and lived in Brighton, Massachusetts. Newton was a cattle dealer, and lived in Boston. Collins and Drake had been in business as partners for many years.

The plaintiff testified in substance as follows: I have known Drake twenty-five or thirty years. He married my sister. Before 1870, I had a great deal of business with Drake and Collins as partners. I also have had business with Drake alone, and with Collins alone. I met Drake in July, 1870, at West Albany, at the cattle yards. He said to me, "If we want some money, can you lend it to us?" I said I could. Drake said, "I will let you know in half an hour." Did not say who "us" were. Fifteen minutes later Drake came back, and said, "Can you lend us \$7000?" I told him I would, went into the hotel and wrote a check for \$7000 to A. M. Drake, or order or bearer, and signed it. Drake indorsed it and it was paid. Drake came to my house that evening, and in conversation there said that he and Collins and Newton were in the cattle business together, were doing well and making money. I had never had any business with Newton at that time; merely knew him to pass the time of day. Drake said, "We are buying cattle, making a nice thing of it. Being in with Newton makes it better, as we do not have to go to Albany so often. Newton has a good commission trade." Drake also said, "If Newton should be in Albany and want money, you can let him have it. It will be all right." "I don't know Mr. Newton," I said. Drake said, "Newton is as good as old gold; and if not, Collins and I are with him, and you know we're good." This was on Saturday night. On Monday morning Drake brought me a check to keep to show that he (or they) had had the \$7000. His name was on it.

Drake wrote me a letter; this is the letter.* Collins brought it to me at West Albany, I should think, on August 14 or 15.

* This letter is dated at Brighton, August 12, 1870. The material portions are "Mr. Newton said he would pay you the \$7000 that we owe you, to-day, and the interest. A. W. C. will be up to-morrow, early. My note will come

Drake told me whenever I wanted money to speak to Newton if he or Collins were not up; and I did speak to Newton on August 29, and told him I wanted some money. He said he could let me have \$1000, if that would be enough. I told him it would, and he told me to draw on Swan & Newton for \$1000, which I did and got the money.

On September 5, I met Drake at Albany, and told him I wanted some money. He said, "I'll get it for you in a few minutes." He found Newton, and they paid me fifty dollars in money for interest. One of them handed me out a New York draft for \$2000. Drake passed me out Newton's check for \$2000 on the National Market Bank, Brighton. They told me to draw on Swan & Newton for \$2000. I agreed not to draw until next day, to give them a chance to sell their cattle. Newton's check for \$2000 I agreed to hold; they asked me to. It was given to me by Drake, and he told me I was to hold it, and one or the other of them would bring me up the money the next week. I have had it in my possession ever since; have never indorsed it. I did draw on Swan & Newton for \$2000, and they paid the draft, but have since demanded it of me, and claim that I must pay it back. After we had got this all settled up, Drake said to me, "If Newton wants money at any time and we are not here, all right, let him have it; we are good. We'll pay it."

I was at West Albany, September 10, and saw Newton. I asked him if the money had been sent up for the check. He said they hadn't come up, that probably Collins or Drake would be up in the morning; but if they didn't come he should have to borrow some money. Asked if I had any. I told him I had. This was on Saturday. On Monday he came to me and told me neither Collins nor Drake had come up; and asked me if I could get him the money on a check which he had with him and showed me. I asked him particularly how much money he wanted, and what he wanted it for. He said he wanted \$12,000, and that he wanted it to pay a note at the Exchange Bank in Albany, which had been given to pay for cattle he had had with Collins and Drake some time previous. He said he would give a check for

due before I come up, and if you will put your name on this one, it shall not cost you anything but the time to write it."

\$14,000, and that would cover the \$2000 check not paid. I went with him to my bank and got a cashier's check for \$12,000, payable to me, and indorsed and gave it to him. The check was paid, and the amount of it was charged to me in my account at my bank. None of this \$12,000 has been repaid to me, and none of the \$7000 has been repaid to me, except as I have stated.

On cross-examination the plaintiff testified : I had known Newton by sight for five or six years ; had heard of Newton and Wales as partners. Drake brought me a check for \$7000 after I lent him the \$7000. He brought it to me as a memorandum check. He said I was to hold it and they would bring the money up to me when I wanted it. I gave that check back to Drake ; didn't see what he did with it. Did not see that it was torn up. He gave it to me on Monday, August 1, in the morning. No, it was not the same day that I lent him the money. I lent that money to Drake and Collins. Drake said, lend us \$7000. He did not say who "us" meant. No person was with him. Not a word was said about Newton. Nothing was said about Newton until that evening. He was gone fifteen minutes. He said, "we" want \$7000. He did not mention Collins. I let him have it by check on Saturday. He brought me a check on Monday. I knew Collins and Drake had been partners for many years. I used to meet Newton at Brighton and Albany ; had heard it reported that he was a partner of Wales. The check he gave me when I lent him the \$12,000 was for \$14,000. It was protested. It went through the regular course of banking business. The \$14,000 check included the \$2000 check. Drake borrowed \$7000 of me on Saturday, July 30, 1870, at the New York Central Hotel. I know nothing in writing was handed or given me at the time to show for it. I lend money in that way. Drake had asked me that morning if I would lend them some money. I said yes. I gave him a check for \$7000. I had \$20,000 in the bank. I know that is all of that transaction. Newton was not present at either interview, in my sight. He didn't use Newton's name. He said "us." At that time I supposed he meant Collins and Drake. I let him have the check without taking anything to show for it. On next Monday, he handed me a check signed A. M. Drake and Norman F. Newton. I said it was no matter about any check. He said he thought he would make it good. Had got Newton's

name on it. I made the remark I did not need any two names. I was not particular as to two names. He said he wanted to make it good. He said he gave it to me as a memorandum check. I said I wasn't particular, it was well enough, something like that. He said he would bring me the money. He has said over and over again, that that check was not to be used. I mean to say, I understood he was borrowing for Collins and Drake. He said "we," "us," and I understood Collins and Drake. He had told me they were in business with Newton, Saturday night. At the time of borrowing, Newton's name was not mentioned.

I swear it was on September 5 I saw Drake, and he brought Newton to settle. I don't remember receiving any letter from Drake but the one before mentioned, between lending the money and September 5. I know I didn't receive any other.

Between July 30, and September 12, I don't remember seeing Drake more than once. I might have seen him half a dozen times. I don't remember any but September 5, now. The draft for \$1000, on Swan & Newton, was drawn August 29. I told Newton I wanted money; could get along with \$1000. He said they hadn't sent him up the money as he expected, and I told him I could get along with \$1000. On September 5, I met Drake, and he went after Newton. Drake didn't ask me if Newton had paid the money; I met him and told him I wanted it. They gave me fifty dollars in money, draft on New York \$2000, and this check signed by Newton, \$2000. Nothing else was given me. That check signed by Drake and Newton. I gave it to them. That was not a negotiable check. It was given as a memorandum check. I mean to swear it was not given to be used. It would draw the money, if they had any in the bank. It was given as memorandum. Drake said, "Keep that check until next week, and we will bring the money up or send it to you." I took Newton's check from Drake. Drake was at my house on July 30. When Drake told me at my house if Newton wanted any money to let him have it, I said that I didn't know anything about Newton financially. If I let him have any money, I did it on the strength of Drake and Collins.

In answer to the question why he took Newton's check the witness testified, "It is customary in that class of people to do it, to take a check signed by one. I have lent thousands of dollars

without the scratch of a pen." I didn't ask for Newton's check nor for a receipt. Newton said there was a note in the bank for cattle they had bought, and he wanted the money to pay that note. He said Collins and Drake had the cattle with him. I can't say whether he said his note, or a note in the Exchange Bank. He did say one or the other. I don't know that he did say that the note was protested, or that it was Hunter's note. He said that the note went to pay for cattle that he, Drake and Collins had had some fortnight before. I think he said Exchange Bank.

On reëxamination the witness in answer to the question why he did not have Collins's and Drake's names put on the checks, answered: "Among drovers doing business in the yards, business is never done in that way. I shouldn't think of asking for it. That's the way business is done in all drover yards. I've bought thousands of dollars for myself and partner, and never signed my partner's name. And it's no uncommon thing to lend money without taking receipt. It is done every day."

Prospero L. Eastman, called for the plaintiff, testified, the defendants objecting, that it was not the custom among drovers dealing in cattle to take or give receipts, either in the sale of cattle, or for money lent; that he was in the cattle yards and saw money lent in all sorts of sums every day, and never saw a receipt given for money so lent. He also testified, on cross-examination: "I have seen as much as \$10,000 lent quite often the last five years since I had charge of the yards, and I can't recollect ever seeing any receipt or memorandum given for it. The business is done out of doors. I have lent money in that way myself, and don't recollect ever taking any receipt for it." There was also other testimony reported to the same effect.

George Perkins, called for the plaintiff, testified to seeing Drake on his way to the plaintiff's house in July, 1870, near Albany, and to having a conversation with him, in the course of which Drake showed to the witness a check signed by the plaintiff for \$7000, and told him that he had gone into the cattle business with Newton; that they were doing well and making money; that they had that day bought one lot of cattle, and made an offer on another, which, however, was held an eighth of a cent higher than

their offer, and Collins would be up in the morning and decide about taking them.

Arthur D. Moore, called for the plaintiff, testified to meeting Drake at Albany, in the latter part of July, or in August, 1870, and Drake's telling him that he had borrowed \$7000 of the plaintiff to buy cattle with; but did not tell him with whom. Also that he met Drake again in the latter part of August, or early in September, and talked with him about business, and Drake said he hadn't been up for a couple of weeks, had been to camp-meeting and had a good time, and, the best of it was, they had been making a little money while they were gone; that Drake then said, "I don't know as you know it, but we are in company with Newton buying cattle." He said it wasn't generally known, and he didn't want anything said about it. He also told me of an arrangement he had made with Mr. Smith to let Newton have money if he wanted it to buy more cattle than he could pay for, and neither he, Drake nor Collins were up. He spoke of the hog trade; said there was no money in it. Cross-examination: He said he borrowed \$7000 to pay for cattle they had had. I suppose he meant Collins and Drake. In the same conversation he said that Newton was in company with him and Collins. He said the best of it was, they had made a little money while they, Collins and Drake, were at camp-meeting. He said he didn't want me to say anything about it, for it was not generally known.

Nathan B. Ellis, called for the plaintiff, testified, that on the first Sunday after the 25th of August, 1870, Drake said to him that the hog trade was good for nothing; that he and Collins had gone into the cattle trade with Newton; that Newton had \$6000 to use of Collins and Drake, and they had borrowed \$7000 of Smith. Witness asked Drake why Collins, who had money, wanted to borrow of Smith; to which Drake replied that Smith had money and wasn't using it, but Collins could use his; that Drake also told him that he had made an arrangement with Smith to let Newton have money if he wanted it, and neither he nor Collins was there; that they didn't want it known they were in company together, as Newton didn't want Wales to know of it, as he wouldn't like it. He said he expected Newton would make enough money while they were at camp-meeting to pay their expenses.

The plaintiff also put in evidence an account book owned and kept by the defendant Drake, one page of which, admitted to be in Drake's own handwriting, is as follows :

BRIGHTON, August 5, 1870.

| | |
|---|----------|
| Profit brought forward | \$210 00 |
| Profit, as per Newton's account, on cattle owned with him . | 209 00 |
| | <hr/> |
| | 419 00 |
| | 5 00 |
| | <hr/> |
| | 414 00 |
| | 105 50 |
| | <hr/> |
| | 519 50 |
| | <hr/> |
| Mr. Collins receives one half | \$259 75 |

Settled to date.

BRIGHTON, August 31, 1870.

Upon this testimony, which is all that was offered by the plaintiff and deemed material by either party upon the questions raised, the defendants requested the court to rule that the plaintiff could not maintain his action. The court declined so to rule.

The testimony put in by the defendants, Collins and Drake, tended to show that they were not partners with Newton, but only interested with him in certain specific transactions, and contradicted the evidence put in by the plaintiff in several particulars. This evidence was reported at length, but as it becomes immaterial in the view taken by the court, it is omitted.

Norman F. Newton was not called as a witness for either party.

There was no evidence that any of the cattle bought by Newton were sold by Collins and Drake, or either of them, or that they were received by or sent to them.

There was no evidence, aside from the declarations of Newton to Smith, to show for what purpose Newton borrowed the \$12,000, or how he used it ; and there was no evidence of any transaction such as Newton's declaration, testified to by Smith, indicated. Both Collins and Drake denied that there was any such transaction ; and the defendants' counsel contended that there was evidence that showed that it was for a private purpose of Newton's.

The defendants made the following objections :

1. To any evidence of conversations with Drake, to show that Collins, Drake and Newton were partners. Also to the statements made by Newton at the time of the alleged loan of \$12,000; also to all testimony in relation to the habit, practice or custom of lending money without taking some evidence of it. The court overruled the defendants' objections and admitted the testimony; but ruled and instructed the jury that no declarations of either would be competent or proper for the consideration of the jury to affect the others, or either of them, upon the question whether such other was a copartner.

2. The defendants offered to prove that two of the plaintiff's witnesses called to prove a partnership of Collins, Drake and Newton, received payments of their claims for cattle sold, shortly before Newton's failure, by them to Newton, during the time of the alleged copartnership, from Wales, Newton's partner, who settled with them after the failure of Newton by paying them fifty cents on the dollar, and that they made no claim for the same upon either Collins or Drake. The court excluded the testimony.

3. The defendants asked the court to rule that as Smith took the check signed by Drake and Newton in their individual names for the \$7000, the plaintiff's claim was upon the check, or upon Drake and Newton, and that he could not hold Collins for the same. Also that as the check for \$7000 was surrendered by the plaintiff upon the receipt of money for part and of other checks or drafts for the balance of the \$7000, the original claim was discharged, and the plaintiff's claim, if any, would be upon such checks or drafts. Also that after the check for \$7000 was surrendered, the plaintiff had no claim upon Collins or upon Drake for the \$7000, or any part thereof. The court refused to make said rulings or any of them.

4. The defendants also asked the court to rule that, upon the second transaction, of \$12,000, the claim of the plaintiff would be upon the \$14,000 check, or upon Newton, to whom he lent the money. The court refused so to rule.

5. The defendants also requested the court to rule that upon the plaintiff's evidence, or upon all testimony in the case, the plaintiff never had any claim upon Collins for the \$12,000 lent; also that the plaintiff never had any claim upon Drake for the

\$12,000 lent, upon the plaintiff's evidence or upon all the testimony in the case. The court refused to make said rulings or any of them.

6. The defendants also requested the court to rule that as the \$14,000 check included the \$12,000 lent at the time, and also \$2000 alleged to remain unpaid on the first transaction, the first sum, of \$7000, had been paid, and no action could be maintained against the defendants, Collins and Drake, for that \$2000. The court refused to make said rulings or any of them.

7. The defendants also asked the court to rule that there was no evidence in the case that Newton was such a partner of Collins and Drake that he was authorized to borrow money for them. The court refused so to rule.

8. The defendants also asked the court to rule that if there was evidence in the case that Collins or Collins and Drake stated that Newton was their partner to persons other than the plaintiff, such evidence, if believed, does not show that there was such a partnership as authorized Newton to borrow money in their names. The court refused so to rule ; but ruled and instructed the jury that such statements were competent and proper for the consideration of the jury in connection with all the other facts and circumstances of the case, upon the question whether a copartnership existed in fact, such as would authorize Newton to borrow money in behalf and upon the credit of the firm ; but that it was not competent upon the question whether the defendants, Collins and Drake, were liable by reason of having held Newton out as their partner, and thereby induced Smith to trust him.

Upon the third, fourth, fifth and sixth prayers, respectively, the presiding judge ruled that it was a matter of fact, depending upon the intent, understanding and agreement of the parties ; and submitted the several questions to the jury, with instructions adapted to each.

The defendants alleged exceptions.

T. H. Sweetser & W. Gaston, for the defendant.

G. A. Somerby & L. S. Dabney, for the plaintiff.

COLT, J. The verdict was against Collins and Drake, as partners of Newton in the cattle business. It has been set aside against the weight of evidence as to Collins on a motion for a new trial. The exceptions remain to be disposed of as to Drake, the only other party defending.

The plaintiff sues for money lent on two occasions to the firm. The first money was paid by him to Drake, the last to Newton. Drake gave the plaintiff a check signed by himself and Newton in their individual names, which the plaintiff testified was a memorandum check to be held by him until the money was repaid. This check was given up on payment of most of the money lent, and on the giving of another check for the balance, signed by Newton alone, which it was contended was also received as a memorandum, and never presented for payment. When the last money was lent the plaintiff took Newton's check for an amount large enough to cover the money then advanced, and the former unpaid check. The last check was protested for non-payment.

It was contended by the defendants that the only remedy of the plaintiff was upon the Newton checks; either because they were taken as payment of the original claim if any against the firm, or because in the original transaction credit was exclusively given to him. But there was evidence that both sums were advanced by the plaintiff solely upon the credit of the firm, and that the checks were not taken by him in payment. This was a question for the jury, depending upon the intent, understanding and agreement of the parties. The presiding judge so ruled and submitted it to them with suitable instructions. *Taylor v. Wilson*, 11 Met. 44. *Allen v. Coit*, 6 Hill, 318. *Thompson v. Percival*, 5 B. & Ad. 925.

/ The refusal to rule that upon all the evidence the plaintiff had established no claim against Collins and Drake is not open to exception, unless it appears that there was no evidence to warrant the verdict. The question here is not whether the verdict was against the weight of evidence, but whether there is any evidence however slight which, though contradicted by other evidence can properly be submitted to the jury, and upon which they can legally find for the plaintiff. *Forsyth v. Hooper*, 11 Allen, 419.

The plaintiff relied on evidence both that the alleged partnership in fact existed, and that Collins and Drake so held themselves out to him at the time of these transactions.

Upon the issues thus presented the declarations and admissions of the alleged partners respectively were properly admitted, and their effect limited by the judge in accordance with established principles. The statements of the individual partners were com.

petent to charge them respectively upon the question of the existence of the partnership in fact, and the nature and scope of its business. When made to other persons they were excluded as not competent to show that Collins and Drake were liable by reason of having held Newton out as a partner, and thereby induced the plaintiff to trust him. And the jury were told that the declarations of either would not be competent to prove that the others were his partners. *Currier v. Silloway*, 1. Allen, 19. *Fitch v. Harrington*, 13 Gray, 468.

For the purpose of shewing the nature and scope of the alleged partnership, and the manner of transacting its business, evidence of the common and usual dealings of persons engaged in the cattle business at this locality was competent; each member of the partnership must be presumed to have intended to clothe the others with all the powers incident to and usually exercised in that business. The evidence tended to show that the cattle business is the business of buying and selling cattle; that a partnership in such business is a trading partnership, which has the right to borrow money. *Etheridge v. Binney*, 9 Pick. 272. *Winship v. United States Bank*, 5 Pet. 529, 560. Parke, J., in *Dickinson v. Valpy*, 10 B. & C. 128, 140. *Boardman v. Gore*, 15 Mass. 331, 340. Story Part. § 126.

The exclusion of the testimony, as to settlements made by two of the witnesses called by the plaintiff to prove the partnership, which was offered to show conduct inconsistent with their testimony, cannot be properly excepted to, because it does not appear that the transactions so settled were such as came within the business of the alleged partnership. They may have been dealings with Newton as a member of another firm, or upon his individual credit. And if so there was no inconsistency apparent in the conduct of the parties.

It was contended that the defendants were interested only in certain specific transactions which did not constitute a general partnership, and did not authorize either one to borrow money on the credit of the others. But upon a careful review of all the evidence we cannot say as matter of law that there was not enough to warrant a verdict for the plaintiff against Drake on one or both grounds upon which a more general partnership was contended for.

It was objected that the judge erroneously admitted the statements of Newton made at the time the last money was advanced as to the purpose for which he borrowed it, showing that it was for the use of the firm. But it is well settled that if Collins and Drake were in fact partners with Newton, or had so held themselves out to the plaintiff, then Newton's statement that he was borrowing the money for the use of the firm is competent against all. It is precisely the same as if he had given the partnership note to the plaintiff, which would be binding on all, notwithstanding a subsequent misapplication of the money. They were statements accompanying the act of borrowing the money, part of the transaction itself, not subsequent admissions, as in *Ostrom v. Jacobs*, 9 Met. 454; *Tuttle v. Cooper*, 5 Pick. 414, and other cases cited by the defendants. *Etheridge v. Binney*, *supra*. *Winship v. United States Bank*, *supra*.

Exceptions overruled.

THE ATTORNEY GENERAL vs. THE WARE RIVER RAILROAD COMPANY.

Suffolk. June 15. — July 16, 1874. COLT & ENDICOTT, JJ., absent.

The Sts. of 1872, c. 53, § 12, and c. 180, § 3, relating to railroads thereafter "constructed," crossing at grade, do not apply to a railroad corporation which prior to the passage of these statutes has located the line of its road, exercised its right of taking land for the use of its road, incurred liability for land damages and expense in laying the road bed, in rock excavation, in the construction of abutments for a bridge, and in the building of a long bridge at grade in the immediate vicinity of the point where it intended to cross another railroad at grade, although the railroad and the crossing at grade were not completed.

INFORMATION filed May 21, 1874, by the Attorney General in behalf of the Commonwealth, at the relation of the railroad commissioners.

The information set forth that before and at the time of the commission of the acts hereinafter complained of, the Cheshire Railroad Company, a corporation established by law in this Commonwealth, had located and constructed its railroad through the town of Winchendon, in the county of Worcester, and was in the actual use and occupation of the same with its engines and cars in the transportation of passengers and freight; that after the

location, construction, use and occupation of said railroad by the Cheshire Railroad Company, the Ware River Railroad Company, a corporation established by law in this Commonwealth, constructed its road and laid its tracks so as to cross the road and tracks of the Cheshire Railroad Company at Winchendon at grade; and said road and tracks at Winchendon now cross the road and tracks of the Cheshire Railroad Company at grade; that said crossing at grade of the Ware River Railroad Company at Winchendon is maintained and used by said company in violation of the laws of the Commonwealth, which prohibit the crossing at grade of existing railroad tracks by the tracks of railroads thereafter constructed; that said Cheshire Railroad was an existing railroad at the time of the commission of the acts complained of, and that said crossing at grade is now maintained and used by said Ware River Railroad Company without right, and that said Ware River Railroad Company with its railroad now crosses the Cheshire Railroad at Winchendon at grade without the consent and approval of the railroad commissioners, as required by law.

The prayer was for process against the defendant corporation, that it might appear and answer to the information; that it should be enjoined from further use of said grade crossing, and decreed to take up and remove the same.

The answer of the defendant set forth the following facts: The defendant corporation was chartered March 16, 1867, and the charter renewed April 1, 1869. The charter authorized the company to build a road from Palmer to the state line of New Hampshire, crossing the Cheshire Railroad in the town of Winchendon. In pursuance of the charter, the company proceeded to locate the road, and such location was duly filed in December 1869, and by that location the Ware River Railroad crossed the Cheshire Railroad in the town of Winchendon at the point in controversy, and it was the intent and purpose to make such crossing at grade, that being the most convenient and most practicable method of crossing at that point. After the filing of said location and before the passage of the Sts. of 1872, *c.* 53, § 12, and *c.* 180, § 3, relating to railroad crossings at grade, the Cheshire Railroad Company filed with the county commissioners of Worcester County a petition setting forth that the Ware River Railroad

Company had filed the location of their railroad across the land and tracks of the Cheshire Railroad, and asked said commissioners to assess damages sustained by said Cheshire Railroad Company by reason of such taking and locating ; that a full hearing was thereupon had and damages assessed by said commissioners in the sum of eighteen hundred dollars, which sum the Ware River Railroad Company has been ready at all times to pay.

After the location as aforesaid, the defendant corporation proceeded with the construction of the road, and the road was brought to sub-grade, ready for the sleepers up to a point within one thousand feet from the proposed crossing. A heavy rock cut had been made about two thousand feet southerly of the crossing, and it was a part of the original plan in the construction of the road that the track across the low land approaching the crossing should be built upon a trestle. The Cheshire Railroad at this point is built upon an embankment twenty feet in height. On the northerly side of the proposed crossing, and not far distant therefrom, a bridge one hundred and twenty-five feet in length had been built at grade with the Cheshire tracks and the said crossing. Depot land had been purchased in the immediate vicinity of the bridge on the northerly side of the Cheshire Railroad, and the abutments were completed to carry the track on a bridge over and above the highway. All the work above indicated was done prior to the passage of the St. of 1872, c. 180 ; and since the passage of that statute the company have proceeded in good faith in the prosecution of their work, and expended a considerable sum of money in the belief that the right to cross the Cheshire Railroad at grade at the point indicated was fully secured to it.

The Monadnock Railroad Company, whose charter gives it the right to connect with the Ware River Railroad, comes into the town of Winchendon on the north of the Cheshire Railroad location. The Ware River Railroad and the Monadnock Railroad are north and south lines, and the interests of both and of the public require that they should be connected. Sixteen miles of the defendant's railroad, from Palmer to Gilbertville, was in operation prior to the act of 1872. The whole road is forty-nine and a half miles in length, from Palmer to Winchendon.

The case was reserved by *Wells, J.*, on the bill and answer, for the consideration of the full court.

C. F. Adams, Jr. (*C. B. Train*, Attorney General, with him,) for the Commonwealth. The defendant corporation in the present case was a corporation whose railroad was not "constructed" on April 8, 1872, the date on which the St. of 1872, c. 180, went into effect. The statute law recognizes four stages of railroad existence: 1. A corporation chartered and organized to build a road. 2. The location of a road. Gen. Sts. c. 63, § 17. 3. The construction of a road. Gen. Sts. c. 63, §§ 40-45. 4. The road in operation. A statute relating to railroad corporations "hereafter incorporated" would signify one thing; a statute relating to roads "hereafter located" would signify another thing; one relating to roads "hereafter constructed," yet another thing; and one relating to roads "hereafter put in operation," a fourth thing. Precedents of each form of words may be found in the statutes. See Sts. 1870, c. 325, § 3; 1871, c. 384; 1871, c. 333; 1874 c. 223. On April 8, 1872, the road of the defendant corporation was "located" at the point of crossing in question, but its road was not "constructed" at or near that point. The rule of construction in such case is well established. *Opinion of the Justices*, 7 Mass. 523.

The cases of *Stearns v. Old Colony Railroad*, 1 Allen, 493, *Baxter v. Boston & Worcester Railroad*, 102 Mass. 383, and *Sawyer v. Vermont & Massachusetts Railroad*, 105 Mass. 196, are distinguishable from the case at bar. In each of these cases a private person had assumed the obligation to fence for a consideration in money which entered into the award made by the county commissioners, and which the corporation paid. The transaction was consummated. The court held that a law subsequently passed imposing an obligation to fence did not affect the duties of parties under such consummated transactions. The owner of land, having for a valuable consideration assumed the burden of fencing, could not, by an act of the legislature, be relieved of it and have it shifted back on to the corporation. The case at bar is wholly distinct. No outside party entered into it; no transaction had been consummated. It was simply a new statutory obligation, relating to construction, imposed upon a corporation. No money had passed under any award of commissioners; no rights had been acquired, or obligations assumed, with which the statute interfered. It was simply

a new duty imposed ; and if it was an expensive duty, that was a matter resting in legislative discretion.

B. F. Thomas, for the defendant.

AMES, J. The statutes upon which this proceeding is to be maintained (if it can be maintained at all) are by their express terms made applicable only to such railroads as should be "hereafter constructed." The defendant's railroad was not only in course of actual construction, and partly completed, but its line had been located, its right of taking land for the use of the road had been exercised, and its liability for land damages incurred ; much expense had been incurred and much labor had been done in laying the road bed, in rock excavation, in the construction of abutments for a bridge over the highway, and in the building of a long bridge at grade with the Cheshire Railroad. All this had been done in the immediate vicinity of the proposed crossing, and with a view to a crossing at grade, at a time when such a method of construction was legally allowable. To require the defendant to change its proposed course of construction, and to cross the Cheshire road by passing over or under it, would render much of the expense already incurred and much of the construction, so far as it had been advanced when the statutes in question went into effect, wholly useless. It might also require a material change in the location, and a renewed and different taking of land for the use of its road.

In *Stearns v. Old Colony Railroad*, 1 Allen, 493, it was held that the St. of 1846, c. 271, requiring railroad corporations to erect and maintain fences along any railroad which they might thereafter construct, did not apply to a railroad which had been located and partially constructed at the time of its passage. In that case, the road had been partially graded. A like decision was given in *Baxter v. Boston & Worcester Railroad*, 102 Mass. 383, a case in which the location was filed and the construction "had been begun" before the statute took effect. See also *Sawyer v. Vermont & Massachusetts Railroad*, 105 Mass. 196.

We see no reason why the construction sanctioned by those decisions is not equally applicable to this case ; and it is therefore ordered that the

Information be dismissed.

ELI PACKARD vs. THOMAS H. PRATT & another.

Suffolk. March 30. — July 28, 1874. COLT, J., absent.

In an action for deceit the declaration alleged that the plaintiff was induced by false and fraudulent representations of the defendant to purchase the stock, fixtures and good will of his business. To prove the purchase the plaintiff put in evidence a written instrument in the form of a lease, whereby the defendant leased to him his interest in the business, fixtures and furniture for six months, the plaintiff agreeing to pay in instalments during this period, and by which the defendant agreed "that provided the said lessee completes the term of this indenture, to redeem and annul this indenture at the expiration of six months, or the said lessee at the expiration of six months repossess the same as his own property with any further cost from said lessor." *Held*, that there was no variance.

TORT for deceit against Thomas H. Pratt and W. A. Weaver. The declaration alleged in substance that on or about December 27, 1872, at Boston, the defendant Pratt being engaged in business styled by himself the "Commercial and Business Exchange," and having offered to sell out one half of the stock, fixtures and good will of his said business to the plaintiff, the defendants did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the said business as theretofore conducted by the defendant Pratt was a splendid chance for any one that wanted a first class and permanent business, that it would bear the closest investigation, that it was a profitable business, and that the net profits thereof realized by the defendant Pratt for the year last past had been three thousand dollars; that the plaintiff relying on said representations purchased of the defendant Pratt one half the stock, fixtures and good will of said business, and paid him therefor the sum of one hundred and sixty dollars. The declaration then alleged the falsity of the representations, that the defendants knew that they were false, a tender to the defendant Pratt of the stock and fixtures, and that the plaintiff disclaimed any interest in them.

Trial in the Superior Court, before *Rockwell*, J., who, after verdict for the defendants, reported the case to this court as follows:

The pleadings are referred to as part of this report; also, the written lease, hereinafter mentioned. The plaintiff testified, the defendants' counsel objecting, that, in consequence of directions

before received by him, he went to room No. 1, in the building No. 593 Washington Street, Boston, said room being up one flight of stairs, and there found both defendants; and that then and there the defendant Pratt, in presence of the defendant Weaver, told the plaintiff that their business was profitable, and that he, Pratt, had received three thousand dollars as net profits from the business the last year; that they had done business to the amount of eight or ten thousand dollars together; that he, Pratt, had made three thousand dollars last year from the business; that he would sell out his part to the plaintiff and do well by him; that the plaintiff replied that he did not know that he could buy such a business; that he had not money to buy such a business. Pratt said he would sell out cheap, and give the plaintiff a chance to make money, as he, Pratt, was going away to New York, and wanted to sell out; that the plaintiff replied that it would be of no use, as the plaintiff had not money enough to buy him out; that the defendant Weaver then said, that perhaps if the plaintiff had only money enough to pay in part, Pratt would wait for the other part; that he, Weaver, liked the looks of the plaintiff, and that the plaintiff would be the very man he, Weaver, wanted. Pratt said that if the plaintiff would pay him what money the plaintiff had, he, Pratt, would sell him his part; that the plaintiff told Pratt, that he, the plaintiff, didn't know about the business, didn't know as it would suit him, didn't know as he could learn it; that Pratt replied that the business was not much to learn, and that Weaver could show it to the plaintiff readily; that the plaintiff told Pratt he would take the business at their price, which was seven hundred and fifty dollars; that Pratt asked the plaintiff how much money he had, and the plaintiff told him he had one hundred and sixty dollars; and Weaver said he thought that would do for the first payment, and for the remainder, the plaintiff could give the money to him as it came in, and he, Weaver, could send it to Pratt; that one of them said there was no need of going out to make a paper; that they could make one out as well; that Weaver sat down and wrote the paper; * that Pratt

* The instrument in question was in form a lease by Pratt to the plaintiff of "all my right, title and interest in the real estate and brokerage business, together with fixtures and furniture" at 593 Washington Street, Boston, for the term of six months, paying the rent or sum of \$750 (\$160 in advance) by equal

and the plaintiff signed it, and that either that day or the next day the plaintiff paid one hundred and sixty dollars to Pratt in Weaver's presence, in the same room, No. 1 ; that the paper was made out in duplicate ; that Pratt took one, and the plaintiff the other ; that after that, the plaintiff went to the said room every day, for about a week, and spent his time there ; that Pratt used to come in there about once a day, and Weaver was there, generally, from ten to five o'clock ; that no business came ; men came with cards, and one man inquired for Pratt & Weaver ; that the plaintiff stayed there six or seven days, in this way ; that the last day or next to the last day, a young man came in, with one of those business cards of Pratt & Weaver ; that Weaver went out with that young man and met Pratt outside the door, there being a thin board partition ; that he told them he was sent there for a chance as collector, and he should like the situation ; that they asked if he had references ; that he said he had ; that they asked if he had two or three hundred dollars to deposit ; that he said he didn't know it was required ; that Pratt told him it was the money he was after, not a reference. The plaintiff also testified that Weaver told him at the end of the week or at the end of six or seven days, that the rent had got to be paid, or that they had got to leave the room ; that he, the plaintiff, then went to Pratt, and asked for his money, namely, the one hundred and sixty dollars, or a portion of it ; that Pratt replied he had no money, and if he had, he could not give it back to him or would not ; that he, the plaintiff, came out and told his story to the chief of police ; that Pratt did not go to New York ; but that he went to 29 Boylston Street, Boston, and told the plaintiff he went to sell out an employment office.

The plaintiff stated on cross-examination, that the duplicate leases were executed together ; that George Norris came in the next day, or two or three days after, and signed both as witness ; that he went to Pratt and asked for the money, one hundred and

weekly payments of \$22.69 at the expiration of each week. The instrument also contained the following clause : "And said lessor agrees that provided the said lessee completes the term of this indenture to redeem and annul this indenture at the expiration of six months, or the said lessee at the expiration of six months repossess the same as his own property with any further cost from said lessor."

sixty dollars, or a part of it, but never offered to return anything. The plaintiff also introduced as a witness, Harrison O. Read, a police officer, who testified that he knew Pratt & Weaver, at 593 Washington Street aforesaid; that he had no knowledge of any business they had except selling out their business; that six or seven persons came to make complaints at the police office; that he never knew of their having any commercial or brokerage business whatever; that they came to this room not more than three or four months before Packard came to the office to complain; that when he told Pratt of the complaints, he said he did nothing but fair business transactions. In their room, he testified, there was a desk, a table, and some chairs, but nothing else that he saw; and that he thought Pratt and Weaver were associated in whatever was done there. He also testified, on cross-examination, that he never saw the defendants together after the plaintiff had paid Pratt the one hundred and sixty dollars. The duplicate lease was put in by the plaintiff. This was all the evidence. The defendants' counsel, having objected to the evidence, especially on the ground of variance, and inapplicability of the evidence to the case set forth in the declaration, now insisted that upon the pleadings and evidence, the plaintiff's case could not be sustained. The court being of that opinion, suggested to the counsel for the plaintiff that the declaration might be so amended as to obviate the objections to the maintenance of the action. But as no amendment was proposed, the court ruled that upon the pleadings and evidence, the action could not be sustained; and by direction, the jury returned a verdict for the defendants. If the above ruling, to which the plaintiff objected and excepted, is correct, the verdict is to stand, otherwise a new trial is to be ordered; or, the case is to be disposed of as the Supreme Judicial Court shall direct.

W. H. Towne, for the plaintiff.

J. L. Eldridge, for the defendants. The court rightly directed a verdict for the defendants, because the declaration alleged a sale or purchase, while the evidence tended to show a lease, and not a sale. The allegation of a sale was descriptive of the identity of that which was legally essential to the plaintiff's claim. It was not a formal allegation. If we strike out from the declaration the word "purchased," it would set forth no cause of action.

ENDICOTT, J. We think there was evidence of fraud, offered by the plaintiff, sufficient to sustain an action on a proper declaration. The precise variance between the declaration and the proof, which led the learned judge to order a verdict for the defendants, does not appear by the report. But it does appear in terms, that he suggested to the plaintiff's counsel that the variance might be obviated by an amendment. In the argument submitted by the defendants' counsel, the only variance relied on, which an amendment could cure, was, that the declaration alleged a sale or purchase of Pratt's interest in the business, while the evidence tended to show a lease and not a sale. The only question for decision therefore is, whether the paper put in evidence, purporting to be a lease should have been set forth in the declaration, and whether it is so far material that by omitting to do so, there is such a variance between the allegations and the proof that the defendants are entitled to a verdict. We do not think there is such a variance. The gist of the action is the fraud and deceit of the defendants, by means of false and fraudulent representations, and the consequent damage to the plaintiff, and not the particular form of the contract entered into by the parties. If by false and fraudulent representations upon which he relied, the plaintiff was persuaded to part with his money to obtain an interest in the pretended business, the precise manner in which the interest was to be secured to him is not so far material that it must be set forth in the declaration. Whether by bill of sale or by lease, it was in substance the purchase of an interest in the business, and if there was fraud there was no contract between the parties.

The writing itself is certainly peculiar, and though in form a lease of a business for six months, it contains a provision, the substance of which is, that upon the payment of the stipulated rent Pratt's interest in the business may pass absolutely to the lessee. In one aspect it is a lease, in another a bill of sale conditional upon the full payment of the sum agreed upon. Its precise legal character, it is not necessary to consider; it was competent, as part of the transaction alleged to be fraudulent, and does not furnish evidence of a transaction or bargain, so different from that alleged, as to constitute a fatal variance.

The other questions argued do not fall within the ruling of the presiding judge and we have not considered them.

New trial ordered.

JOHN L. ELDRIDGE vs. WILLIAM H. HAWLEY.

Suffolk. March 6. — August 17, 1874. WELLS & ENDICOTT, JJ., absent.

In an action on a promissory note given with others in settlement of a partnership account, the sum due from the defendant in settlement was in dispute. A witness for the plaintiff testified as to the amount, that it was made up from the books of the firm, which were referred to at the settlement, but that he could not recollect the items, or how it was made up, and that the books were in his possession. He was then requested by the defendant's counsel to produce the books the next day, but failed to do so. *Held*, that the defendant's counsel had a right to argue to the jury upon the absence of the books; and that an instruction at the plaintiff's request, "that inasmuch as the books are not in the custody of the plaintiff, no inference is to be drawn from the non-production of the books, it being in the power of either party to summon the witness with the books," was erroneous.

It is within the power of the presiding judge at a jury trial to withdraw or reverse, without the consent of the parties to the suit, an instruction or ruling given in the course of the trial.

If the judge presiding at a trial withdraws an instruction which has been given to the jury, he should do so in so distinct a manner as to leave no doubt in their minds as to the law applicable to the question before them.

The judge presiding at a jury trial gave, at the request of the plaintiff, an erroneous instruction, and the defendant excepted. The plaintiff then waived the instruction; and the judge said: "If the party declines to receive it, I will leave that matter as it stands before the jury." *Held*, that the jury were not sufficiently instructed to disregard the instruction given, and that, as the matter about which the instruction was given was one of fact for them to consider, the jury should have been so instructed.

CONTRACT on a promissory note, signed by the defendant, payable to Parker L. Riggs, and indorsed, after maturity, to the plaintiff. At the trial in the Superior Court, before *Devens, J.*, the jury returned a verdict for the plaintiff, and the following bill of exceptions was allowed:

"It was in evidence that the defendant, the payee, Riggs, and Francis Burr, were partners in business, under the name of Hawley, Burr & Riggs; that subsequently Riggs withdrew from the partnership; that upon such withdrawal there were certain sums due Riggs for money advanced in the business by him, which the plaintiff contended amounted to \$1600, and that this note was among others given in settlement of the defendant's share of this indebtedness. The defendant denied that the sum due amounted to \$1600, and testified that the true sum would appear from the books, and that these notes were subsequently

115 410
151 234
115 410
155 41

obtained from him by fraud, and were without consideration. The plaintiff introduced said Burr as a witness in his behalf, who testified that the sum found due at the settlement was \$1600; that said sum was made up from the books of the firm, which were referred to at the settlement, but he could not recollect the items, or how it was made up; and upon his examination in behalf of the defendant, he testified that said books of account were in his possession at the present time; the defendant's counsel requested him, before the afternoon adjournment, to produce those books the next day, before the close of the trial, but the said books were not produced by any one, and the defendant's counsel argued to the jury upon the absence of those books.

"At the conclusion of the charge, upon the plaintiff's request, the court ruled 'that inasmuch as the books are not in the custody of the plaintiff, no inference is to be drawn from the non-production of the books, it being in the power of either party to summon the witness with the books.' The defendant's counsel then stated that he notified the witness while upon the stand to produce them. In reply to which the plaintiff stated that he contended that notice pending the trial was not a sufficient notice. The defendant's counsel excepted to the ruling. The plaintiff then said, 'I will waive the instruction.' And the court said, 'If the party declines to receive it, I will leave that matter as it stands before the jury.'" The defendant excepted to the above ruling.

I. Knowles, Jr., for the defendant.

J. L. Eldridge, for the plaintiff.

DEVENS, J. The ruling of the judge who presided at the trial, at the close of his charge, in reply to the request of the plaintiff, that, inasmuch as the books were not in the custody of the plaintiff, no inference was to be drawn from their non-production, it being in the power of either party to summon the witness with the books, was not correct, considered as a legal proposition. Whether an inference should properly have been drawn from such non-production, either against the theory of the plaintiff, (which was that the sum of sixteen hundred dollars was due upon a settlement made upon the basis of the various items as exhibited by the books of the firm of which the defendant and the payee of the note had been members,) or against

the credibility of the witness who had testified as to the balance due according to the books, but who had failed to produce them upon the request of the defendant, was a question of fact for the jury. The instruction is not a statement that no legal inference arises from the non-production of the books, which would leave the jury free to draw such inferences in fact as they thought they were justified in doing by all the circumstances, but, as presented to us by the exceptions, must be deemed a statement that as matter of law no inference was to be drawn from their non-production. As in this form the instruction was erroneous, there should be a new trial, unless the error was cured by what took place afterwards.

After the defendant's counsel excepted to this ruling, the plaintiff's counsel withdrew the request for it, by saying that he would "waive this instruction." It is contended by the defendant that as the instruction was once given, it was not in the power of the court to withdraw it without the assent of the defendant. This position is, however, manifestly untenable. It must sometimes happen in the course of *nisi prius* trials, by reason of the brevity and rapidity with which questions of law are necessarily discussed in the presence of the jury, that evidence is admitted, which, on reflection, the judge at a later stage of the trial determines to have been improperly admitted; so also that rulings in matters of law are made which he afterwards desires to modify or even reverse. To deprive him of the power, without the consent of parties, of striking out such evidence, modifying or even reversing a ruling which he deems erroneous, would seriously diminish his power of conducting the trial with the advantage of all the deliberation which can properly be used. It has therefore been heretofore held that this power did exist and might properly be exercised, and that where evidence was so struck out or instructions modified, it must be deemed that the jury acted upon the evidence as finally submitted and the instructions as finally given. *Hawes v. Gustin*, 2 Allen, 402.

When, however, incompetent evidence has been admitted which is struck out, or an erroneous ruling made which is reversed, it is the right of the party who has excepted to such evidence or ruling and is liable to be injured thereby, to have it made clear that in some proper form the jury were instructed to

disregard such evidence or ruling, so that, assuming them to have been guided by the directions of the court, it may fairly be presumed that it was disregarded, and no injury occasioned thereby. The question is then whether the ruling was so distinctly withdrawn that we can say that the party objecting to it could not have been affected thereby: if there is any ambiguity upon this matter, there should be a new trial. The remark of the judge in response to the statement of the plaintiff that he waived the instruction, that "if the party declines to receive it, I will leave the matter as it stands," may undoubtedly be interpreted to mean that the ruling given in response to the request of the plaintiff might be disregarded, as such request was withdrawn, and was probably so intended; but is not expressed with the precision and clearness that the occasion demanded. It does not necessarily give the jury so to understand, nor inform them that what he had previously said was in no way to form the basis of their decision, nor does it recall them, as it should have done, to the consideration that the question on this point was solely one of fact for them. As we cannot say but that they were still misled by the ruling we deem to have been erroneous, there should therefore be a new trial. *Exceptions sustained*

FRANKLIN MEAD vs. JONAS PARKER.

Suffolk. March 13. — September 4, 1874. COLT & ENDICOTT, JJ.,
absent.

In a written contract to convey real estate, the words "a house on Church Street," are a sufficient description of the estate to satisfy the requirements of the statute of frauds; and the house may be identified by parol evidence.

The presumption, that an estate is situated in a certain place, arising from the fact that a written contract to convey it is dated at that place, is one of fact and may be rebutted by oral evidence.

CONTRACT to recover damages for an alleged breach of the following contract in writing signed by the defendant: "Boston, December 17th, 1872. This is to certify that I, Jonas Parker, have sold to Franklin Mead a house on Church Street for the sum of fifty-five hundred dollars; and, in payment, said Mead

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assumes the mortgage of twenty-nine hundred dollars, and pays cash one hundred dollars; balance, bill of sale of a steam engine and crushing machine, and trucks and railway, and all the implements in the building; and also the building in which the said machinery and tools, now with the same; and papers necessary to convey above to be made and passed on or before 25th December, 1872."

The declaration alleged that the house referred to was on Church Street, Somerville.

At the trial in the Superior Court, before *Putnam, J.*, the defendant contended that the writing declared on was not such an agreement in writing as was required by the statute of frauds, Gen. Sts. c. 105. The court ruled that the writing was a sufficient agreement within the meaning of the statute. The case went to the jury, and evidence was offered by the plaintiff to prove the identity of the property, and that the bargain was made between the parties on the premises.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the above ruling.

A. J. McLeod, for the defendant.

J. H. Hardy, (*G. W. Morse* with him,) for the plaintiff.

WELLS, J. In the opinion of a majority of the court, there is no substantial point of difference by which to distinguish this case from *Hurley v. Brown*, 98 Mass. 545. In that the writing disclosed an agreement for the sale of "a house and lot of land situated on Amity Street." There being several such, parol evidence was admitted to show that there was one only which the defendant had any right to convey, and that the parties had been in treaty for the sale and purchase of it. The court held that the subject matter of the contract might thus be identified; and when so ascertained the writing might be construed to apply to it; and was thus made sufficiently definite and certain for specific enforcement in equity.

In that case, the location of the property in Lynn appeared from the writing. In the present case, the writing bears date at Boston; which might indicate that the property was in Boston. But that is an inference of fact, not conclusive. If it appeared that there was no Church Street in Boston, or that the defendant had no house there, but did own one upon Church Street

in Somerville, the identification of that as the subject of the negotiation and agreement might be effected by parol evidence upon the same principle and by the same rule as was applied in *Hurley v. Brown*. It is not a question of the sufficiency of the writing under the statute of frauds, so much as it is of the right to resort to parol evidence in aid of the writing, where an ambiguity exists in respect to the property intended to be sold, or to which the contract relates. The most specific and precise description of the property intended requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property, as they were when the negotiations took place and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. That parol evidence is competent to furnish these means of interpreting and applying written agreements is settled by the uniform current of authorities. *Baker v. Hathaway*, 5 Allen, 103. *Farwell v. Mather*, 10 Allen, 322. *Putnam v. Bond*, 100 Mass. 58. *Stoops v. Smith*, 100 Mass. 63, and cases there cited. 1 Greenl. Ev. §§ 286, 288.

The case finds that "evidence was offered by the plaintiff of the identity of this property, and that the bargain was made between the parties on the premises." No question is made of the sufficiency of this evidence for the purpose, if it was competent so to connect the writing with its subject matter. The objection is that as the writing does not of itself describe the subject of the sale with any degree of certainty, it is therefore insufficient as a memorandum under the statute of frauds; and that parol evidence cannot be resorted to in order to identify the property and relieve the ambiguity.

We think the writing is sufficient to satisfy the statute of frauds; and if, when the facts were shown, the ambiguity disappeared, it was capable of being enforced as a contract.

Exceptions overruled.

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147 206**EDWARD M. SARGENT vs. BOSTON AND LOWELL RAILROAD CORPORATION & another.**

Suffolk. March 10. — September 4, 1874. COLT & ENDICOTT, JJ.,
absent.

A railroad corporation is not bound to furnish an expressman, who seeks to carry on his business over its road, with facilities and accommodations different in kind from those furnished to the general public; and the fact that it has furnished him with such facilities for many years, and that he has thereby acquired a valuable business, is immaterial.

The St. of 1867, c. 339, obliging each railroad within the Commonwealth to give to all persons or companies reasonable and equal terms, facilities and accommodations for the transportation of merchandise, does not render it unlawful for such a railroad to carry on the express business itself and to refuse to allow similar privileges to another person.

When a railroad corporation may lawfully refuse to furnish a person desiring to carry on an express business over its road with greater facilities than are furnished to the public generally, the fact that the corporation carries on such business itself, and that this is *ultra vires*, is immaterial.

TORT against the Boston & Lowell Railroad Corporation, and the Nashua & Lowell Railroad Corporation. Writ dated November 15, 1871. The first count of the plaintiff's declaration alleged that the defendants before and at the times hereinafter mentioned were common carriers of goods and chattels for hire from Boston to Lowell, from Boston to Nashua, New Hampshire, from Boston to East Wilton, New Hampshire, from Lowell to Lawrence, and from Lowell to Salem; that said corporations owned, controlled, managed or operated all of said routes for the transportation of passengers, express matter and freight; that by the charters of said corporations, and the laws of the Commonwealth, the defendants were bound to give all persons reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of their merchandise and other property upon and over the railroads owned and operated by said corporations, and for the use of their depots and other buildings and grounds; that on November 17, 1865, and for a long time previous, the plaintiff was engaged in business as an expressman or common carrier for hire, by passenger trains, of merchandise and other property, over all of said routes; and that by his skill, energy and courtesy he had built up a

very large and profitable business upon said routes ; that on said day, the defendant corporations, conspiring and illegally contriving how they might deprive the plaintiff of the gains and profits of his said business, and appropriate the same unto themselves, notified the plaintiff that proposals would be received for the rent of the express privileges over said routes during the year 1866 ; that said defendant corporations, in violation of their charters and the laws of said Commonwealth, pretended to receive bids for said express routes and privileges, and in return therefor to grant the exclusive right to said express routes and privileges to the highest bidder therefor ; that on December 19, 1865, the said defendant corporations pretended to have rented or let exclusively said routes and privileges to George F. Penniman, Frederick Lovejoy and P. W. Jones ; and on said day last mentioned, notified the plaintiff, that they had leased the said express privileges to said Penniman, Jones and Lovejoy for the term of one year from and after the last day of December then instant, and that they required the plaintiff to vacate seasonably, for the use of said Penniman, Lovejoy and Jones, the depot, offices and other premises of said defendant corporations then occupied by the plaintiff in his business over said routes ; that by and in pursuance of said notification, the said defendant corporations took away from the plaintiff the said rights and privileges over said express routes, and the valuable good will and trade which the plaintiff had secured in his said business, although the plaintiff had offered to pay the said defendant corporations a just and reasonable sum of money to be allowed to continue in his said business over the said routes as formerly, and transferred the same to the said Penniman, Jones and Lovejoy, to the exclusion of the plaintiff.

The declaration further alleged that the plaintiff was credibly informed and had reason to believe that said Penniman, Jones and Lovejoy were and are only the paid agents of said defendant corporations, and not the proprietors of said express privileges, and that they have continued as such, and such only, to the date of this writ, and that the profits accruing from said fraudulent arrangement are the property of the said defendant corporations ; that from January 1, 1866, up to the date of the writ, the said defendant corporations had and have had ample convenience and accommodation for the carriage and conveyance, not only of all

freight and express parcels of the said Penniman, Jones and Lovejoy, but also for the carriage and conveyance of the freight and express parcels of the plaintiff; and that the defendant corporations, contriving unjustly and unlawfully to deprive the plaintiff of the profits and gains of his business as express carrier so built up as aforesaid, had excluded the plaintiff from receiving and transporting upon and over the routes owned and operated by said defendant corporations any express matter, and also had excluded as aforesaid the parties having charge of the same in the employment of the plaintiff from receiving and transporting upon and over said routes any express matter upon any terms which were reasonable and just, unless such express matter was intrusted to said defendant corporations, or to persons designated by them to act as express carriers of the same; that by said illegal acts of the said defendant corporations, the plaintiff had lost all the profits and gains accruing from his said business over the said routes of the defendant corporations, from the date of said exclusion to the date of the writ; and that his said business as express carrier had thereby been entirely taken away and lost unto him.

There was a second count, the nature of which is stated in the opinion. Trial before *Colt, J.*, who reported the case to the full court in substance as follows:

The plaintiff seeks to recover damages of the defendants for breaking up his business as an expressman over the railroads of the defendants, who were jointly liable, if liable at all. The plaintiff in his opening offered to prove that for a long time prior to November 17, 1865, the defendants had been common carriers of persons and merchandise over the railroads operated by them and mentioned in the first count; and that from the year 1842 to January 1, 1866, there were often, and for long periods, opposition expresses running over each of said railroads, in the same baggage car and at the same time, during all which period the plaintiff had run an express; that contracts were entered into by the defendants and these expresses upon said roads, for the conveyance of express matter over said roads, designating the space in the cars of the passenger trains to be occupied by such express matter; that this express matter during its transit was in the actual custody of the expressman with whom such contract was made, or his agent

that at the time of the alleged tort the good will of the plaintiff's business was valuable, and that he was more or less damaged in his business and property by the alleged tort; that September 1, 1857, the plaintiff and E. S. Rand, under the style of Sargent & Co., and H. T. Morrill and Robert Howison, under the style of Morrill & Co., made a contract with the defendants for doing express business over the routes of the defendants, which was to continue till April 1, 1860, unless previously terminated by mutual consent; that under this contract said firms carried on the express business over the roads of the defendants until April 1, 1860, and, by oral extension of said written contract, continued said business till December 19, 1865, when the defendants notified them that the express route on which they had been accustomed to run had been let to other parties, and that thereafter they would not be afforded the facilities before enjoyed by them; that on November 17, 1865, a printed notice of the defendants was delivered to the plaintiff, as stated in the declaration, and a like notice was delivered to each of the copartners and others, to the effect that proposals would be received by the defendants for the renting of the express privileges, but that there was no public notification by advertisement or otherwise; that on December 19, 1865, the defendants decided to let the express routes under said proposals to Penniman, Lovejoy & Jones, respectively, and on the same day delivered to Morrill, Howison, Sargent and Rand, respectively, the first mentioned notices; and that on December 20, 1865, the defendants made contracts with Messrs. Jones, Lovejoy and Penniman, respectively, for doing said express business; that upon the expiration of these contracts they were renewed for a year; that at the same time with the making of these last-named contracts, an order was promulgated by the defendants that the plaintiff and his messengers and agents were to be excluded from carrying on an express business over said roads, which order was enforced from January 1, 1866, to the date of the writ; that during that time the plaintiff had repeatedly demanded to be allowed to carry on his express business over said roads as formerly; that the plaintiff was able and offered to pay the defendants a reasonable compensation therefor; and that at the times of said demands there was sufficient accommodation in the defendants' baggage cars for the plaintiff as well as the other

occupants of said cars; that at the expiration of the year 1867 the defendants took upon themselves the exclusive management of all the express business upon their roads, collecting, transporting and delivering express parcels under the name of the Boston & Lowell and Nashua Railroads Parcel Department; and were so transacting the business at the date of the writ. That Edward Tuck was allowed, prior to 1865, and continuously since, to the date of the writ, to pass over the road between Lowell and Boston, on an ordinary passenger season ticket, for which he paid the usual price, doing a general collection business in Boston for banks, insurance companies and others in Lowell desiring his services.

If upon the foregoing facts the plaintiff would be entitled to recover, the case is to stand for trial; otherwise, judgment is to be rendered for the defendants.

S. C. Darling, for the plaintiff, cited *New England Express Co. v. Maine Central Railroad*, 57 Me. 188; *Sandford v. Railroad Co.* 24 Penn. St. 378; St. 1867, c. 339.

D. S. Richardson & G. F. Richardson, (*J. H. George*, of New Hampshire, with them,) for the defendants.

WELLS, J. This action is founded upon the supposed obligation of the defendants, as common carriers, to provide facilities and accommodations to enable the plaintiff to transact his business as expressman over and upon the railroads of the defendants. For this purpose he requires that his merchandise and parcels shall be transported, not as freight under the general charge and control of the managers and servants of the railroads, but in their passenger trains and under the exclusive control and supervision of the plaintiff and his agents: who also require special accommodations and facilities in the cars and stations of the defendants, for the receipt and distribution of their packages. It is not alleged that there is any contract for such service. The contract which once existed, and the course of business in previous years, are recited for the purpose of showing the manner in which the business of the plaintiff had grown up and the good will connected therewith had been gained, as bearing upon the damages caused by withdrawing from him the means for its further prosecution. The complaint is, that under the guise of a proposal to sell or let the privilege which the plaintiff and his associates had before

enjoyed, to be used exclusively by the one party who would pay most for it, the defendants had in fact denied it to all, and assumed the conduct of the business of express carriage and parcel delivery by its own agents and servants.

The allegation of the second count, that the defendants had refused to receive and transport articles of freight for the plaintiff in the usual modes of transportation of freight, is abandoned.

We know of no principle or rule of law which imposes upon a railroad corporation the obligation to perform service in the transportation of freight, otherwise than as a carrier of goods for the owner in accordance with their consignment; or which forbids it from establishing uniform regulations applicable alike to all persons composing the public to whom the service is due. We are pointed to no provision in the charters of these defendants, or in the general laws relating to railroads, which subjects the use of their roads to the convenience or requirements of other carriers than the corporations authorized to construct and operate them, and such other railroads as may have been authorized to enter upon or unite with and use them. Gen. Sta. c. 63, § 117.

All the provisions of law for the regulation of railroads contemplate the unlimited exercise by the corporation of the rights and duties of general carriers of goods and passengers; and this involves the right to adopt any and all reasonable rules and regulations to direct the mode in which their business shall be transacted. They cannot be required to convert their passenger trains to the purposes of freight at the discretion of parties not responsible for the management of the trains; nor can they be compelled to admit others than their own agents and servants upon their trains or to their stations for the custody, care, receipt and delivery of freight or parcels.

Whether the defendants, in establishing and conducting the business of their own "parcel department" undertake to collect and distribute goods and parcels in a manner which involves acts *ultra vires*, does not affect the question; nor, if they do so, does it afford the plaintiff any ground of action. His claim is for their refusal to furnish to him certain claimed facilities upon the roads. That refusal does not involve any acts or exercise of powers *ultra vires*.

Nor does the fact that for many years the defendants did afford certain facilities to separate and independent carriers, as express companies, confer any right upon them or impose any obligation, either of contract or duty, upon the defendants to continue the same unchanged.

Whatever may have been contemplated, when the charters for these roads were granted, as to the parties by whom and the mode in which the tracks would be used for the running of trains or carriages upon them, and the manner in which tolls would be received, it cannot be doubted that since the St. of 1845, c. 191, the direction of the use of the roads, and the control of all carriages upon them, are exclusively in the directors of the corporations owning them. It is a franchise of a public nature, it is true; and the directors are bound to conduct its exercise with a view to public convenience. But they, and not the individual members of the public, are intrusted with the discretion, authority and duty, in the first instance, to determine what the public convenience requires. They are subject, in this respect, to the oversight and regulation of the legislature. It is only when they disregard such regulations as are provided by law, or required by a reasonable consideration of the public convenience and the purposes of their charter, that individuals are entitled to complain.

The plaintiff's counsel argues that it is unreasonable, and a violation of the legal obligations of the defendants, to make any discrimination between individuals; or to refuse to the plaintiff privileges which they grant to any other party; and therefore that the arrangement of the defendants with another express company, by which the plaintiff was excluded from similar facilities, was a violation of his legal rights. Such does not appear to be the rule of the common law as held in Massachusetts. *Fitchburg Railroad v. Gage*, 12 Gray, 393. If such a rule has been established by the St. of 1867, c. 339, the plaintiff's case is not maintained upon that ground: 1st, because the contracts with other parties complained of were made before the statute, to wit, in December, 1865, for one year from January 1, 1866, and renewed only for one year from January 1, 1867, — and although the report finds that during the time from January 1, 1866, to the date of the writ, November 15, 1871, the plaintiff "has repeatedly demanded to be allowed to carry on his express

business over said roads as formerly," it does not appear that any such demand was made after that statute took effect and before the arrangement with those other parties expired. 2d, because the declaration does not charge any such wrong. The allegation is that the parties with whom the supposed contracts were made "were and are only the paid agents of said defendant corporations, and not the proprietors of said express privileges, and that they have continued as such, and such only, to the date of this writ; and that the profits accruing from said fraudulent arrangement are the property of the said defendant corporations." The whole scope and drift of the declaration is to charge the defendants with "conspiring and illegally contriving," by means of pretended contracts with other parties, to deprive the plaintiff of the profits of his express business in order to appropriate the same to their own use. The gravamen of his complaint then is not that the defendants have refused to give him "equal terms, facilities and accommodations" with other persons and companies, but simply that they have refused to give him such facilities as he requires, for his special business as carrier, over their roads. His claim must stand upon the right to demand such facilities independently of any enjoyment of like facilities by others. As an absolute right this cannot be maintained.

The plaintiff contends that the "parcel department" which the defendants have established, to the exclusion of the plaintiff and others desiring to make like arrangements, is in contravention of the equality required by the statute, as much as if it were conducted in the interest of a third party. But we think the statute was intended to apply to the dealings of the railroad corporation with the public, and not to the mode in which it should arrange and conduct the different branches of its business as carrier. All that the plaintiff can demand is that, in each of those branches, he shall have equal terms with other persons and companies.

The report finds that when the plaintiff demanded to be allowed to carry on his express business over said roads as formerly, "there was sufficient accommodation in the defendants' baggage cars for the plaintiff as well as the other occupants of said cars." But there was no refusal to carry the plaintiff and his freight upon the same terms and in the same manner as the defendants per-

formed like service for other persons and companies. It was a refusal only to permit the plaintiff to occupy a portion of the space in the cars and stations in the same manner and for the same purposes as the defendants themselves used and occupied them, paying therefor, and for the required transportation, some special rate which could not well be adjusted otherwise than by special agreement.

The plaintiff fails to make out a legal cause of action, and the
Judgment must be for the defendants.

NATIONAL WEBSTER BANK *vs.* ELIZABETH T. ELDRIDGE.

Suffolk. March 19. — September 4, 1874. AMES & DEVENS, JJ., absent. ENDICOTT, J., did not sit.

Where a testator directs that the judge of probate shall approve of the appointment of a trustee, to be made by persons designated by his will, the person occupying the office of judge of probate acts under the authority conferred upon him by the will, and not as a court or judicial officer, and notice to the parties in interest is not required.

The provisions of the Gen. Sts. c. 100, § 9, do not operate to vest the title to trust estates in trustees not appointed under the provisions of that statute.

If an appointment by deed under the provisions of a will, which devises an estate to trustees, with power to appoint others to supply vacancies as they may occur, and which declares "that the new trustees so appointed shall have the same power, right and interest touching the trust premises, as if herein appointed trustees," does not operate as a good appointment of the estate by which the title will vest in the trustees by force of the devise itself, it will remain in the survivors of the original trustees as a naked trust, and upon the execution of a power of sale conferred upon the trustees by the will, it will pass to the purchasers by force of the terms of the devise, and by their deed under the power.

Where a demurrer was filed to a bill in equity for the specific performance of an agreement to purchase real estate, and the defect in the plaintiff's title was afterwards cured, *Held*, that whether the bill could be maintained must be determined on all the equities of the case after answer filed.

BILL IN EQUITY for the specific performance of an agreement to purchase real estate.

The material allegations of the bill were as follows: In the year 1855 John Dorr, of Boston, died, leaving a last will and testament, which was thereafter duly proved and allowed by the Probate Court for the county of Suffolk. At the time of his death Dorr was the owner of an estate in Boston, situated on the

corner of Milk Street and Sewall Place, known as Sewall Block. By the terms of the will Sewall Block was, with other property, devised and conveyed to John Dorr, Junior, Charles Hayward and Peter Wilder Freeman, trustees, upon certain trusts in the will declared. The trustees and their successors were authorized, whenever they should deem it expedient, to sell said Sewall Block at public auction, and to convey the same to a purchaser or purchasers, free and discharged from any obligation to see to the application of the purchase money. The will expressly relieved the trustees above named and all future trustees under it from giving bonds, unless the judge of probate having jurisdiction should deem it necessary, upon the petition of a person or persons interested in the trust estate. The will further provided as follows: "And if either of said trustees shall die or shall refuse to accept or shall relinquish said trust or be removed therefrom, the surviving or other trustees or trustee shall, by any writing signed and sealed by them or him, appoint some other suitable person or persons, to be approved by the said judge of probate, or by any justice of the Supreme Judicial Court of said Commonwealth, to be a trustee or trustees in the place of the trustee or trustees so dying, refusing, resigning or removed; and in default of such appointment, whenever and as often as the same shall be necessary, I direct that a new trustee or that new trustees shall in every such case be appointed by the said judge of probate or by one or more of the said justices; and the new trustee or new trustees so appointed shall have the same power, right and interest touching the trust premises and be subject to the same duties and liabilities as if herein appointed trustee or trustees. And it shall be lawful for any or either of my trustees to relinquish said trust at pleasure. And in case of the death, resignation or removal of any or either of my trustees, I hereby declare that the trusts, powers and duties hereby created and assigned to them may be executed and discharged by the remaining trustees or trustee for the time being."

The said Dorr, Hayward and Freeman accepted the office of trustees under said will, and duly qualified and acted as such. Shortly afterwards Hayward deceased, and in December, 1855, Theodore H. Dorr was appointed in his place by the surviving trustees, and was approved as such trustee by the judge of pro-

bate for the county of Suffolk. In June, 1867, John Dorr and Theodore H. Dorr resigned their offices, and in August of the same year, upon the appointment by the remaining trustee, Freeman, and approval by the judge of probate, Richard B. Lawrence and Ellerton L. Dorr became trustees in their stead, and have ever since acted as such. In June, 1869, upon the decease of Freeman, John D. Bryant, upon the nomination of the remaining trustees, and approval by the judge of probate, became trustee in his stead, and has ever since acted as such. No bonds were ever required of, or given by, any of the above-named persons as trustees under said will, nor any conveyance or conveyances of the trust property made by any of them to his or their successors in said trust. Nor prior to the appointment and approval of the new trustees, as above set forth, was any notice given or any order of notice issued to or upon parties interested.

September 5, 1871, the trustees Lawrence, Dorr and Bryant, in the due exercise of the discretion and authority reposed in them by the will, and having previously given the notices required thereby, sold the real estate known as Sewall Block at public auction. The plaintiff purchased the same, and on September 25 received due conveyance thereof in fee from the trustees, and has ever since been seised and possessed of the same. March 21, 1873, the plaintiff sold the same to the defendant by a written agreement, and the plaintiff, after doing all things on its part required to be done by the said agreement, tendered to the defendant a good and sufficient deed of conveyance of the real estate, and requested her to accept the same and to pay the sum of money stipulated to be paid by the terms of said agreement, and that she refused so to do.

The defendant demurred to the bill, and assigned, as causes of demurrer: That the plaintiff's bill disclosed that it could not make a good title to the estate therein described, because, 1. If the appointment of trustees under John Dorr's will, or the approval thereof, was vested in the Probate Court and the judge of probate in his official capacity, each and every of the appointments of new trustees made under said will was invalid for want of notice and for want of bonds. 2. If said appointments and approval were vested in the individual holding the office of judge of probate and not in the court, as such, then upon each and every ap-

pointment and approval made under said will there should have been, as there are not, conveyances from the respective trustees to their successors in the trust.

An amendment to the bill was subsequently made, alleging that after the time at which the conveyance was stipulated to be made, John Dorr, the survivor of the trustees appointed under the will, made a deed of release and quitclaim of all his right, title and interest in the trust estate to the present trustees, the grantors in the deed to the plaintiff, and that after the execution of said deed to the present trustees, they had executed a deed of quitclaim to the plaintiff.

The case was reserved on the bill and demurrer, for the consideration of the full court.

A. Lincoln, for the defendant.

B. F. Thomas, for the plaintiff.

WELLS, J. The estate in question was devised to three trustees, with full power to sell and convey. In case of a vacancy in their number, the remaining trustees or trustee were empowered and directed to appoint others to fill the place, "by any writing signed and sealed by them or him," to be approved by the judge of probate or by any justice of the Supreme Judicial Court, and in default of such appointment, the vacancy was to be filled by said judge or justice. During the continuance of such vacancy it was provided that "the trusts, powers and duties hereby created and assigned to them may be executed and discharged by the remaining trustees or trustee for the time being." Upon any new appointment being made in either mode, "the new trustee or new trustees so appointed shall have the same power, right and interest touching the trust premises, and be subject to the same duties and liabilities as if herein appointed trustee or trustees." By the demurrer the facts are admitted to be as set forth in the bill; to wit, that the present trustees have received their appointment and have succeeded to the places of the original trustees "in manner and form as provided by said will," viz., by writing of appointment signed and sealed by the persons designated to appoint, and the approval of the judge of probate: also that the sale was conducted and the conveyance made to the plaintiff, according to the terms of the power.

Objection is made, in the first place, that the appointment of the new trustees successively is invalid because no notice was given of the proceedings in the Probate Court. But upon such an appointment the judge of probate acts under the authority conferred upon him by the terms of the will, and not by virtue of his general authority as a court or judicial officer under the statutes establishing the court and defining its jurisdiction. *Shaw v. Paine*, 12 Allen, 293. It was not a judicial proceeding, and therefore required no notice.

The appointment of the trustees not having been made under the authority of the statute, it would follow, as is contended by the defendant, that the provisions of the Gen. Sts. c. 100, § 9, would not operate to vest the title in them. But we are inclined to the opinion that such an appointment by deed, under the directions of a will which devises the estate to trustees, with power to appoint others to supply vacancies as they may occur, and which declares that the new trustees so appointed "shall have the same power, right and interest touching the trust premises" as if herein appointed trustees, may operate as a good appointment of the estate by which the legal title will vest in the new trustees by force of the devise itself.

If the title did not so vest, it remained in the surviving original trustee as a naked trust; and upon the execution of the power of sale, expressly conferred upon the new trustees, it would pass to the purchaser by force of the terms of the devise and by their deed under the power.

The conveyance of all his right and interest in the legal title to the new trustees, by the survivor of the original trustees, and their second deed to the purchaser in confirmation of the title supposed to have been previously conveyed, removes whatever of doubt there could have been before as to the sufficiency of the plaintiff's title. This has been done since the time when the agreement was to have been performed, it is true; but whatever weight may be due to that circumstance, it is a matter to be considered in the final determination of all the equities of the case. For the purpose of presenting those the defendant must answer to the merits.

Demurrer overruled.

GEORGE G. WALL & another vs. JOHN H. ROBINSON & others.

Suffolk. March 4. — September 4, 1874. WELLS & ENDICOTT, JJ.,
absent.

When labor is performed, or furnished, under an entire contract, in the erection or repair of several buildings, owned by the same person and situated on the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, although the contract specifies separate amounts for the work to be done on each house.

PETITION to enforce a lien for work and labor under the St. of 1872, c. 318, § 1. The respondents demurred to the petition, and at the hearing in the Superior Court, the demurrer was sustained, and the petitioners appealed to this court. The facts of the case appear in the opinion of the court.

W. S. & W. F. Slocum, for the petitioners.

J. R. Churchill, (*A. Churchill* with him,) for the respondents.

MORTON, J. The petition, as amended, alleges that the petitioners performed and furnished labor in the erection of buildings and structures, to wit, three dwelling-houses and one stable, upon a lot of land owned by the defendants, by virtue of a contract with one Barnard and with the consent of the owners of the lot. By the contract, as stated in the amendment, the petitioners were to do certain work specified, upon the houses and the stable, and were to be paid one hundred and forty dollars for each house and thirty dollars for the stable. We cannot construe the petition as alleging that the work upon each building was furnished under a separate contract applicable to such building, but the fair construction is that the work was done upon all the buildings under one contract. It is alleged to have been furnished "by virtue of a contract," embracing all the work. The question is thus presented whether a mechanic who has performed and furnished labor upon several buildings situated upon one lot owned by the same person, under an entire contract, has a lien under our statutes.

In *Landers v. Dexter*, 106 Mass. 531, the petitioner claimed a lien upon twenty houses, treating the whole as one estate. It appeared that a portion of his debt arose under a contract to perform labor on twelve of the houses, and another portion of it under an entirely independent contract to labor upon the other eight houses. It was held that he had no lien which attached to the

whole estate. But the court did not decide whether a lien under either of his contracts attached to the twelve or the eight houses which were the subject of that contract. That question is now presented.

The statutes are designed to give to the mechanic who by his labor and skill enhances the value of an estate the security of a lien upon the estate to the extent he has thus added to its value. They provide that any person to whom a debt is due for labor performed or furnished in the erection, alteration or repair of any building or structure, by virtue of an agreement with, or by consent of the owner, shall have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land on which the same is situated.

In the case at bar the petitioners have performed labor upon several buildings situated upon the same lot under an entire contract for an entire price. We think such a case is within the purpose of the statute and the intention of the legislature. The parties by their contract have connected the several buildings and treated them as one estate. Under the contract the labor performed upon each building creates a lien upon the whole lot and therefore upon all the other buildings.

Although it cannot be said with strict accuracy that the labor for which the lien attaches was all performed on each building affected by it, yet it was all performed on one estate; and to deny the lien would defeat the spirit of the statute by a too literal adherence to its letter.

A similar question existed, though it was not argued, in *Whitford v. Newell*, 2 Allen, 424, where a lien for a debt due, under a contract for an entire price for labor upon a dwelling-house and barn, two separate buildings upon the same lot, was maintained, and enforced against the whole estate.

We are of opinion that when labor is performed or furnished under an entire contract, in the erection or repair of several buildings owned by the same person and situated upon the same lot, a lien attaches upon the whole estate for the whole value of the labor performed, if the other conditions of the statutes are fulfilled.

In the case at bar, therefore, if the proofs support the allegations, the petition may be maintained. *Demurrer overruled.*

**BAY STATE BRICK COMPANY vs. JOSHUA T. FOSTER & others.
ATTORNEY GENERAL vs. BAY STATE BRICK COMPANY.**

**Suffolk. March 30, 31. — September 4, 1874. AMES & DEVENS, JJ.,
absent.**

The decision of surveyors of highways, acting within the scope of their authority, under the Gen. Sta. c. 44, § 8, that a structure in the highway is an obstruction to public travel, is conclusive; and evidence is not admissible to show that the structure is not in fact an obstruction, or that the removal of the obstruction will seriously incommode and damage the person who placed it there; or that the surveyors did not act in good faith, in deciding that it was an obstruction to public travel.

The fact that the persons chosen to be surveyors of highways are selectmen of the town, does not prevent their acting as surveyors, nor invalidate their acts in that capacity.

The fact that the rails of a private railroad were placed on a highway by the permission of the town authorities, who permitted them to remain there for a series of years, does not prevent the surveyors of highways from removing them if they deem them an obstruction to public travel.

A manufacturing corporation owning the land on both sides of, and the fee in, a highway, laid railroad tracks across the highway; the surveyors of highways having decided that such use of the highway was an obstruction to travel, the attorney general, at the relation of the surveyors, filed an information for an injunction to prevent the continuance of such use. *Held*, that the injury to the right of the public was not of such a nature as to require the extraordinary process of injunction.

THE FIRST CASE was a bill in equity against the surveyors of highways in the town of Medford. The bill alleged in substance that the plaintiff corporation was and long had been engaged in the manufacture of bricks on its own land; that it owned the land on both sides of Riverside Avenue, a highway in the town of Medford, and the fee in the soil of the avenue itself, subject only to the public easement; that for the purpose of reaching the railroad, by which the bricks of the corporation were carried to Boston, it was obliged to lay iron rails across said highway, on which its cars loaded with bricks could run; that this track was laid with the consent of the town, was no obstruction or inconvenience to the use of the way, and was indispensable to the prosecution of the company's business; that the defendants threatened to take the rails up, not for the benefit of the public, or in the discharge of any public duty, but instigated by the private malice and for the selfish purposes of an individual, and in order to extort money from the corporation. The bill

prayed for an injunction against the removal of the rails and for general relief.

The defendants in their answer demurred to the bill, for the reason that the plaintiff had a plain, adequate and complete remedy at law, and averred that the railroad track was an inconvenience, and an unlawful obstruction to public travel; and that in pursuance of their right and duty, as surveyors of highways, they had ordered it to be removed.

THE SECOND CASE was an information by the attorney general at the relation of the surveyors of highways, charging the Bay State Brick Company with having unlawfully obstructed a public highway in Medford, called Riverside Avenue, by laying and maintaining a railway across it, and by using said railway for the transportation, by means of locomotive engines, of cars and wagons loaded with bricks, and thereby making the highway unsafe and inconvenient; that the corporation had been ordered by the surveyors of highways to remove the track, and refused, and still refuse, to do so. The prayer was for an injunction forbidding the maintenance and use of said track.

The answer contained a demurrer, and also set up in defence the matters stated in the bill in the first case.

The two cases were heard together, before *Ames, J.*, who reserved them for the consideration of the full court, upon a report, in substance as follows:

Evidence was offered to prove the title of the plaintiff in the first action, to the soil in the highway and on both sides of it; and numerous witnesses on the part of the Bay State Brick Company were called and sworn, but before their examination, the counsel for that company was called upon to explain what he proposed to prove by them; and it appearing that the claim on the part of the Commonwealth and of the surveyors was, that the matters and things proposed to be proved would not sustain the corporation in its defence in the second case, or enable it to maintain the case stated in the first case, it was proposed and ordered by the court that the cases should be reserved upon the pleadings and the various offers of proof submitted by the said corporation,

The counsel for the corporation then offered to show that the rails were originally laid down upon application to, and with leave from, the highway surveyors of the town of Medford; and that they have remained and been used with the knowledge, sanction and approval, express and implied, of the successive boards of selectmen or highway surveyors of the town, from 1868 down to the summer of 1873, when the selectmen first made complaint; that this interference by the selectmen was expressly stated to the company's agent to be, not because they believed the rails to be any incumbrance or hindrance or obstruction to the highway, or that they rendered it unsafe or inconvenient, but because a man named Wellington complained of them, and insisted upon their doing it; that Wellington, assuming to act in behalf and with the authority of the town, communicated to the plaintiff in the first suit, that if it would pay him a sum of money, it might have the use of the track.

It was not contended that the selectmen went to the company, or authorized Wellington to go in their behalf, understanding that he was to get money for them. The company's offer was to prove that the whole thing was stirred up and started by Wellington, at his instigation, from corrupt motives, and that the surveyors were made his tools, unwittingly perhaps. And it was insisted that such was the proper inference from the facts proved or offered in proof.

The company further offered to prove that, as a matter of fact, the mode of occupation and use of the highway were entirely unobjectionable; that there was no plausible pretext or cause for any interference on the part of the surveyors of highways; that there was no justification in fact for their interference, and no reason by which they would be justified in interfering, in the honest belief that it was necessary for the protection of the public; that in the summer of 1873, at the instance of said Wellington, the surveyors caused the rails to be removed; that afterwards, upon the request and at the expense of the brick company, a written opinion on the subject was obtained from Sidney Bartlett, Esq., and communicated to the defendants; and the track was relaid by the company in pursuance of and in conformity to that advice; and that it was so laid that it cannot reasonably and in fact be said to obstruct the way, or to come within the Gen.

Sts. c. 44, § 8; that this relaying was with the sanction and approval of the surveyors, and that they could not honestly and reasonably consider the track so relaid to be an obstruction coming within the section above referred to; and that neither in fact nor in law was it a nuisance; that after the rails were so laid the company proceeded to use them; and that then, without any change of facts or circumstances, and without any official action or vote of the board at any meeting, the surveyors notified the company to remove the rails by October 18, informing it that if it did not do so, the surveyors would do it themselves; and they were about to do so when the bill was filed.

The corporation also offered to show such a general state of facts and circumstances as would justify the court in inferring that the action and proposed action of the board was an abuse of their legal authority and position, and an illegal exercise of it; and that their action and proposed action were an abuse of their legal authority, and a known violation of their official duty.

It was agreed that the selectmen of the town were made surveyors of highways; and a record of the doings of the surveyors, authorizing the removal of the rails, was put in evidence.

It was proved that Riverside Avenue, formerly known as Ship Street, was an ancient way leading from Medford Square over the company's land; that the town at various times had caused it to be repaired, and had by vote caused it to be laid out at an increased width; that it leads to the Wellington Farm, so called, and is there closed by a gate; that it is used mostly in going to and from that farm and six or eight houses in the neighborhood; that it has been more than once widened by the town, and that it is not very much travelled.

A. A. Ranney, for the Bay State Brick Company. 1. The owner of the fee in land over which a way runs has a legal right to do with it whatever he pleases, so long as his use of it does not interfere and is not inconsistent with its use by the public. *Vestry of St. Mary v. Jacobs*, L. R. 7 Q. B. 47. *Perley v. Chandler*, 6 Mass. 454. *Adams v. Emerson*, 6 Pick. 57. *Har-rington v. County Commissioners*, 22 Pick. 263. *Atkins v. Bord-man*, 2 Met. 457. *Woburn v. Henshaw*, 101 Mass. 193.

2. In the exercise of the right of eminent domain, certain boards, or persons, are invested with a judicial power and the ex-

clusive right of determining when public necessity or convenience requires that private property be laid out as a highway. Gen. Sts. c. 43, §§ 4, 5. But the provisions for removal of obstructions in Gen. Sts. c. 44, §§ 1, 8, vest no such judicial power of determination in the selectmen or highway surveyors.

S. Bartlett, contra.

ENDICOTT, J. These cases involve the same questions, and were argued together.

In the first case the Bay State Brick Company seeks to enjoin the highway surveyors of the town of Medford from disturbing or removing certain railroad tracks, which the company has laid across a public highway in the town, known as Riverside Avenue, for the purpose of transporting bricks and other merchandise by steam power. These tracks cross the highway at right angles; the plaintiff is the owner of the land on each side of the highway at that point, and it is conceded that it also owns the fee of the land occupied by the way. It contends that these tracks were laid with the permission and sanction of the selectmen and surveyors of Medford, and had so remained, and were used by the plaintiff for a series of years, until the defendants in their official capacity caused them to be removed, as obstructions to public travel and the proper use of the highway; that being the owner of the soil, it can make use of the highway for any purpose consistent with the public easement, and that its tracks are so constructed that there is no obstruction to public travel, and that the use of the highway for such a purpose is not incompatible with the public easement.

The right here asserted, to remain in the owner of the soil of a public way, is to construct railroad tracks upon which to run cars by steam power, across that portion of the way worked and used for public travel, and thus to form a connection between lots of land on either side of the way.

This necessarily involves the right to enter upon and tear up the surface of the travelled way, to place a permanent structure therein, and to make changes more or less extensive, for the purpose of establishing a method of passage and transportation, very different if not inconsistent with the method of passage and transportation to which the public easement has devoted the same portion of the way. If the plaintiff has this right, any

owner having similar title may construct and maintain in the highway similar structures and methods of transportation; and the highways may be crossed at any point by railroad tracks, which the town authorities cannot remove, if built as railroad tracks duly authorized are built. We are not aware of any case where the familiar principle, that the owner of the soil retains all rights not incompatible with the public easement, has been carried to this extent. But it is not necessary to review the cases on this subject, or to determine the precise extent of the rights of the owner in this regard. This case is not to be confounded with those cases where the legislature, having given by statute easements in a public way to other corporations, as to water, gas, railroad or telegraph companies, a bill in equity may lie to restrain one in the exercise of its easement from encroaching upon the privileges of another. There, the question is of the rights of different parties enjoying easements in the same way; here, the plaintiff having placed certain structures on the travelled way, in the attempted exercise of its rights as owner of the soil, and the surveyors having decided, as matter of repair, that such structures interfere with public travel and the proper use of the way, the only question is whether this court sitting in equity will review that decision.

Whether the plaintiff has such right or not, in the exercise of that right it is very clear that it cannot interfere with or incommode the public travel. In the large class of analogous cases, where the owner of the soil may cultivate the soil of the way, take off the herbage, cut down the trees, remove the soil, or construct a watercourse, he must exercise his right in subordination to the public easement, and in such a manner as not to put any obstruction in the way, or incommode, hinder or endanger persons travelling thereon. If he cannot so exercise this right, either by reason of the manner in which he is obliged to do it, or by reason of the necessities of travel on that particular highway, then such exercise of the right is incompatible with the public easement, and as a right it may be said to cease to exist.

This plaintiff has an undoubted right to transport bricks and merchandise across this highway, but if it attempts to do so, by structures placed in the surface of the travelled way, that the authorities charged with the care of the highways decide.

to be obstructions to public travel, they may be removed. The case is presented, when it is the duty of the surveyors to act as directed by Gen. Sts. c. 44, § 8; and this court will not review their judgment and pass upon the question whether there was an obstruction or not. *Benjamin v. Wheeler*, 8 Gray, 409, and 15 Gray, 486. *Heald v. Lang*, 98 Mass. 581. It is merely a question of repair, where the discretion of the surveyors, when exercised, is decisive, as it is in many other cases where town officers are called upon to act. See *Higginson v. Nahant*, 11 Allen, 530.

The exception to the jurisdiction of the surveyors because they were also chosen selectmen we do not consider well taken. It was held in *Benjamin v. Wheeler*, 15 Gray, 490, that if the acceptance by a selectman of the office of surveyor incapacitates him from holding the office of selectman, it would by no means follow that as surveyor of highways he could not proceed with the discharge of his duties.

Nor were the surveyors prevented from acting in the premises because the rails were placed there, and then suffered to remain, by permission of the town authorities. Such permission can give no rights on a public highway, to obstruct it, or incommode the travel thereon, and cannot restrain the proper authorities from afterwards removing them, if in their judgment it is necessary. Nor does it affect the right of the surveyors to act, that the plaintiff will be now severely incommoded and damaged by the removal of the rails, it having gained no right to obstruct the way, and having used it subject to the action of the authorities, who might at any time have ordered their removal.

One other question is raised by the plaintiff. It is contended that the surveyors did not act in good faith, but were instigated to their action by the desire to accommodate an individual rather than to remove an obstruction from the highway. This question was settled in the case of *Benjamin v. Wheeler*, before cited, where it was held that an act within the scope of an officer's authority does not become illegal by reason of the motive which may have influenced his mind in doing it.

The evidence, therefore, offered by the plaintiff, was not competent, the acts of the surveyors being conclusive, and the

Bill must be dismissed, with costs.

In the second case the attorney general at the relation of the defendants in the previous case has filed an information charging that the Bay State Brick Company has obstructed the highway by its tracks, and praying that it may be enjoined from so doing. This case presents the same questions arising upon the same state of facts.

We think, upon these facts, that no obstruction to the rights of the public is disclosed of such a character as to call for or require the extraordinary process of injunction; or that may not be removed or prevented by the surveyors of highways in the exercise of the powers vested in them, the extent of which has been considered at length in the previous case. The

Information must therefore be dismissed.



CAROLINE W. BURLIN vs. OLIVER N. SHANNON.

Suffolk. March 8. — September 4, 1874. WELLS & ENDICOTT, JJ., absent.

In an action against a husband for board furnished his wife, evidence of acts of cruelty by the defendant towards her of such a nature as to justify her in leaving him, committed prior to the cause of a like action between the same parties, in which the jury returned a verdict for the defendant, and found specially that the wife "lived separate from her husband without his consent, and without any justifiable cause," and judgment was rendered accordingly, is inadmissible, although the witness offered was not a competent witness at the trial of the former action, and is competent in this.

In an action against a husband for board furnished his wife who lived apart from him, a letter of the wife to the husband was put in evidence, tending to show that the separation was not caused by her fault, and that she was willing to return. The defence then introduced testimony to the effect that the plaintiff told the witness that the wife sent the letter to evade the law, and that she did not intend to live with her husband. *Held*, that this testimony was competent only to affect the credibility of the plaintiff as a witness, and the good faith of her claim; and that evidence offered in rebuttal, that the wife did the acts in question with a different intention from that stated by the plaintiff, was rightly rejected.

Where the validity of a divorce is involved in the issue tried before a jury, objections to the sufficiency of the notice to the libellee, and to the form of the proceedings, which do not appear to have been made at the trial, are not open to an excepting party at the argument in this court.

Where a husband, whose wife is living apart from him without justifiable cause, removes from this Commonwealth to another state and acquires a domicile there,

115 438
147 180
115 438
154 208
115 438
157 45

without the purpose of obtaining a divorce, and afterwards obtains a decree of divorce in that state, according to the laws thereof, and after notice to her by leaving a summons at her abode in this Commonwealth and by publication in a newspaper in that state, the courts of that state have jurisdiction of the cause and of both the parties, and the decree of divorce is, by the Gen. Sts. c. 107, § 55, valid and effectual in this Commonwealth as to all persons; although the wife was never in that state, had no settlement there derived from her parents or ancestors, never appeared in the suit there, had no knowledge or information that he contemplated going to that state, or that he had left this Commonwealth, till after he had filed his libel for divorce, and was never provided by him with a home or support in that state, or requested or furnished with means by him to go to that state, and was without such means.

CONTRACT for board furnished from February 22, 1860, to February 7, 1866, to Harriet M. Shannon, alleged to be the wife of the defendant.

The answer denied all the allegations in the declaration, and set up that the defendant, in 1856, legally obtained, in the proper court of the State of Indiana, a divorce from Harriet M. Shannon, to whom he was married in 1835. Trial in the Superior Court, before *Dewey, J.*, who after a verdict for the defendant allowed a bill of exceptions in substance as follows :

There was no controversy in regard to the price charged for the board of Mrs. Shannon. The plaintiff introduced copies of the following records :

1st. A judgment recovered in this court in Suffolk, in 1854, by this plaintiff against this defendant for board of his wife from September 7, 1846, to May 31, 1850.

2d. The proceedings and judgment of this court in Middlesex at October term, 1852, upon a libel for divorce *a vinculo* filed by Oliver N. Shannon against Harriet N. Shannon, September 10, 1851, for desertion by the wife from September 7, 1846, to the time of filing the libel ; in which the rescript filed March 11, 1853, was : " Libel dismissed, the libellant having failed to support it by his proofs ; costs for the libellee, deducting therefrom the amount paid by her for depositions ; " and the judgment was for costs, \$121.10.

3d. The proceedings and judgment in this court in Middlesex, April term, 1855, upon a libel for divorce *a mensa*, filed by Oliver N. Shannon against Harriet M. Shannon, June 10, 1853, for desertion by the wife from October 24, 1850, to the time of filing the libel ; in which the libel was " dismissed without prejudice," June 11, 1855.

The plaintiff then called witnesses to prove, and offered to prove, that Mrs. Shannon left her husband in 1846, on account of many acts of extreme cruelty, and so oft repeated, as to fully justify her leaving him.

The defendant then offered in evidence a copy of the record of the proceedings and judgment in the Superior Court in Suffolk, September term 1858, in an action brought by this plaintiff against this defendant, for board of his wife, from June 1, 1850, to July 18, 1853, and of the same case in this court in Suffolk, October term, 1860; by which it appeared that in that case a general verdict was returned for the defendant, and judgment entered thereon, and that at the trial certain questions were submitted to the jury, which they answered as follows:

1. "Was the verdict and judgment rendered thereon, in the case *Burlen v. Shannon*, in the Supreme Judicial Court, November term, 1854, recovered on the ground that the defendant's wife was justified in living separate from her husband by cruelty, or was it on the ground of absence by reason of his consent?" Ans. "Absent by consent."

2. "Did the defendant, on his wife's return from Philadelphia in October, 1850, make a suitable provision for her in his own home, and in good faith, upon sufficient assurances, request her to return and accept of it?" Ans. "He did."

3. "Did Mrs. Shannon, without a justifiable cause, refuse to accept the provisions so offered to her?" Ans. "She did."

4. "Did Mrs. Shannon, during the period for which the board is claimed in the declaration in this suit, live separate from her husband, without his consent, and without any justifiable cause?" Ans. "She did."

At the trial of that case Mrs. Shannon could not legally testify, and did not. At this trial she was a witness, and it was proposed to prove by her, as well as by others, the alleged acts of cruelty; and the introduction of said copies was objected to. The presiding judge ruled that the special findings and judgment were conclusive; and that no evidence of acts of cruelty by the defendant to his wife, prior to July, 1853, could be admitted.

The defendant put in evidence an authenticated copy of the record of the Circuit Court, in the county of Vigo and State of Indiana, showing the following proceedings: The defendant, on

January 15, 1856, filed in the clerk's office of said court his petition for divorce from said Harriet M. Shannon, his wife. The petition was amended on the same day. As amended, the cause alleged for the divorce was desertion by the wife from December, 1849, to January 15, 1856. A summons was issued, directed to the Sheriff of Vigo County, requiring him to summon Mrs. Shannon to appear, to answer, on the first Monday in March, 1856. On the back of the same is the return of a deputy sheriff for Suffolk county, Massachusetts, dated "Suffolk, ss., February 6, 1856," that he left on that day, "a true copy" of the summons "at the last and usual place of abode of the within named Harriet M. Shannon, said Harriet M. Shannon being in the house, as I was informed, but admittance to her being denied me by her order;" and that on same day he "delivered to J. P. Healy, Esq., attorney for said Harriet M. Shannon, a like copy." On March 20, 1856, "it appearing to the court, from the affidavit of a disinterested witness, that the defendant is not a resident of Indiana," notice of the pendency of this suit was ordered by publication, that the defendant might appear before said court, on the first Monday in September then next. At said September term, after proof of said notice by publication, the defendant was defaulted, and the cause was heard by the judge, and the record states that the court finds that the facts and allegations in the plaintiff's petition are true, and that a divorce ought to be granted; and the court further finds from the evidence that said defendant has wilfully, and without cause, and without the plaintiff's consent, utterly deserted and abandoned the petitioner for five years consecutively, prior to the filing of said petition by the plaintiff, and now continues said desertion and abandonment; and a divorce was decreed from the bonds of matrimony.

The plaintiff also offered evidence that Harriet M. Shannon, early in October, 1853, went to the defendant's residence in Newton, and had an interview with him. As to the conversation which occurred between them, the evidence was conflicting. The plaintiff contended that Mrs. Shannon offered, in good faith, to return and live with the defendant, and that he refused; and the defendant contended that the wife did not offer in good faith to return, and was not refused.

It was proved that about ten days afterwards, on October 17, 1853, a letter was written by Mrs. Shannon and sent to the defendant; that he received the same on that day, but never replied to it in any manner. A copy of the letter is in the margin.* The defendant introduced a witness, who testified, in substance, that the plaintiff told him that Mrs. Shannon went to the defendant's house in October, 1853, and sent the letter to evade the law; that she did not intend to live with him, and would not.

After the defendant's evidence was closed, the plaintiff, by way of rebutting the testimony of this last witness, called Mrs. Shannon and inquired of her whether she went to her husband in October, 1853, with the sincere desire and purpose to return if her husband would receive her, and whether she made the offer to return in good faith, and whether she sent said letter in good faith. All this was objected to and excluded.

It was testified by the defendant that he started in June or July, 1855, and went into several western states, but did not stop in any of them; that in the fall of 1855, or first part of the winter, he went to Terre Haute, where the petition for divorce was drawn. It did not appear more definitely at what time he went. There was evidence, on the part of the defendant, that he removed to Indiana, on account of the ill-health of his daughter. It was proved that the defendant and his wife had not lived together since July 18, 1853.

It was testified, and there was no conflicting evidence, that Harriet M. Shannon was never in the State of Indiana; that during the years 1855 and 1856, and for years previously, she was living with her sister, the plaintiff, in Boston, about seven miles from the defendant's residence in Newton, and that the

* "Mr. O. N. Shannon: Dear Sir, You know I claim that I have never deserted you, as you allege in your libel for divorce against me; but that, on the contrary, I have suffered from your cruelty and desertion for a long time. Ten days since I called, as you remember, hoping to have an interview, which, I believed, would have led to a reconciliation, or an amicable arrangement of our difficulties, and also offering to return to you, both of which you distinctly refused. Now I wish to say that, upon reflection, I have concluded not to force myself upon you at present, contrary to your expressed and real wishes; but if, hereafter, you should sincerely desire to receive and treat me properly, I trust I shall be ready, as I always have been, to discharge my duty towards you."

defendant during said time knew well her said residence ; that he never notified her of his intention to go to Indiana, never requested her to go, nor in any way informed her that any provision had been or would be made for her in Indiana, or that any means had been or would be furnished to defray the expenses of a journey by her to that state ; that the defendant did not in fact provide any means to defray the expenses of said journey, nor make any provision for her support in Indiana, though he was abundantly able so to do ; that Mrs. Shannon was without means to defray the expenses of such a journey ; that the defendant had no reason to believe, and did not believe, she had such means, and that the first knowledge she had of his having gone to Indiana, was the copy of the summons left by the deputy sheriff as before stated ; and it was not pretended she had any settlement in Indiana derived from her parents or ancestors.

It was proved, and there was no conflicting evidence, that Mrs. Shannon did not appear, nor employ or authorize any one to appear, in the suit for divorce in Indiana, nor in any way submit to the jurisdiction of the court in that case.

The plaintiff requested the presiding judge to instruct the jury, among other things, as follows : " 1. That, if the jury should be satisfied, from the evidence in the case, that Mrs. Shannon was never in the State of Indiana ; that she had no knowledge or information that her husband contemplated going to that state, that she had no knowledge or information that he had gone from Newton, till after he had filed his libel for divorce in Vigo County, Indiana ; that she never had any settlement in that state derived from her parents or ancestors ; that he never made any provision for her support, or for any home for her in that state ; that he well knew at and prior to the times in 1855 and 1856, when he went to that state, that his wife was, and had for years, been living with the plaintiff in Boston, about seven miles from his own residence in Newton ; that he never notified her of his intention to go to Indiana, and never requested her to go, nor in any way informed her that any provision had been or would be made for her in Indiana ; that he did not provide or furnish any means to defray the expenses of a journey to that state, though he was well able so to do ; that his wife was utterly destitute of the means to defray the said expenses, and that he had no reason

to believe, and did not believe, that she had the means ; that she did not appear in said case of Oliver N. Shannon, libellant, in Indiana, nor authorize any one to appear for her, nor in any manner assume or authorize any person to assume the defence of that case ; the court in Indiana had no jurisdiction over Mrs. Shannon, and the decree of that court, dissolving the marriage relation of the defendant and his wife, would be invalid in this state.

“ 2. That the facts proved, and not in dispute, that the defendant left this state and went to Indiana after having failed to obtain a divorce in this state, and instituted proceedings there to obtain a divorce so soon after the termination of proceedings here, as testified to by the defendant and shown by the records of the two cases of the defendant against Mrs. Shannon, would warrant the fair inference that he went with the intent to apply for a divorce, or that such was one of his purposes ; and that if they should be satisfied that such was the fact, there being no dispute that the cause for which the Indiana divorce was granted arose here, that divorce would be of no force or effect in this state.

“ 3. That if the Indiana divorce, upon the legal principles to be stated to the jury, should be found to be of no effect in this state, then the fact of the defendant having obtained said divorce, and having relied upon it as valid during the time from its procurement hitherto, would justify Mrs. Shannon in living apart from him, and in not offering to return to him during the time the plaintiff claims, in this action, to have furnished board.”

The instructions requested were not given, except as modified below, and the presiding judge instructed the jury thus : “ That if the defendant had his domicile in the State of Indiana at the time of filing his petition in that state for a divorce, and it so continued until the time of the granting of the divorce, then the domicile of the wife would follow that of the husband, so as to give the court in Indiana jurisdiction of both parties ; unless the wife had prior to and at the time of the defendant's removal of his domicile from Massachusetts to Indiana, resided and lived apart from her husband in Massachusetts for a justifiable cause, and that a justifiable cause would be such wrongful conduct on the part of the husband as under the laws of Massachusetts would justify her living apart from him, as cruelty, or adultery, or his

neglecting to provide a home for her, or neglecting to make suitable provision for her support and maintenance.

"That if the court in Indiana had no jurisdiction of Mrs. Shannon, under the foregoing rule, the divorce is not valid.

"That if the court in Indiana which granted the divorce had jurisdiction of the cause, and of both parties, and the divorce was decreed according to the laws thereof, it is valid in this state, and a bar to the present action, unless the jury find that the defendant went to Indiana, when he was an inhabitant of this state, to obtain a divorce for a cause accruing here, and whilst the parties resided here. But if the jury find that the defendant went to Indiana, to obtain a divorce when he was an inhabitant of this state, for a cause accruing in Massachusetts, and whilst the parties resided here, the divorce would not be valid here, and no bar to this action. And that if the jury find that one of the causes for his going to Indiana, was to obtain a divorce under the circumstances just stated, the divorce so obtained would not be valid here, and no bar to this action.

"That if the said Vigo County Court had jurisdiction of the subject of divorce, it would have jurisdiction of the cause, notwithstanding the acts complained of as the foundation for the divorce were done in Massachusetts. That the facts proved and not in dispute that the defendant left this state and went to Indiana soon after he had failed to procure a divorce here and instituted proceedings there for a divorce would warrant the jury in finding that he went there for that purpose, but it would not require them to find that was his purpose, but they would determine that question upon all the evidence in the case."

The court gave instructions in reference to the third prayer of the plaintiff, which it is unnecessary to state, as by the finding of the jury upon the legal principles stated by the court, the validity in this state of the Indiana divorce is established.

The jury returned a verdict for the defendant; and answered two questions put to them by the court, as follows:

1. "Had Mrs. Shannon, at the time of the removal of Mr. Shannon to Indiana, justifiable cause for living apart from him?"
Ans. "No."

2. "Did Mr. Shannon go to Indiana to obtain a divorce for a cause accruing in Massachusetts, and while he and his wife resided here?" Ans. "No."

To all of the above rulings and refusals the plaintiff alleged exceptions.

J. S. Abbott, for the plaintiff.

E. D. Sohler, for the defendant.

GRAY, C. J. This case grows out of a protracted controversy, with which in various stages and aspects this court has long been familiar,* between Oliver N. Shannon and Harriet N. Shannon, who was once his wife, and who claimed to be such to the time of his death.

The object of the action now before us is to recover for board and lodging furnished to her from February 1860 to February 1866. It was brought against him in his lifetime, and is now defended by the administratrix of his estate.

In a similar action brought by this plaintiff against him for board furnished from June 1850 to July 1853, the jury at September term 1858 returned a general verdict for the defendant, and also found specially that Mrs. Shannon did, during the period for which board was claimed in that action, "live separate from her husband without his consent and without any justifiable cause;" and on that verdict judgment was rendered. At the trial of the present action, the plaintiff offered to prove that Mrs. Shannon left her husband in 1846, on account of acts of cruelty which justified her in leaving him. But this evidence was rightly rejected as inconsistent with the findings and judgment in the former action, which conclusively established between the parties to that action, who are the parties to this, that she had no justifiable cause for leaving him. *Burlen v. Shannon*, 14 Gray, 433, 437. *Same v. Same*, 99 Mass. 200, 205. The fact that Mrs. Shannon did not and could not by law testify at the former trial does not make the former judgment less conclusive.

The testimony introduced by the defendant of a declaration of the plaintiff as to the intention with which Mrs. Shannon did certain acts was competent only to affect the credibility of the plaintiff as a witness and the good faith of her claim, and does not appear to have been admitted for any other purpose. The offer

* *Shannon v. Shannon*, 2 Gray, 285, 4 Allen, 184, and 10 Allen, 249. *Burlen v. Shannon*, 3 Gray, 387, 14 Gray, 433, and 99 Mass. 200. *Shannon v. White*, 109 Mass. 146. *Shannon v. Shannon*, 111 Mass.

made by the plaintiff, by way of rebutting this testimony, to prove by Mrs. Shannon that her intention in doing the acts in question was different, was rightly rejected. Proof of what was Mrs. Shannon's intention had no tendency to disprove what the plaintiff had said.

The remaining and the principal question in the case is of the validity of the decree of divorce from the bond of matrimony, obtained by the husband in Indiana, in 1856, for the cause of five years' desertion by the wife.

It appears by the record of the case in which that decree was rendered, that notice was given to the wife by the leaving of a summons at her abode in this Commonwealth, and by publication in a newspaper in Indiana. The objections, made at the argument, to the sufficiency of the notice and the form of the proceedings, do not appear to have been made at the trial, and are therefore not now open to the plaintiff. Upon this bill of exceptions it must be assumed that the proceedings and decree were in accordance with the laws of Indiana.

The jury have found that Mr. Shannon did not go to Indiana to obtain a divorce for a cause arising in this Commonwealth while the parties resided here. The case is thus distinguished from those cited by the plaintiff, in which it appeared that the libellant had gone into another state to obtain a divorce for a cause which occurred here while the parties resided here, or which would not be a cause of divorce under our laws. *Hanover v. Turner*, 14 Mass. 227. *Lyon v. Lyon*, 2 Gray, 367. *Chase v. Chase*, 6 Gray, 157. *Smith v. Smith*, 13 Gray, 209. "In all other cases, a divorce in any other state or country, according to the laws thereof, by a court having jurisdiction of the cause and both the parties, shall be valid and effectual in this state." Gen. Sts. c. 107, § 55.

For the purpose of jurisdiction in cases of divorce, the general rule is that the domicile of the husband is the domicile of the wife also, or, as stated by Mr. Justice Wilde, "The wife could not acquire a domicile separate from her husband, and although they lived apart, she still followed his domicile." *Greene v. Greene*, 11 Pick. 410, 415. The only exception to this rule, which has been recognized by this court, is that an innocent wife may under some circumstances have a separate domicile for the purpose of sustain-

ing a libel against a guilty husband ; not that a wife, who has left her husband and is living apart from him without cause, has such a separate and exclusive domicile as will prevent him, if in good faith domiciled elsewhere, from obtaining a divorce from her in the place of his domicile.

In *Harteau v. Harteau*, 14 Pick. 181, the parties were married in this state, lived here several years, and then removed into the State of New York, and took up their residence there. The wife, on the ground of the husband's desertion and cruel neglect to support her in that state, returned to Massachusetts, and took up her abode here, and applied for a divorce here for the causes alleged to have occurred in New York, the husband continuing to have his domicile in New York. The court was of opinion that if the wife had always continued to reside in this Commonwealth, she might have maintained a libel here, even for a cause which occurred in another state, and after the husband had acquired a domicile there ; and dismissed the libel because, both parties having renounced their domicile here, the return of the wife to this state would not give the court jurisdiction over the husband under the statutes then in force.

The later statutes provide that a libellant who has resided in this state for five years, and did not remove into this state for the purpose of procuring a divorce, may obtain a divorce for any cause allowed by law, whether it occurred in this Commonwealth or elsewhere ; and that in no other case shall a divorce be decreed for any cause arising out of this state, unless the parties had previously lived together as husband and wife in this state, and one of them lived in this state when the cause occurred. Gen. Sts. c. 107, §§ 11, 12.

In *Shaw v. Shaw*, 98 Mass. 158, the husband and wife, having been married and resided together here, left this Commonwealth to take up their residence in Colorado. In Pennsylvania, on the journey, he treated her with extreme cruelty, and she left him and returned to this state, and continued to reside here. It was held, that she might maintain a libel here for a divorce for the cause occurring in Pennsylvania, although the husband before it occurred had left this state with the intention of never returning, and never did in fact return, and therefore no notice was or could be served upon him in this Commonwealth.

In *Hood v. Hood*, 11 Allen, 196, the parties together removed from this state to Illinois, and resided there some years. The wife then deserted the husband and returned to Massachusetts, and ever after resided here, and the husband entered into an agreement for her separate maintenance. He afterwards applied in Illinois for, and after notice to her by publication in that state obtained, a decree of divorce from the bond of matrimony for her desertion. This court held that as the husband's domicil was in Illinois, and his domicil was in law the domicil of the wife, the decree of divorce there obtained by him was valid and conclusive against her. And it has since been decided that that decree, being conclusive between the parties upon the subject whether the marriage between them was dissolved, was equally conclusive upon that subject in an action between any persons whatever. *Hood v. Hood*, 110 Mass. 463.

The case at bar is not distinguishable from that of *Hood v. Hood*. At the time of Mr. Shannon's removal to the State of Indiana, his wife was living apart from him, and, as the jury have found, without justifiable cause. Such being the fact, the new domicil acquired by him in that state was in law her domicil, and the courts of that state had jurisdiction of the cause and both the parties; and the divorce there obtained must, by the express terms of the Gen. Sts. c. 107, § 55, be held valid and effectual in this Commonwealth. *Exceptions overruled.*

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WILLIAM J. FLYNN vs. NORTH AMERICAN LIFE INSURANCE COMPANY.

Suffolk. March 12. — September 4, 1874. COLT & ENDICOTT, JJ., absent.

An action on a policy of life insurance under seal, whereby the insurer covenants with A., his heirs, executors, administrators and assigns, to pay the sum insured to B. on the death of A., cannot be maintained by B.

GRAY, C. J. This action is brought by William J. Flynn upon a policy of insurance on the life of Garrett Royle, his father-in-law. The application states, and the policy shows, that the insurance was obtained for the benefit of Flynn; and the applica-

tion was signed "Garrett Royle for William J. Flynn." The original premium was paid by Flynn for Royle, and a receipt therefor given by the insurance company to Flynn in his own name; the annual premiums were paid by Flynn; part only of the first premium, and none of the subsequent ones, were repaid to him by Royle. By the policy, the insurers promise and agree to pay the sum insured to Flynn and his representatives. But this promise and agreement is expressed to be made to and with Royle and his representatives; and the policy is under seal. Royle and not Flynn is the covenantee. It is well settled that upon an agreement under seal, none but a party to it can maintain an action at law. *Sanders v. Filley*, 12 Pick. 554. *Johnson v. Foster*, 12 Met. 167. *Millard v. Baldwin*, 3 Gray, 484. *Northampton v. Elwell*, 4 Gray, 81. Dicey on Parties, 101. Whatever therefore might have been Flynn's right of action if the agreement sued on had been a simple contract, there was no sufficient privity between him and the insurers to maintain an action in his name upon this policy; and it is unnecessary to consider the other grounds of defence. *Judgment for the defendant.*

A. A. Ranney, for the plaintiff.

R. D. Smith & M. M. Weston, for the defendant.

THOMAS GODDARD vs. HENRY P. BINNEY.

Suffolk. March 14. — September 4, 1874. COLT & ENDICOTT, JJ.,
absent.

An executory agreement for the manufacture and sale of a specific chattel, to be manufactured in accordance with the terms of the agreement, is not a contract of sale, within the statute of frauds, Gen. Sts. c. 105, § 5.

When the vendor has done everything he was to do under an executory agreement for the manufacture and sale of a specific chattel, which was to be manufactured in accordance with the terms of the agreement, and has given notice thereof to the purchaser, the general property in the chattel vests in the purchaser, and the chattel is at his risk.

A. agreed to build a buggy for B., and to deliver it at a time certain. B. gave directions as to the style and finish of the buggy, and it was built in compliance with his directions, and marked with his monogram. Before the buggy was finished B. called to see it, and in response to an inquiry of A., asking if he might sell the buggy, replied that he would keep it; when the buggy was finished, A. notified

B., and sent him a bill for it. B. retained the bill and promised "to see" A. "about it." The buggy was afterwards destroyed by the fire while in A.'s possession. *Held*, in a suit by A. for the price, that the agreement was not a contract of sale within the Gen. Sts. c. 105, § 5; and that the property in the buggy had passed to B., and he was liable.

CONTRACT to recover the price of a buggy built by the plaintiff for the defendant.

Trial in the Superior Court before *Dewey, J.*, who reported the case for the consideration of this court in substance as follows:

The plaintiff, a carriage manufacturer in Boston, testified that the defendant came to his place of business in April, 1872, and directed the plaintiff to make for him a buggy, and the plaintiff entered the order in his order-book; the defendant gave directions that the color of the lining should be drab, and the outside seat of cane, and as to the painting, and also that the buggy was to have on it his monogram and initials. The sum of \$675 was agreed as the price. It was to be done in or about four months. The plaintiff immediately began work upon the buggy and made every part, it being painted, lined, and with the initials, as ordered.

The last of August, when the buggy was nearly completed, wanting only the last coat of varnish, and the hanging of it on the wheels, the defendant came to the plaintiff's place of business and asked when it would be done. The plaintiff replied in about ten days, and asked the defendant if he might sell the buggy, or if he wished it, as he, the plaintiff, had opportunities of selling it to others. The defendant then inquired if the plaintiff could furnish him another if he sold that, to which he replied, he could not, as he was going to give up the business of manufacturing, and that unless he took this he could not have any. The defendant then said he would keep this one.

The defendant did not at this, nor at any other time, see the buggy. The buggy was finished September 15, in accordance with the original order. It is usual to keep carriages some time after they are finished to let the paint and varnish harden.

October 14, 1872, the plaintiff sent to the defendant the following bill: "Boston, October 14, 1872. Mr. H. P. Binney. Bo't of Thos. Goddard, one new cane seat buggy, \$675. Rec'd Pay't. (Buggy was finished Sept. 15.)"

The bill was presented by a clerk of the plaintiff. The defendant after looking at it, said he would see the plaintiff soon. The bill was in the plaintiff's handwriting and was kept by the defendant. The same clerk called again soon after and asked the defendant for a check, to which he replied that he would pay it soon, and would see the plaintiff. Calling a third time, before the fire of November 9th, the defendant said, "Tell Mr. Goddard I will come and see him right away." By the fire of November 9, 1872, this buggy and all the property on the plaintiff's premises were destroyed. After the fire the plaintiff again called on the defendant for payment. He wanted to know if it was insured, and said he would see the plaintiff about it.

After the buggy was finished, it was kept with the completed work on the plaintiff's premises; and it was at all times after it was finished till burned worth and could have been sold by the plaintiff for upwards of \$700, the value of buggies of the plaintiff's manufacture having advanced after the contract was made in April.

The defendant put in no evidence, and contended that this action could not be maintained, that it came within the provisions of the Gen. Sts. c. 105, § 5, and that there had never been any delivery of the said buggy to the defendant, nor any acceptance thereof by him, and that the property belonged to and was at the sole risk of the plaintiff at the time of the fire, and that if any cause of action arose against the defendant for not taking away the said buggy, it arose prior to the fire, and no damage was caused to the plaintiff thereupon. The plaintiff contended that the contract did not come within the provision of the statute referred to, and that it was the duty of the defendant, upon being notified that the buggy was completed, to take the same away within a reasonable time, and that not having done so the buggy was at the risk of the defendant when burned.

The plaintiff further contended that upon the evidence the jury would be authorized to find that there had been a delivery of the buggy to the defendant, and an acceptance by him, and without submitting that question to the jury it was agreed by the parties, that if there was any evidence which could have properly been submitted to the jury as showing a delivery, and an acceptance of the buggy by the defendant, then it shall be taken that the jury would have found said delivery and acceptance.

Upon the evidence hereinbefore stated, the presiding judge directed a verdict for the defendant ; and it was agreed that if the jury would have been authorized to find a delivery and an acceptance by the defendant, or if upon the facts above stated the court is of opinion that at the time of the fire the said buggy was on the premises of the plaintiff, at the risk of the defendant, the verdict is to be set aside, and judgment entered for \$675 and interest, from October 15, 1872 ; otherwise, judgment on the verdict.

C. A. Welch, for the plaintiff.

G. Putnam, Jr., for the defendant. The contract between the plaintiff and defendant was not one for labor and materials, but was a contract, the result of which, when carried out, would be the change of property in the chattel from the plaintiff to the defendant, and therefore was a contract of sale within the statute of frauds. Benjamin on Sales, 79 *f seq.* *Lee v. Griffin*, 1 B. & S. 272. *Atkinson v. Bell*, 8 B. & C. 277. *Moody v. Brown*, 34 Me. 107. In the cases of *Mixer v. Howarth*, 21 Pick. 205, and *Spencer v. Cone*, 1 Met. 283, it was held that the statute of frauds does not apply to contracts for the manufacture of articles not in the usual course of the vendor's business ; but this is on the ground that the statute does not apply to executory contracts, unless they relate to articles usually sold by the vendor. It has never been decided in Massachusetts that such contracts are for labor and material.

The case of *Mixer v. Howarth* rests on a supposed distinction which more recent criticism has shown not to be based on principle nor on a sound construction of the statute. Benjamin on Sales, 79. *Lee v. Griffin*, and *Moody v. Brown*, *supra*. It is noticeable that every case which has since arisen in the Commonwealth, except *Spencer v. Cone*, 1 Met. 283, which was decided the next year in a *per curiam* opinion, has been distinguished from it. *Gardner v. Joy*, 9 Met. 177. *Lamb v. Crafts*, 12 Met. 353. *Waterman v. Meigs*, 4 Cush. 497. *Clark v. Nichols*, 107 Mass. 547. If the decision of *Mixer v. Howarth* rests upon the distinction between articles which the plaintiff usually has for sale in the course of his business and articles which he manufactures expressly to order, then that decision is overruled in principle by the later case of *Lamb v. Crafts*, where the court says : " When a person stipulates for the future sale of

articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor." In *Mixer v. Howarth*, as in this case, the article was manufactured in the course of the plaintiff's business, and consequently the transaction was a contract of sale, within the meaning of *Lamb v. Crafts*.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the statute of frauds, or a contract for labor, services and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other states of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, (such as flour from wheat not yet ground, or nails to be-made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. *Crookshank v. Burrell*, 18 Johns. 58. *Sewall v. Fitch*, 8 Cow. 215. *Robertson v. Vaughn*, 5 Sandf. 1. *Downs v. Ross*, 23 Wend. 270. *Eichelberger v. M^cCauley*, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in *Lee v. Griffin*, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See *Maberley v. Sheppard*, 10 Bing. 99; *Howe v. Palmer*, 3 B. & Ald. 321; *Bal-dey v. Parker*, 2 B. & C. 37; *Atkinson v. Bell*, 8 B. & C. 277.

In this Commonwealth, a rule avoiding both of these extremes was established in *Mixer v. Howarth*, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special

order, and not for the general market, the case is not within the statute. *Spencer v. Cone*, 1 Met. 283. "The distinction," says Chief Justice Shaw, in *Lamb v. Crafts*, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In *Gardner v. Joy*, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are *Waterman v. Meigs*, 4 Cush. 497, and *Clark v. Nichols*, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject matter. It is proper to say also that the present case is a much stronger one than *Mixer v. Howarth*. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the statute of frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his

acceptance of possession. *Dixon v. Yates*, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the mean time. *Noy's Maxims*, 89. 2 Kent Com. (12th ed.) 492. *Bloxam v. Sanders*, 4 B. & C. 941. *Tarling v. Baxter*, 6 B. & C. 360. *Hinde v. Whitehouse*, 7 East, 571. *Macomber v. Parker*, 13 Pick. 175, 183. *Morse v. Sherman*, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the statute of frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and

Judgment entered for the plaintiff.

EDWARD B. NEWHALL & another vs. WILLIAM L. PIERCE.

Suffolk. March 12.—September 4, 1874. COLT & ENDICOTT, JJ.,
absent.

A. employed a broker to sell a house, but afterwards sold it himself to one to whom the broker had furnished information which induced him to make the purchase; and in settling with the broker did not tell him the name of the purchaser. *Held*, that the question whether the not mentioning the name of the purchaser was such a concealment of a material fact as to avoid the settlement was one of fact for the jury.

CONTRACT for commissions on the sale of a house. At the trial in the Superior Court, before *Devens*, J., the following facts appeared: The defendant employed the plaintiffs, who were real estate brokers, to sell a house in Melrose, belonging to him. Afterwards the defendant sold the house to one Andrews, who was a member of the firm of Wadleigh, Spurr & Co.; and immediately after the sale went to the plaintiffs and told them that he had sold the house to one of the firm of Wadleigh, Spurr & Co., and asked what their charge would be; they told him that as they had not sold it, they had no charge against him, unless they had advertised it, and as they had not advertised it they had no charge, but he might give them what he chose to; he gave them ten dollars, and they said that was satisfactory. The plaintiffs introduced evidence tending to show that they had furnished the information which induced Andrews to purchase the house.

The presiding judge instructed the jury "that if, at the time of the settlement, the defendant did not inform the plaintiffs that he had sold the place to Andrews, but did say that he had sold it to one of the firm of Wadleigh, Spurr & Co., of which firm Andrews was a member, and that upon that statement, without the name of Andrews being disclosed, the settlement was made, the plaintiffs would not be bound by the settlement, but might recover the balance." The defendant alleged exceptions to the foregoing instructions.

R. I. Burbank & R. Lund, for the defendant.

O. Stevens, for the plaintiffs.

DEVENS, J. There had been between the parties to this cause a conversation in which the plaintiffs, who had been employed by the defendant to sell a house for him, had stated that they had no claim for their services (the actual sale having been made by the defendant himself); and the plaintiffs had received from the defendant a small sum for their trouble. The instruction upon this part of the case was in substance that if at the time of this settlement, as it was called by the parties, the defendant did not inform the plaintiffs of the name of the person to whom he had sold his house, the plaintiffs would not be bound thereby. The instruction was erroneous in this, that it decided as a question of law that which was properly matter of fact for the jury. Assuming that the transaction between the parties had been a settlement, as both appear to have regarded it, under proper instructions, it was for the jury to say whether the failure of the defendant to inform the plaintiffs of the name of the party to whom he had sold the house, considering all the circumstances under which it occurred, was such a concealment of a material fact by the defendant, as would entitle the plaintiffs to avoid the settlement as one into which they had been entrapped by him.

Exceptions sustained.

JOHN E. MAYNARD *vs.* BOSTON AND MAINE RAILROAD.

Suffolk. March 5. — September 4, 1874. WELLS & ENDICOTT, JJ.,
absent.

If a horse, while trespassing upon the track of a railroad corporation, is killed by a locomotive engine, the corporation is not liable unless the injury was caused by the wanton and reckless misconduct of its agents; and it is not enough to show that they carelessly ran over the horse, and did not use reasonable care to avoid him.

TORT for the killing of a horse on the Newburyport Railroad by the defendants' locomotive engine. Trial in the Superior Court, before Putnam, J., who allowed a bill of exceptions in substance as follows:

proved or admitted at the trial that the railroad was
ned by a corporation chartered by the laws of Massa-

achusetts, called the Newburyport Railroad Company, and at the time of the accident the defendants were operating the railroad, under a lease. The horse in question was owned by the plaintiff, and was kept by him upon an island in the Merrimack River. It had crossed the stream to the adjoining land, owned by one Peabody, through whose land the railroad ran, and passed over this land, and came on to the railroad track, through the fence which was built along the line of the railroad. The question as to whether this fence was defective or not became immaterial, because the presiding judge ruled that the Gen. Sts. c. 63, § 43, could not be extended so as to include land owners whose lands did not adjoin the road, and that this horse not belonging to the owner of the adjoining land, but straying through his land upon the road, must be considered as trespassing upon the defendants' road. The plaintiff's counsel admitted this, but contended and offered evidence tending to show that by an exercise of proper care the injury to the horse might have been avoided. The defendants offered evidence to control this, and tending to show that they did all they reasonably could do to stop their train before striking the horse. There was no evidence of any wanton misconduct on their part.

The counsel for the defendants contended and asked the presiding judge to rule, that the defendants would not be liable, unless the plaintiff proved a reckless and wanton misconduct of their employees in the management of the train when the horse was killed. The presiding judge declined so to rule; but did rule that though the horse was trespassing upon the defendants' land at the time, the managers of the train could not carelessly run over him, but were bound to use reasonable care to avoid injuring him, and that if the jury found that by the exercise of reasonable care they might have avoided injuring the horse, they would be liable. The jury found for the plaintiff, and the defendants alleged exceptions.

C. P. Judd & C. F. Choate, for the defendants.

S. J. Thomas, for the plaintiff. The instructions given were in exact conformity to the language of Chapman, J., in delivering the opinion of the court in *Eames v. Salem & Lowell Railroad*, 98 Mass. 560: "But, though the sheep were there by trespass, this would not authorize the defendants to kill or maim

or otherwise injure them wilfully or carelessly. Even in driving off animals trespassing upon one's land, reasonable care must be used. And if they get upon the track, where they may expose passing trains, and the people upon the trains, to great danger, the managers of the trains are still bound to use reasonable care to avoid injuring the animals, and may not carelessly run upon them." Managers of trains must use such care as is reasonable in the circumstances in which they are placed. If in their conduct the element of care is wanting, then their conduct is misconduct. *Carter v. Towne*, 98 Mass. 567. *Corrigan v. Union Sugar Refinery*, Ib. 577. *Rogers v. Newburyport Railroad*, 1 Allen, 16. *Stout v. Sioux City Railroad*, 2 Dillon, 294; *S. C. nom. Railroad Co. v. Stout*, 17 Wall. 657.

GRAY, C. J. If the horse had been rightfully upon the defendants' land, it would have been their duty to exercise reasonable care to avoid injuring the horse. But it being admitted by the plaintiff that his horse was trespassing upon the railroad, they did not owe him that duty, and were not liable to him for anything short of a reckless and wanton misconduct of those employed in the management of their train. The defendants were therefore entitled to the instruction which they requested. *Tonawanda Railroad v. Munger*, 5 Denio, 255; *S. C.* 4 Comst. 349. *Vandegrift v. Rediker*, 2 Zab. 185. *Railroad Co. v. Skinner*, 19 Penn. St. 298. *Tower v. Providence & Worcester Railroad*, 2 R. I. 404. *Cincinnati, Hamilton & Dayton Railroad v. Waterson*, 4 Ohio St. 424. *Louisville & Frankfort Railroad v. Ballard*, 2 Met. (Ky.) 177.

The instruction given to the jury held the defendants to the same obligation to the plaintiff as if his horse had been rightfully on their land; and made their paramount duty to the public of running the train with proper speed and safety, and their use of the land set apart and fitted for the performance of that duty, subordinate to the care of private interests in property which was upon their track without right.

Some passages in the opinion in *Eames v. Salem & Lowell Railroad*, 98 Mass. 560, 563, were relied on by the plaintiff's counsel at the argument, and apparently formed the basis of the rulings of the learned judge in the court below. But in that case there was no evidence of any negligence or misconduct in the

management of the train, and an exact definition of the defendants' liability, by reason of such negligence or misconduct, was not required. In the present case such a definition was requested by the defendants in appropriate terms, and was refused, and for that refusal their *Exceptions must be sustained.*

115 461
158 60

EDWARD S. RAND & another vs. JOHN H. HUBBELL & others.

Suffolk. March 31. — September 4, 1874. AMES & DEVENS, JJ., absent.

Whether the distribution, by a corporation, of its earnings among its stockholders is an apportionment of stock, or a division of profits, depends upon the substance and intent of the action of the corporation, as shown by its votes.

A corporation voted to increase the number of shares of its capital stock, so as to allow each stockholder to increase the number of shares held by him by one half, and commanded the directors to do whatever was required by law for that purpose. A vote of the directors, passed on the same day, declared that a dividend in cash should be payable to each stockholder at the time within which he was allowed by the vote of the corporation to take his new shares, and should be applied by him in payment for those shares; and directed the treasurer to issue such shares to old stockholders only. Each stockholder received a check for the amount of his dividend, and immediately exchanged the check for a certificate of the shares apportioned to the stock held by him. The checks were then destroyed, and were not presented at the bank. *Held*, that the stock issued in compliance with the above votes constituted a stock dividend; and that in the case of shares of old stock held by a trustee, the new shares must be considered an addition to the capital of the trust fund.

When the directors of a corporation vote a cash dividend for the purpose of paying for new stock to be issued to its stockholders, the whole transaction constituting in fact a stock dividend, if the issue of the stock is void because of non-compliance with the provisions of the St. of 1870, c. 179, the cash dividend will fall also, and cannot be claimed by a person entitled to the income of certain shares of said stock.

BILL IN EQUITY by the administrators with the will annexed of Sarah Louise Hubbell, to obtain the instructions of the court as to whether certain shares of stock should be inventoried as part of the estate of said Sarah Louise, and whether said shares were income or capital. The case was reported by Ames, J., for the determination of the full court, in substance as follows:

Sarah Louise Hubbell died September 10, 1873. By her will, which was duly proved October 7, 1873, she disposed of her entire estate, real and personal.

Peter Hubbell, by his last will, which was proved February 14, 1871, gave to his wife, the said Sarah Louise, during her life, the use, income and improvement of all the rest and residue of the estate, real, personal and mixed, of which he should die seised or possessed or entitled to, remaining after payment of his debts and sundry legacies, with full power to sell and reinvest proceeds at her discretion; and on her decease, such rest and residue to his heirs at law of lineal descent; and appointed her executrix of his will. She was also required to pay an annuity of \$3000 to the son of the testator, and legacies of \$1000 each to nine nephews and nieces.

He died January 9, 1871, and was at the time of his death the owner of 1355 shares of the capital stock of the Bay State Brick Company, a corporation organized under the general laws of Massachusetts, the capital stock of which was, down to April 14, 1873, \$500,000, divided into 5000 shares of \$100 each. The certificates for said 1355 shares stood in the name of Peter Hubbell, until the transaction of May 23, hereinafter mentioned.

On April 14, said corporation at a legal meeting of its stockholders passed the following vote: "That it is expedient to increase the capital stock of the company to the amount of two hundred and fifty thousand dollars, so that the capital stock shall be seven hundred and fifty thousand dollars, instead of five hundred thousand dollars as now constituted, divided into shares of one hundred dollars each; and that each stockholder of record of this date be entitled to one share in the new stock so created for every two shares held in the old stock; that said capital be increased accordingly, and that the new stock be paid for and taken on or before the 15th day of May, A. D. 1873; and that the directors be authorized and directed to take the requisite steps to this end, and do whatever is required by law for this purpose; and that new certificates be issued according to law."

On April 14, the directors of said corporation passed the following votes: "That an extra and special dividend of fifty dollars a share be paid on or before May 15, 1873, to holders of the old

stock as it stood April 14, 1873, the dividend to be applied by the stockholders in payment for the new stock created." "That in issuing stock under the recent vote of the stockholders the treasurer be authorized to recognize assignments of fractional parts of new shares among the stockholders; but he is not to issue new stock to other than the old stockholders without further action of the directors."

On the same day, the treasurer of said corporation issued to each stockholder therein the following notice: "By a vote of the stockholders the company has increased its capital stock to the extent of \$250,000 more. Holders of shares of record April 14, 1873, are entitled to one share of the new stock for every two of the old, with a right to transfer fractional shares as between each other. An extra dividend has been ordered of fifty per cent. on the old stock, payable May 15, 1873, which is to be taken in payment of the new stock. Please call, take the stock and dividend, and pay for the same. Please bring your old certificate."

The treasurer of the corporation made out checks upon the Blackstone National Bank for the respective amounts of the dividends so ordered by the directors, and intrusted them to the clerk of the corporation, from whom each stockholder received the check for the amount of his dividend, and gave therefor a receipt upon the dividend book of the corporation in the form hereinafter set forth; and on receiving the check, he was told by the clerk to take it to the president of the corporation; and he accordingly took the check to the president in the adjoining room, and exchanged it for a certificate of the shares apportioned to the stock held by him, and gave a receipt for the shares. This was the course of proceeding adopted by the officers of the corporation, and this course was pursued by every stockholder, except perhaps in one or two cases, when the clerk was absent, the president transacted the business; and all the new stock was issued in this manner. After this use was made of the checks they were all destroyed. None of them were ever presented at the bank. In the case of fractional shares, parties concerned settled among themselves by payments in cash. The moneys of the corporation were from day to day deposited in the Blackstone National Bank, to the credit of Job A. Turner, treasurer, and drawn out and used in the transaction of the business of the corporation.

The checks were received by the respective stockholders on different days from May 14, to July 7, 1873, on which days there were on deposit in said Blackstone National Bank certain amounts to the credit of the treasurer; but these amounts were not specially provided or expected by the corporation to be drawn upon for the payment of said checks, nor were they sufficient therefor; but they were used by the corporation in the ordinary course of its business in the same manner as if no such checks had been given. Moneys were deposited by the corporation in said bank, and drawn out and expended from day to day in its business without regard to said checks. It was taken for granted that each stockholder would take his proportion of the new stock, and would use his dividend check to pay for it. All of the dividend checks were used in that manner; and the corporation was not prepared, and its officers did not expect, to pay them in any other manner. The bank account was not disturbed by any of these transactions, except so far as fractional shares were concerned, which were bought and sold. The corporation had no other bank account.

Warren Sanger was employed by Sarah Louise Hubbell, from the time of her appointment as executrix of the will of Peter Hubbell, to act for her as executrix, and in the management of her personal affairs. She left for Europe on November 9, 1872, and returned to the United States in August, 1873. Just before leaving, she gave to Sanger a power of attorney. Sanger received, on or about April 14, 1873, the notice to said executrix of that date, issued by the treasurer to the stockholders as before stated. He was present at the meeting of stockholders of April 14th, and knew of their vote. He did not see the vote of the directors, but gathered its purport only from the notice. On May 23, 1873, he received from the clerk of the corporation a check signed by the treasurer for \$67,700 on the Blackstone National Bank, and signed a receipt therefor in the name of Sarah Louise Hubbell, executrix, by him as her attorney, in the form following: "We, the subscribers, acknowledge to have received of the treasurer of the Bay State Brick Company a dividend of the sums severally set against our names, being extra and special dividend of \$50 per share, payable May 15, 1873. May 23. S. Louise Hubbell, Ex. Warren Sanger, Attorney."

On receiving this check, Sanger was told by the clerk to take it to the president of the corporation in the other room, and receive the certificate of the stock from him. He accordingly carried the check immediately to the president, and delivered it to him, and received certificates of 677 shares, for which he gave receipts. These certificates imported that the estate of Peter Hubbell was entitled to the shares.

Sanger was asked by the counsel for the heir of Peter Hubbell, "Did you understand that you could use the check for any other purpose than to pay for the stock?" This question was objected to; but the presiding judge ruled that it might be put; he thereupon answered that he understood that he could use the check only for that purpose; and to this ruling the counsel for the legatees of Mrs. Hubbell took exception.

Mrs. Hubbell arrived at New York, on her return from Europe, in August, 1873, very ill, not able to reach her home, and she died at a hotel in New York. Sanger saw her about three weeks before her death, and repeated to her orally what had been done, and that he had acted under the advice of her counsel in taking the new stock. Her mind was perfectly clear, but she did not express either assent or dissent. No papers were exhibited to her, nor did she know the form in which the certificates were taken. She was told that her counsel said it was a stock dividend.

On April 14, 1873, the surplus earnings and accumulations of the corporation were invested as shown by the statement of all its assets and liabilities then existing, contained in the report of the treasurer, amounting to \$259,450.62.

No property was sold or converted into money to raise funds for the payment of said dividend or said checks, nor was any money ever specially provided or designed by the corporation for the payment thereof; nor did the corporation, in fact, have cash on hand at any time sufficient for the payment thereof, or of any considerable part thereof; nor were any moneys applied or used for the payment of any of said checks or dividends.

Yearly reports were made to the stockholders by the treasurer, showing the entire property of the corporation taken at cost or estimated as aforesaid, and all its liabilities made up in like manner, and showing a balance called "surplus," as follows:

| | |
|----------------------------------|--------------|
| 1870, April 1, surplus | \$108,211.50 |
| 1871, April 1, " | 122,123.02 |
| 1872, April 1, " | 182,886.91 |
| 1873, April 1, " | 259,450.62 |

The brick-yards, including land, buildings, machinery and the mill at Cambridge and Medford, owned by the corporation, were taken in some of these reports at their cost, \$535,317.53; but the president of the corporation testified that in his opinion it would be somewhere between \$750,000 and \$1,000,000 to replace as much property as the corporation owned in Cambridge and Medford, and that the land on Columbus Avenue and Stanhope Street in Boston, taken at its cost, \$56,949.60, was worth \$150,000 or possibly \$200,000.

Cash dividends were declared by the corporation semi-annually from four to five dollars per share from 1871 to 1873.

On January 7, 1868, the directors passed the following vote: "Resolved, that a stock dividend be declared of 25 per cent. on the capital stock of the company, certificates of the same to be issued by the treasurer on or before April 1, 1868." And the stockholders at their meeting February 5, 1868, voted, "That the capital stock be increased so that the same shall be in amount \$500,000, divided into shares of the par value of \$100 each; that the new shares be issued to the stockholders of January 1, 1868, in the rates of one new share for every four old shares; and that the extra dividend declared at the directors' meeting held January 7, 1868, called stock dividend, be received, and applied in payment for the new shares to be issued, the holders of stock having the rights to sell and transfer their claims for the new stock for fractional parts of shares."

The new stock was issued in pursuance of these votes. As to the market value of the shares, it appeared that there were never many transactions in it in the market. The stock was confined to a limited number of owners at first, and was for the most part kept by them among themselves. Before April 14, 1873, there had been sales at from par to ten per cent. premium, and after that date there had been a few sales at par, and one at 95 per cent. When the new stock was created, the directors expected to pay half-yearly dividends at the same rate as

John H. Hubbell, one of the respondents, contends that said shares are capital and belong to the estate of Peter Hubbell, and that he is under the will of Peter Hubbell entitled to the same ; and the other respondents, who were the residuary legatees and devisees under the will of Sarah Louise Hubbell, contend that the dividend of 50 per cent. belonged to said Sarah Louise ; that it was the duty of the directors to sell the said 677 shares, as they remained untaken on May 16, and that the proceeds, to the extent of their par value, would belong to the corporation, and any premium to the capital of the trust fund ; that if the issue of the new certificates cannot now be set aside, the new shares should be treated as taken and paid for at par by the said Sarah Louise out of her own property, and that said shares should be sold now under the order of this court, and their proceeds, to the extent of their par value, should go to the estate of said Sarah Louise, and any premium to the heir of Peter Hubbell, her estate making good any loss of premium incurred by lapse of time since May, 1873 ; or that such order be taken as shall substantially secure to the estate of said Sarah Louise the value of the cash dividend, and to the heir of Peter Hubbell the value of the right to take the new shares under the vote of the stockholders.

The case is reserved for the consideration of the full court ; such disposition thereof to be made, or such order to be entered therein as shall be proper ; and the court may make such inference from the facts stated as a jury would be justified in doing.

E. S. Rand, for the plaintiffs.

H. W. Paine & R. H. Dana, Jr., for the legatees under the will of Mrs. Hubbell. 1. It is often expedient for a corporation to create new stock, either to raise money, or for the purpose of making the nominal capital represent more nearly the actual capital, when the latter has greatly increased. In doing this for the latter purpose, it was formerly lawful for a corporation to issue the new shares gratuitously to the stockholders. That was a stock dividend. The St. of 1870, c. 179, prohibits stock dividends. Since this act corporations can increase their stock only in accordance with the rules there laid down. This statute recognizes and defines the right of the stockholder to be the right to take his proportion of new shares at par. The value of that right it measures by the premium the new shares will bring at auction. The St. of

1871, c. 392, § 4, authorizes a corporation to disregard this pre-emption of the stockholder at its discretion, and to sell the new stock by auction in the first instance. The result of these statutes, so far as concerns the rights and duties of the corporation, is that when new stock is created, no matter for what purpose, the corporation must sell it for not less than par. It may or may not, at its discretion, offer the stockholder the preëmption at par. If it does not, or if the preëmption is refused, it must sell at auction, and, in the latter case, pay the premium to the stockholder. So far as concerns the rights of the stockholder, they are limited to the preëmption of his proportion at par, even that being at the discretion of the corporation; and the value of his preëmption, if he has it allowed him, is the premium.

The action of the corporation of April 13, 1874, was intended to be in conformity with this law. The stockholders voted an increase of stock; settled the proportion to be one share of new for two of old; recognized the right of the stockholders to take the new shares in that proportion; fixed the time within which the stockholder must exercise his option of thirty days, the shortest time allowed by the statute; and required the directors to take all necessary steps "required by law," and to issue the new certificates "according to law." This vote was simply a creation of new stock. It recognized the rule that the new stock must be "paid for" by the old stockholder. The vote was not only consistent with but strictly in pursuance of the St. of 1870. Under that vote and the St. of 1870, unless the stockholder took his new shares within thirty days, and "paid for" them, he lost his right to them, and they were required to be sold at auction. There can be no doubt that, under this vote, a tenant for life, who is also trustee for the remainderman, would be under no obligation to furnish the money to pay for the new shares, and that his duty would be done if he required or allowed the new shares to be sold by the directors under the St. of 1870, and carried the premium to the capital of the trust fund. Under this vote of the stockholders, and the St. of 1870, a tenant for life had no interest in taking the new stock at par, and the right of the remainderman is conclusively settled to be the privilege of taking his proportion of stock at par; and the value of this preëmption is the premium obtained by a public auction. *Atkins v. Albree*, 12

Allen, 359. *Gray v. Portland Bank*, 3 Mass. 364. St. 1870, c. 179.

2. If the directors counteracted this vote, their action was void. But they did nothing necessarily inconsistent with that vote and the St. of 1870. They passed two distinct votes. The first related to a cash dividend, as to which the stockholders had taken no action. The second related to the issue of new stock "under the recent vote of the stockholders." It recognized the possibility that some stockholders might not take their shares, though at a premium, as in the case of trustees having no funds, and that such shares would have to be issued "to other than the old stockholders." They gave the notice to the old stockholders required by the St. of 1870. As all the new shares were in fact taken by the old stockholders, they were not called upon to sell them by public auction under the St. of 1870. If any had not been so taken, the occasion would have arisen for the "further action of the directors" referred to in their vote; as, for instance, providing for the auction, the form of certificates, the distribution of the proceeds (the par value to the corporation and the premium to the old stockholders), perhaps the recital that the shares were not taken within the time limited, and anything else rendered proper under the new system introduced by the statute. It is true the directors did not, in practice, adhere to the letter of the statute requiring them to treat the shares not taken within the thirty days as abandoned. They probably considered it a right of the corporation which might be waived. Very likely the stockholders who took their certificates after May 15 may have given notice of their intention to take them before that date. Or, the directors may well have thought that their omission to insert the time in the notice may have entitled the stockholders to take their shares within a reasonable time.

3. The vote declaring the dividend of fifty per cent. is an act of the directors only, distinct from and independent of the act of the stockholders creating the new stock. It is in form a declaration of a cash dividend. "That an extra and special dividend of fifty dollars a share be paid on or before," &c. The directors did in fact give, for this dividend, to each stockholder, a check upon their bank, payable absolutely, and took from each stockholder a receipt as for a cash dividend. No order was given to the bank

not to pay these checks, and no notice given to the stockholder that they would not be paid. If any stockholder had taken his check to the bank, it would have been paid, certainly to the extent of the funds in the bank. If he took his new stock, he had a right to pay for it in cash. It was immaterial to the corporation whether he gave the check for the new stock, or paid cash and drew the check. It was also immaterial to the corporation whether he paid for his new shares before he received his dividend or after. It is true, the vote of the directors declaring the cash dividend says: "The dividend to be applied by the stockholders in payment for the new stock created." This clause of the vote is immaterial in determining the rights of third parties, unless it has the effect of resolving the entire transaction of April 14, of the stockholders and directors alike, into the creation of a stock dividend, to wit, the gratuitous distribution of the new stock among the old stockholders, in violation of the St. of 1870. Even if the directors intended to evade the statute, the court will construe the entire act as being not in violation of the statute, if possible, in a question between third parties. This clause in the vote may mean simply that the check given would be received as payment for the stock, if the stockholder exercised his preëmption. To give it the effect of turning the entire transaction into a stock dividend, in violation of the statute, it must be construed as depriving the stockholder of his option. It is not enough to construe it as establishing an order of business in the taking of the new stock, even to the extent of saying that the new stock would not be issued for anything else than the identical check given in to be cancelled; for, perhaps, it was competent for the directors to establish such a rule of business for those who took the new shares. To sustain the case of the remainderman, it is necessary to construe it as an order that no stockholder should exercise his option, but must receive his shares in exchange for his dividend or be deprived of both, and to hold that such action was competent as against a stockholder. Such a construction is not necessary, and, unless it be the only possible construction, will not be adopted. The corporation has never acted on that construction, there having been no case of a stockholder refusing to take his shares. It would be a most unreasonable construction in its operation, as it would give to the stockholder who took his shares their full value.

par and premium alike, and deprive the stockholder who declined to take his shares of the shares and the dividend both. If the clause necessarily has that extreme construction suggested for the remainderman it may be treated as a void act, as inconsistent with the statute and the vote of the stockholders; and the entire transaction of April 14 may be treated as the creation of new stock under the statute of 1870, and the simultaneous declaration of a cash dividend sufficient to enable the stockholder to pay for his new shares if he chose to take them, notwithstanding that clause in the vote of the directors.

4. It is contended for the remainderman that the fact that the company made no extraordinary deposit in the bank sufficient to meet extraordinary drafts for the cash dividend shows that the dividend was formal only and that the whole transaction was intended to be a stock dividend. But that fact does not prove even such an intention. The directors properly assumed that the stockholders, or most of them, would take their new shares, as they were very valuable, more so than a public sale would indicate, for their value was better known to the stockholders than to the public. Also, the directors probably held a large part of the stock themselves. It was in few hands, and they knew, or could probably easily learn, how far the new shares would be taken. If any large amount of new shares was refused, they could easily make good the checks by new deposits on any day or hour, and the sale of shares so refused would make good the amount of the checks paid. And they established an order of business which, whether obligatory on those who took the new shares or not, would doubtless be followed in most, if not all cases, and save the necessity of keeping an extraordinary deposit for thirty days or more.

5. The condition of the corporation made it judicious for it to do two things: first, to declare a large extra dividend based on surplus earnings and values; second, to create a large amount of new stock, so that the nominal capital might represent more nearly the actual capital. It was not necessary that the amount of the cash dividend should be determined by the par value of the stock; but it was convenient both to the treasurer and the stockholders to make them equal, as the check given for the one, or its proceeds, might be paid for the other. It was not necessary to the carrying out of the vote for a cash dividend that the corporation

should have that amount of cash on hand, or of cash and floating capital immediately convertible into cash. In addition to the "plant," and everything used in the work of the company, the convertible capital would have paid the dividend, if necessary; but, for the reasons previously stated, it was not necessary to actually convert any capital into cash. Not only would most stockholders take the new stock, but if any large number refused it, the proceeds of its sale in the market would have balanced the checks of those who refused. Indeed, even if the corporation had acted under the St. of 1871, and sold the whole of the new stock in the market, in the first instance, its proceeds would have paid the cash dividend of fifty per cent. without disturbing any of the floating capital.

6. There is nothing in this case which makes pertinent the cases of *Minot v. Paine*, 99 Mass. 101; *Daland v. Williams*, 101 Mass. 571; or *Leland v. Hayden*, 102 Mass. 542. In *Minot v. Paine*, there was no pretence of a cash dividend. It was in form and in fact a stock dividend, and such dividends were then lawful. In *Daland v. Williams*, the court held that while there was some form of a cash dividend kept up, it was in fact a stock dividend, and that the forms were only a color to evade the statutes of Maine, which prohibited stock dividends. But stock dividends were then lawful in Massachusetts, and the court was not obliged to construe the acts of the corporation as within the law of another state, or to declare them void. The facts upon which the court went were different from the facts in this case. In that case the treasurer was not to pay the forty per cent. dividend at all. He was to give certificates of new stock for it. The whole transaction was in fact the giving of certificates for new stock and calling their par value a cash dividend. In the case at bar, the stockholders ordered the new stock "to be paid for" by the stockholders who took it, and made no reference to a cash dividend. The directors voted a cash dividend to "be paid," and gave the stockholders checks for it, absolute on their face, which the stockholders could have used. In that case the stock brought a premium of sixty-three per cent., which rendered the option practically nothing. There was no cash or floating capital, on which the pretended dividend was based. All the surplus had been invested in the "plant" of the corporation, and was practically inconvertible. In the case at

bar, the cash dividend is based on floating capital and convertible property. *Leland v. Hayden* was decided when stock dividends were lawful. Moreover, the facts which induced the court to treat the second dividend of twenty per cent. as a stock dividend, do not exist in this case. It was provided in that case by the vote that if a shareholder refused to take his new shares, they should be sold on his account, and that he should receive the proceeds of the sale instead of his dividend of twenty per cent., while the proceeds would be much larger than the dividend, as the new stock brought a high premium. This provision was conclusive. It treated the new shares as his, whether he accepted them or refused them. In the present case there was no such vote. The rights of parties were in terms left to the operation of the laws, and if a stockholder refused to take his new shares, they would be sold for the benefit of the corporation, which is conclusive that the shares were not his; in other words, that it was not a stock dividend. The second twenty per cent. dividend was not based on any floating capital as was the first dividend. The corporation had not the double purpose as to its second twenty per cent. dividend which the corporation in this case had, viz.: to make an actual dividend based on surplus earnings, not irrevocably invested in the "plant" of the corporation, and at the same time to increase the stock so that the nominal capital might more accurately represent the actual capital.

7. In case of doubt between the tenant for life and remainderman, there is no policy in this country which should induce a court to favor the latter. In the case of a trust established by will, evidently for the purpose of providing a support for a widow for life, the inclination of the court should be, in doubtful cases, to treat dividends as income. *Reed v. Head*, 6 Allen, 174. *Harvard College v. Amory*, 9 Pick. 446. *Balch v. Hallett*, 10 Gray, 402. *Simpson v. Moore*, 30 Barb. 637. *Lord v. Brooks*, 52 N. H. 72. *Bradlee v. Appleton*, 16 Gray, 575. *Harris v. Knapp*, 21 Pick. 412. In this case there is the further consideration that the testator required his widow to pay out of the income an annuity of \$3000 to John H. Hubbell, and legacies of \$1000 each to nine nephews and nieces, and that it was evidently his intention to give to his widow the fullest powers to use and deal with the estate, subject only to the obligation to preserve the capital undiminished in value for transmission to the final legatee.

S. Bartlett & B. F. Brooks, for the remainderman.

GRAY, C. J. Money earned by a corporation is corporate property, and not the separate property of the stockholders, unless and until distributed among them by the corporation. In the absence of any restraining statute, the corporation may treat it and deal with it, either as an increase of its property or as profits of its business. So long as the corporation holds it as part of the corporate property, it is capital of the corporation, and the interest therein, represented by each share, is capital and not income of that share, as between the tenant for life and remainderman, legal or equitable, thereof. When a distribution of such earnings is made by the corporation among its shareholders, the question whether such distribution is an apportionment of additional stock, or a division of profits, depends upon the substance and intent of the action of the corporation, as shown by its votes. It would be impracticable for the courts, in determining the comparative rights of different persons in a particular share of stock, to go behind the votes of the corporation and its directors, and investigate the accounts and affairs of the corporation, in order to ascertain how the corporation acquired the funds out of which the dividend was declared. *Minot v. Paine*, 99 Mass. 101.

The English judges, though varying in opinion upon the effect of particular votes declaring extraordinary dividends, have all agreed that the determination of each case must turn upon the legal construction of the vote of the corporation. In the earliest cases on the subject, Lord Loughborough and Lord Eldon, each sitting as chancellor, as well as the House of Lords acting upon their joint advice, declined to enter upon an inquiry to ascertain when each part of the profits had arisen, or, in the words of Lord Loughborough, "hunt it back." *Brander v. Brander*, 4 Ves. 800, 801. *Irving v. Houstoun*, 4 Paton's House of Lords Cases, 521, 531. *Paris v. Paris*, 10 Ves. 185, 190. *Barclay v. Wainewright*, 14 Ves. 66, 78. In *Price v. Anderson*, 15 Sim. 473, 477, Vice Chancellor Shadwell said: "The question must be determined by the mode in which the company have dealt with their profits." And in one of the latest cases, Vice Chancellor Wood (since Lord Chancellor Hatherley) expressed the same rule more fully, as follows: "As long as the company have the profit of the half year in their hands, it is for

them to say what they will do with it, subject, of course, to the rules and regulations of the company." "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare." "Where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time." *In re Barton's Trust*, L. R. 5 Eq. 238, 243-245.

By the law of this Commonwealth, as declared by this court, a dividend made in new stock is ordinarily to be deemed capital. Thus when the vote of the corporation is to distribute to each stockholder a certain number of additional shares in the corporation in proportion to the amount of shares already held by him, the shares so distributed are received by the stockholder as capital and not as income, although the means of making the dividend are derived from the net earnings of the corporation. *Minot v. Paine*, 99 Mass. 101. And when a corporation votes to increase its capital stock and to allow the holders of the old shares to subscribe for the new ones *pro rata*, and that any new shares not so taken shall be sold by the directors and the premiums realized by the sale paid over to the parties entitled to the right of subscribing for the shares, the sum received by the directors upon such a sale is capital to the stockholder. *Atkins v. Albree*, 12 Allen, 359.

Even when, at the time of the creation of new shares to be distributed among the old stockholders, a dividend is declared in cash to the same amount, the thing received by each stockholder, whether in stock or in cash, is to be deemed capital and not income, if such appears upon a view of the whole action of the corporation to be the real character of the transaction. Thus, if a corporation votes to create new shares, and at the same time declares a dividend payable in cash to the stockholders, and authorizes its treasurer to receive this dividend in payment for such shares, and to issue certificates of stock in return, the dividend is, as between the owners of successive interests in the shares, capital, and not income, although the corporation is not allowed, by the law of the state in which it is established, to make stock dividends. *Daland v. Williams*, 101 Mass. 571. So where a corporation voted to create new shares, to be issued and disposed of as the directors should deem proper; and the directors

voted to offer to each stockholder the right to take at par twenty per cent. of a new share for each old share held by him, and that if any one should not avail himself of his right, it should be at the disposal of the directors; and the directors on the same day declared a dividend of twenty per cent. in cash derivable from the shares which the stockholders should respectively pay for the new shares taken by them under the preceding vote; it was adjudged that a trustee holding stock in the corporation, whether he received the amount of his dividend in stock, or suffered the stock to which he was entitled to be sold by the directors and received the dividend in cash, took it, in either alternative, as capital and not as income. *Leland v. Hayden*, 102 Mass. 542.

On the other hand, dividends which appear to have been intended by the corporation as dividends of profits, and not as a distribution of capital stock, are to be deemed income of the shares on which they are paid. Thus dividends made in cash by a manufacturing corporation, though made out of money received from the sale of patent rights and a large amount of castings, are income and not capital. *Harvard College v. Amory*, 9 Pick. 446. So cash dividends made by a land company, whose business is to sell lands, out of sales of land which is the corporate property, have been held, in the absence of any controlling facts, to be income and not capital of a trust fund created by the will of a stockholder. *Balch v. Hallet*, 10 Gray, 402. *Reed v. Head*, 6 Allen, 174. And where a dividend, declared to be made out of the earnings of the corporation, is not made in the form of cash, but in old shares of the corporation itself, in which it has invested the amount, it is income of the shares previously held by the stockholders. *Leland v. Hayden*, 102 Mass. 542.

In the case at bar, the material facts, by the application to which of the rules already stated the decision must be governed, are as follows: On April 14, 1873, the corporation voted that its capital stock be increased by one half, that each stockholder of that date be entitled to one new share for every two old shares, that the new stock be taken and paid for on or before May 15, and that the directors should do whatever was required by law for this purpose. On the day on which this vote was passed, the directors voted "that an extra and special dividend of fifty dollars a share be paid on or before May 15, 1873, to holders of the old stock as it stood

April 14, 1873, the dividend to be applied by the stockholders in payment for the new stock created ;” and that the treasurer should not issue the new stock to other than the old stockholders without further action of the directors. On the same day, the treasurer issued a notice to each stockholder, stating that the corporation had increased its capital stock ; that each stockholder was entitled to one share of the new stock for every two of the old ; and that an extra dividend had been ordered of fifty per cent. on the old stock, which was to be taken in payment of the new stock ; and ending thus : “ Please call, take the stock and dividend, and pay for the same.” Every stockholder received from the officers of the corporation a check for the amount of his dividend, signed a receipt therefor, and immediately exchanged the check for a certificate of the shares apportioned to the stock held by him. After this use had been made of the checks, they were all destroyed and none of them ever presented at the bank. Mrs. Hubbell, who held shares as the executrix of her husband’s will, and was entitled by that will to the income thereof during her life, being absent in Europe, the acts in her behalf were done by her attorney, communicated by him to her upon her return, and silently acquiesced in by her.

Upon these facts, it is clear that the intention of the corporation and of its directors and officers was to make a stock dividend, and a stock dividend only. The vote of the corporation was to increase the whole number of shares, and to allow each stockholder to increase the number of shares held by him, by one half; and commanded the directors to do whatever was required by law for this purpose. The vote of the directors, passed on the same day, declared that a dividend in cash should be payable to each stockholder at the time within which he was allowed by the vote of the corporation to take his new shares, and should be applied by him in payment for those shares ; and directed the treasurer to issue such shares to old stockholders only. The notice issued by the treasurer to the stockholders, and the subsequent dealings between each stockholder and the officers of the corporation, proceeded upon the same theory, and are inconsistent with any other. No money was ever paid, or intended to be paid, by the corporation to any stockholder. The declaring of the dividend in cash, and the giving of checks therefor, were mere forms

adopted to carry out the scheme of creating new stock and distributing it among the stockholders.

The St. of 1870, c. 179, appears to us to have no bearing upon this case, except as affording an explanation of the circuitous course followed by the corporation to attain its end. If the issue of new shares was void, because of non-compliance with the provisions of the statute, the vote to pay a dividend in cash to each stockholder for the sole purpose of being applied to take up such shares would fall with it; for it could not be held that a separate dividend of profits was made, against the manifest intent and purpose of the whole transaction.

It follows that neither the proportion nor the nature of each stockholder's interest in the corporate property is affected by the question of the validity or invalidity of the new issue; and that in either alternative the new shares are not to be deemed income of the old shares left by Mr. Hubbell at his death, and as such belonging under his will to his widow. The case falls within the decision in *Daland v. Williams*, 101 Mass. 571, already cited.

Decree accordingly.



GEORGE H. GIFFORD *vs.* JOHN H. THOMPSON & others.

Bristol. April 1. — September 4, 1874. COLT & AMES, JJ., absent.

A trust fund was invested in the stock of a corporation, which having sold its franchises and property, and being about to wind up its affairs and dissolve, voted to pay a dividend in cash to its shareholders upon the surrender of their certificates. Its assets at the time of said distribution consisted in part of undivided earnings. *Held*, that the entire amount received by the trustee was capital and not income.

BILL IN EQUITY by George H. Gifford, trustee under the will of Pardon Gifford, against the residuary legatees under said will, to obtain the direction of the court as to the disposition to be made of a sum of money received from the New Bedford and Taunton Railroad Company, in lieu of certain shares of the stock of said corporation, in which part of the trust fund had been invested.

The case was reserved by *Morton, J.*, for the consideration of the full court upon the bill and answers, from which it appeared to be as follows :

The last will and testament of Pardon Gifford contained the following clause: " Eighth. All the rest and residue of my estate is to be placed in the hands of a trustee or trustees, and the income arising therefrom to be paid to my two grandsons, viz.: John H. Thompson and Pardon G. Thompson, equally between them, annually, during their natural lives, and if one of them should die before the other, the survivor to take all of said income during his natural life, provided the one that dies first leaves no children, and at the death of the last one of my said grandsons, namely, John H. Thompson and Pardon G. Thompson, the aforesaid rest and residue of my said estate to be equally divided among my great-grandchildren that are living at the time of the death of the last of my said two grandsons. If there should be none of my great-grandchildren at that time, then it is to be equally divided between the widows of my said grandsons, if any living, and the children of my brothers, namely, Isaac Gifford, George W. Gifford, Paul Gifford, and also Ruth Weeden and Abby Robinson, children of my brother Benjamin Gifford, and the children of my wife's sister Barbara Gifford, and their heirs."

A part of the " rest and residue of said estate " was invested in the stock of the New Bedford and Taunton Railroad Corporation. That corporation acting under the authority conferred upon it by the St. of 1873, c. 20,* sold all its franchises and property, and being about to wind up its affairs and dissolve, its directors passed the following vote: " Voted, that a dividend of \$150 per share is hereby declared, payable to stockholders of this day on the surrender of the certificates, when the treasurer shall have received \$750,000 on account of the sale of the road, including therein the drafts of our stockholders on our treasurer for and on account of dividend at the rate of or not exceeding \$150 per share, with the surrender and assignment of certificate of stock of this corporation for the requisite number of shares."

* This is entitled " An act to incorporate the New Bedford Railroad Company, and to authorize the consolidation of railroads between New Bedford and Fitchburg, and for other purposes." It authorizes the New Bedford and Taunton Railroad Corporation to sell its franchises and property to the New Bedford Railroad Company.

In pursuance of this vote the corporation paid, in cash, a dividend of one hundred and fifty dollars on each share. For many years the corporation had earned more money than it had divided amongst its stockholders, and a part of the above dividend came from such undivided earnings; and it was averred that as much as \$50 dollars per share out of said dividend of \$150 came from such undivided earnings since the probate of the will.

The tenants for life in said trusts contended that they were entitled to the entire amount received from the dividend as income; and the great-grandchildren of the testator, of whom there were seven, claimed that the dividend should be considered as capital, and reinvested for the purposes of the trust fund.

C. T. Bonney, for the contingent interests.

T. M. Stetson, for the tenants for life.

GRAY, C. J. The earnings of the corporation remained, while undivided, part of the capital of the corporation, and the interest therein, represented by each certificate of a share of stock, was part of the capital and not of the income of that share, as between those entitled to successive rights in it. *Minot v. Paine*, 99 Mass. 101. *Rand v. Hubbell*, ante, 461. The vote of the corporation, in substance and intent, as manifested upon its face, was not a division of earnings, profits or income, as such, among the owners of shares which were to continue to exist; but a winding up of all the affairs of the corporation, and an apportionment and distribution of all its property as capital, though in the shape of money, among the stockholders, in exchange for their shares and upon the surrender of their certificates. The money paid to the plaintiff as trustee was but an equivalent and substitute for the shares surrendered at the time of receiving it, and is to be held and invested by him upon the same trusts upon which those shares had been held, and the income only paid to the grandsons of the testator according to his will. *Decree accordingly.*

COMMONWEALTH vs. JAMES A. COE.

Suffolk. June 15. — September 5, 1874. COLT & ENDICOTT, JJ.,
absent.

An indictment for cheating by false pretences charged that the defendant obtained money as a loan from a person by falsely pretending that a forged certificate of stock was a good, valid and genuine certificate of stock, and set forth the certificate at length. Held, that the fact that the certificate was made out in the name of the lender was no reason for quashing the indictment.

An indictment for cheating by false pretences, setting forth a certificate of stock as the false token with which the fraud was committed, need not set forth in what manner the certificate could be used to deceive.

In an indictment for cheating by false pretences, the description of the property obtained as a "check and order for the payment of money" is sufficient, and the check need not be set forth at length.

An allegation, in an indictment for cheating by false pretences, that the defendant "obtained money as a loan with the intent to cheat and defraud," is sufficient.

A false representation, that a certificate of stock is good, valid and genuine, is not a representation as to the ability of the person making it to repay money obtained thereby, within the Gen. Sts. c. 161, § 54, requiring that the representation should be in writing.

An allegation in an indictment for cheating by false pretences, that a certificate of stock, which was the false token used, "was of the tenor following," is to be referred to the time when the false pretence was made; and it need not set forth indorsements on the back of the certificate.

In an indictment for cheating by false pretences, it is not necessary to set forth the fact, that the defendant gave his promissory note for the money at the time when it was obtained by the false pretences; and evidence at the trial that such a note was given, does not constitute a variance.

An allegation, in an indictment for cheating by false pretences, that a certificate of stock "was not a good, valid and genuine writing and certificate of stock, but was false, forged and counterfeit, and of no value," is not a descriptive allegation, and proof that a certificate purporting to be for one hundred shares of stock, is in fact a certificate issued for one share and subsequently altered, does not constitute a variance.

On the trial of an indictment for cheating by falsely pretending that a forged certificate of stock was genuine, evidence of the possession and use by the defendant of other forged certificates of stock about the same time, whether before or after wards, is admissible on the question of guilty knowledge.

The fact that a forged certificate of stock was offered and received as security for a loan of money, is evidence upon which it is competent for a jury to find that the lender was thereby induced to part with his money; although the lender in reply to the question, if he did not rather trust the defendant than any security, testifies that he "had every confidence in him."

At the trial of an indictment for obtaining money by false pretences, the presiding judge in charging the jury suggested the inquiry whether the person defrauded.

would have lent the money if he had known that the security offered, a certificate of stock, was forged and worthless; and then instructed them that, if he would not, and was in fact induced to make the loan by the delivery of the certificate, and his belief in its genuineness, and the jury find the other facts constituting the offence, it would be sufficient; and added: "And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality." The defendant excepted to "this part of the instructions relating to the obtaining of money or property upon a loan, by means of false pretences." *Held*, that this exception could not be sustained.

It is no defence to an indictment alleging the obtaining of money by false pretences, that the person so obtaining the money intended to repay it, and evidence of ability to make the repayment is immaterial.

Where the property obtained by false pretences is a check for \$7000, evidence that the check, which was given as for a loan of money, was drawn on a bank, that the drawer at the time made deposits in two banks and was in the habit of drawing on one of them, is sufficient to warrant the jury in finding that the check was of value.

Before a writing can be used as a standard of comparison of handwriting it must be proved that the specimen offered as a standard is the genuine handwriting of the party sought to be charged, and this question of its admissibility is to be determined by the judge presiding at the trial. So far as his decision is of a question of fact merely, it is final, if there is proper evidence to support it; and exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency.

INDICTMENT for cheating by false pretences. Trial in the Superior Court before *Aldrich, J.*, who allowed a bill of exceptions in substance as follows:

The indictment contained two counts. On the first, which alleged an intent to cheat and defraud one Frank Shaw, the jury found that the defendant was not guilty. The second count, on which the defendant was found guilty, alleged that the defendant at Boston, on January 4, 1873, "being a person of an evil disposition and devising and intending by unlawful ways and means to obtain and get into his hands and possession the goods, merchandise, chattels and effects of the honest and good citizens of this Commonwealth, and with intent to cheat and defraud one John Ferris, and with the view and intent to effect the loan hereinafter mentioned, did then and there unlawfully, knowingly and designedly falsely pretend and represent to said John Ferris, that a certain paper writing and certificate which he said Coe then and there had and produced to said Ferris, and which was of tenor following, to wit:

"No. 59. Eastern Railroad Company. 100 shares.

"Be it known that John Ferris of Boston is a proprietor of one hundred shares in the capital stock of the Eastern Railroad Company, subject to all assessments thereon, and to the provisions of the charter and the by-laws of the corporation, the same being transferable by an assignment thereof in the books of the corporation, or by a conveyance in writing recorded in said books; and when a transfer shall be made or recorded in the books of the corporation and this certificate surrendered, a new certificate or certificates will be issued.

"Dated at Boston this third day of January, A. D. 1873.

[Seal.]

"Thornton K. Lothrop, *President*.

"John B. Parker, *Treasurer*."

was then and there a good, valid and genuine certificate of ownership of stock in said company, lawfully and duly issued and signed by said Lothrop and Parker, and was then and there of the value of ten thousand dollars. And the said Ferris then and there believing the said false pretences and representations, so made as aforesaid by the said Coe; and being deceived thereby was induced, by reason of the false pretences and representations so made as aforesaid, to loan and deliver, and did then and there loan and deliver to the said Coe, upon the security and pledge of the said certificate, then and there by said Coe delivered to said Ferris as such security for said loan, the sum of seven thousand dollars, one check and order for the payment of money of the value of seven thousand dollars, one piece of paper of the value of seven thousand dollars, of the proper moneys, goods, merchandise, chattels and effects of said Ferris. And the said Coe did then and there receive and obtain the said moneys, goods, merchandise, chattels and effects of the said Ferris as such loan, by means of the false pretences and representations aforesaid, and with intent to cheat and defraud the said Ferris of the same moneys, goods and merchandise, chattels and effects. Whereas in truth and in fact, said writing and certificate was not then and there a good, valid and genuine writing and certificate of ownership of stock in said company, duly and lawfully issued and signed by said Lothrop and Parker, but was then and there a false, forged and counterfeit writing and certificate, and was not then

and there of the value of ten thousand dollars, but was then and there of no value, all of which he said Coe then and there well knew. And so the jurors aforesaid upon their oaths aforesaid do say that the said Coe, by means of the false pretences aforesaid, on the said fourth day of January in the year of our Lord eighteen hundred and seventy-three, at Boston aforesaid, unlawfully, knowingly and designedly did receive and obtain from said Ferris the said moneys, goods, merchandise, chattels and effects, of the proper moneys, goods, merchandise, chattels and effects of the said Ferris, with intent to defraud him of the same, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided."

Before the jury were sworn the defendant filed a motion to quash the indictment, as follows :

"And, as to the second count, the defendant says there is therein no offence or crime formally and distinctly set forth, in this :

"1. That it does not appear thereof that the said Coe had or pretended, or claimed to have any, interest or property in said certificate set forth therein, or the property therein described, or could make any transfer thereof or give any title thereto, but the contrary thereof appears in said indictment.

"2. Because, by said indictment, said certificate is described as the property of and certificate of said Ferris, and therefore said Ferris could not be deceived or defrauded by the delivery thereof to him.

"3. Because said check or paper writing alleged to have been delivered by said Ferris to said Coe is not set forth as described.

"4. Because the indictment does not set forth what is the tenor of the certificate alleged to have been delivered by the defendant."

The defendant, in addition to the above motion to quash, before the jury were sworn to try the issues arising upon said indictment, moved that said indictment be quashed, "because it is not sufficient, and does not set out an offence or crime committed by him, in this :

"1. That it does not appear by said indictment that the defendant had any right, title or interest in, or pretended or claimed

to have any right, title or interest in, or any property whatever in the certificate of stock described in said indictment; nor that there was any way whereby the defendant could enable John Ferris, mentioned in said indictment, to obtain any property in or advantage from said certificate, other than he already at that time possessed; and thus he, said Ferris, could not be deceived thereby, nor have delivered anything of value upon the security thereof.

" 2. Because it appears by said indictment that said certificate was the property of said John Ferris, and that the said Ferris could not be defrauded by the delivery thereof to himself, nor by any representations regarding it.

" 3. Because it is not set forth in said indictment how, or in what manner, said Ferris could be deceived by the offer of said certificate, or any representations regarding the same.

" 4. Because said certificate by its terms, as appears in said indictment, was transferable only by conveyance in writing recorded in the books of the corporation by the said John Ferris, purporting to be the owner thereof, and the surrender of said certificate and the issue of a new certificate, or certificates; and thus it appears that the said Coe had no property in said certificate, and that the said Ferris could receive no benefit therefrom.

" 5. Because the check and piece of paper alleged to have been delivered to said Coe by said Ferris are neither of them set forth nor described.

" 6. Because in said indictment it is set forth that the said Coe obtained from said Ferris a loan only of the property therein mentioned, it not being alleged that the said Ferris was deprived of his property therein, and it is not alleged how he could be, or was, defrauded of his property therein.

" 7. Because the allegations of said indictment charge representations made relating to the means and ability of the defendant to repay, at some future day, a loan then obtained; and it is not alleged in said indictment that the representations made by the defendant were made in writing.

" 8. Also, because said indictment alleges that the described certificate was of a certain tenor, without setting forth what is its tenor."

The court overruled both motions, and the defendant excepted. At the trial, the attorney for the Commonwealth offered in evidence, as the certificate described in the second count, a certificate, similar to that set forth in this count, with blank transfers indorsed thereon. The defendant contended that said indorsements should have been set out in the indictment, and asked the court to rule that there was a fatal variance between the allegation and the proof offered. The court declined so to rule, and the defendant excepted.

It appeared in evidence that at the time of the delivery to Ferris by the defendant of the last named certificate, the defendant also delivered to said Ferris his, the defendant's, promissory note for the amount of said loan, payable three months from its date. The defendant asked the court to rule that the giving of the note and the note itself should have been set out in the indictment; and not being so set out, that there was in this respect a fatal variance between the allegations and proof. The court declined to make such ruling, and the defendant excepted.

It was proved that the certificate of stock delivered to Ferris was, when originally issued, a valid certificate for one share of stock in the Eastern Railroad Company, and that it had been subsequently altered, without the authority of the company, so as to read "one hundred shares" instead of "one share." The defendant contended that the certificate, having been originally duly issued as a certificate for one share, still remained a good and valid certificate for one share, and was of value, notwithstanding the alterations subsequently made without the authority of the company; and asked the court to rule that in this respect there was a fatal variance between the allegations and proof. The court declined so to rule, and the defendant excepted.

During the trial the attorney for the government, for the purpose of proving guilty knowledge on the part of the defendant, offered to show that he had at other times than those mentioned in the indictment uttered other forged certificates of stock, some of them being certificates of stock in a corporation other than the one named in second count of the indictment. The defendant objected to this evidence. But the court ruled, that for the purpose stated above, evidence was competent to show that the defendant had uttered other forged certificates of stock, similar to

the one set forth in the second count, at or about the time he delivered the one named in this count to Ferris.

Several certificates of stock, shown by the evidence to have been altered and forged, numbered 117, 274, 389, and 9,316, were then introduced by the government, together with evidence as to the times when, and the persons to whom, these forged certificates were uttered and delivered by the defendant. To the admission of these certificates and evidence the defendant excepted. At the time of the trial indictments were pending against the defendant for forging or uttering said certificates.

It was proved that the certificate No. 59, set forth in the second count of the indictment, was delivered by the defendant to Ferris, January 4, 1873; that No. 5,558, set forth in the first count, was delivered to Shaw, April 23, 1873; that No. 117 was delivered to one Cary, in February or March, 1873; that No. 274 was delivered to the Third National Bank of Boston, January 31, 1873; that No. 9,316 was delivered to one Deshon, about the same time; that No. 389 was delivered to Deshon, March 4, 1873. It was also shown that all these certificates were delivered by the defendant, to the several persons named, as collateral securities for loans made to him by said persons. It was further shown in evidence that certificate No. 5,558 was originally issued in the name of George Warner, for two shares, under date of April 16, 1873, and that the words "George Warner is" had been altered to "Warren & Co.," and the word "two" altered to "one hundred," and the figures in the date had been changed to "23"; that certificate No. 59 was originally issued in the name of "John Ferrer," for one share, under date of August 7, 1872; that the word "Ferrer" had been altered to "Ferris"; the word "hundred" had been written after the word "one," and the date changed to January 3, 1873. That all these changes in these certificates had been made after the certificates had been issued by the respective companies, and without their authority or permission or knowledge, and before they were uttered by the defendant. Certificate No. 117 was shown to have been issued in the name of W. Y. Coe, for one share, December 27, 1872, that the words "one share" had been changed to "eighty shares," and the name N. C. Cary substituted for that of W. Y. Coe. Certificate No. 274 was originally issued in the name of James

A. Coe, for two shares, under date of January 31, 1873, that the "two shares" had been changed to "two hundred shares," and "Third National Bank" substituted for "James A. Coe." Certificate No. 389 was originally issued to James A. Coe, for "one share," under date of February 25, 1873, and subsequently the "one share" had been changed to "fifty shares," the name "James Deshon" substituted for that of "James A. Coe," and the date changed to March 4, 1873. It was shown that all these alterations in the several certificates were made after the certificates had been issued by the several companies, and without their knowledge or authority, and before they were uttered by the defendant.

John Ferris was the only witness called to prove the representations and pretences made to him by the defendant at the time Ferris made the loan to him. He testified in substance as follows: I live in Boston; know the defendant; lent him money about January 4, 1873, and took a note for it. This is the note. I took it from the defendant. He gave me collateral. This certificate, No. 59, is I think the certificate he gave me. I didn't look at the number. I received it at the time I took the note. I gave him a check. I do not know where it is now. I have looked for it and cannot find it. It was for seven thousand dollars. At that time I kept an account at the Eliot Bank, and one at the City Bank; and the bank on which I was then in the habit of drawing was, I think, the Eliot Bank. I put the certificate away among my papers in my safe. I did not alter the certificate. It appears now to be in the same condition it was in when I received it. On cross-examination the witness testified that he had been in the habit for some time of lending considerable sums of money to the defendant; that on the occasion when the note above mentioned was given he went to the defendant and asked him to take some money of him. The cross-examination of this witness then proceeded as follows:

Ques. Did you make any inquiry into the security? Ans. I did not.

Ques. Did you not rather trust him, knowing him, than any security? Ans. I had every confidence in him.

Ques. And you went to him, and asked him if he would take some money from you, and he said he would? Ans. I think I gave him the check in his own office.

Ques. And then did he give you the note at the time you gave him the check ? **Ans.** Yes, sir.

Ques. Was there anything said by you or by him as to the security, except that he handed you out a paper after you had made the bargain ? **Ans.** Nothing, sir.

Ques. Then the transaction, if I understand it, is substantially this : You had some money to put at interest ; you went to Coe and asked him to borrow the money ; he gave you a note and this security, and you took them and put them away ? **Ans.** Yes, sir.

Ques. Now I want to put you the question : Did you believe then, or do you believe now, that Mr. Coe got this money from you with the intent to defraud you ? **Ans.** I do not.

The defendant's note to Ferris for the \$7000 loan was dated January 3, 1873, payable three months from date. The defendant offered evidence to show that he paid all his liabilities as they fell due down to the date of his arrest, May 14, 1873 ; that at all times after the giving of said note to Ferris down to the time of his arrest, and always before, he had met his engagements with promptness ; that he had the means to pay all his debts as they became due in the ordinary course of business ; that he paid one of \$80,000 on May 13, the day before his arrest, and that he had then \$40,000 left on deposit, and that at the time of his arrest he had a large amount of property, and was engaged in a prosperous business. This evidence was objected to by the attorney for the government, and ruled out by the court, to which ruling the defendant excepted. The defendant did not in any part of his offer of evidence offer to prove, that at the time he obtained the loan from Ferris he was solvent, and had property in his own right, sufficient to pay all his debts.

The loan from Ferris to the defendant, as appears by the testimony, was made by the delivery of the lender's check to the defendant for the sum of \$7,000, being the same sum for which the defendant at the same time gave his note to Ferris. The defendant asked the court to rule that this was not evidence of the delivery of anything of value to the defendant. The court declined so to rule, but submitted it as evidence to the jury.

The defendant objected to the admission in evidence of the certificate described in the first count of the indictment, as issued to Warren & Co. ; but it was admitted and the defendant excepted.

The government proposed to use the promissory note delivered by the defendant to Ferris as furnishing a standard of comparison to show that the alterations in the two certificates set forth in the indictment were in the handwriting of the defendant, as bearing upon the question of his guilty knowledge of said alterations. The defendant objected to such use of the note ; but the court ruled that the note having been delivered by the defendant as his own, its genuineness was sufficiently proved to authorize its use as such standard of comparison, the defendant having neither offered, nor proposed to offer, any evidence in denial of the claim of the government that the writing in the note was the handwriting of the defendant.

At the close of the evidence, the counsel for the defendant requested the court to direct a verdict of acquittal on the second count, contending that the evidence was not sufficient, in any view of it, to authorize the jury to find the defendant guilty. The court declined to comply with this request, but submitted the case to the jury upon the evidence with the following instructions, (first reading to them Gen. Sts. c. 161, § 54, upon which the indictment is founded.) Full instructions, not now objected to, were given in relation to the first count, and then the attention of the jury was called to the second count, and they were instructed that, to authorize a conviction on this count, they must be satisfied beyond all reasonable doubt :

“*First.* That the defendant, as alleged in this count, did unlawfully, knowingly and designedly falsely pretend and represent to said Ferris that the certificate therein described was a good, valid and genuine certificate of stock, and was of value as set forth in the count.

“*Second.* That said certificate was not a good, valid and genuine certificate of stock, but was a false, forged and counterfeit one, and was of no value.

“*Third.* That said Coe knew at the time he delivered the said certificate to Ferris that said pretences were false, and that said certificate was not valid and genuine, and of value, but that it was a false, forged and counterfeit certificate, and was of no value.

“*Fourth.* That said Ferris believed said false pretences, and was deceived thereby, and was induced by reason of the same to

loan and deliver, and did loan and deliver, his order or check to said Coe upon the security and pledge of said certificate as set forth in said second count.

"*Fifth.* That the defendant designedly made said false pretences, and obtained said loan and property of said Ferris as set forth in said count, with intent to cheat and defraud said Ferris. That if the jury, upon all the evidence, had any reasonable doubt of the affirmative proof of any one or all of these propositions it would be their duty to acquit the defendant."

The jury were further instructed, that a false pretence within the meaning of the statute which had been read to them might be defined to be a representation of some fact or circumstance calculated to mislead which is not true; that it must relate to some past or existing facts; that to give the false pretence a criminal character, the party making it must know it to be false, and must make it with an intent to cheat and defraud; that such false pretence may be made orally, or it may be made in writing.

That the false pretence set out in this second count being that the certificate therein described was, at the time of said delivery, a good, valid and genuine certificate of ownership of stock, &c., and of the value of seven thousand dollars, if the defendant, knowing that certificate to be a false and forged one, and of no value, delivered it to Ferris as a valid and genuine certificate and of value, for the purpose of obtaining from Ferris a loan of money, and Ferris received it believing it to be valid and genuine, and of value, that would constitute a false pretence, even though the defendant at the time of the delivery made no oral representations respecting the character of the certificate. The court stated to the jury that if upon all the evidence they should find the certificate was a false, forged and counterfeit one, it would be a matter of some consequence, as bearing upon the question of the guilty knowledge of the defendant, to determine whether the alleged alterations in the certificate were in the handwriting of the defendant or not, and upon this question as to whether the defendant made these alterations, the court said to the jury that the district attorney had called their attention to the signature of the note, and had asked them to say whether the handwriting in these alterations, if they are such, did not correspond with the signature in the note, and that the use of the note was objected

to by the defendant. One of the counsel for the defendant, terposing at this point of the charge, said, "The objection made was not that. The mere passing of the note, while it be evidence of signature, would not be evidence that the balance of the note was in the handwriting of the defendant, as of the note was printed; the objection was to comparing word 'January.'"

The presiding judge resumed and proceeded to say to the jury that in determining the question as to whether the defendant or did not know that this was an altered and forged certificate it was of importance for them to ascertain, if they could find the evidence, whether or not he made the alterations himself, to this end comparison had been instituted between the handwriting in this note, and the altered parts of this certificate.

"The rule of law upon this subject is, that before any writing can be used as a standard of comparison, it must be shown by clear and undoubted testimony, that the specimen offered as a standard is the genuine handwriting of the party sought to be charged. If he recognizes it himself as his handwriting, the same may be used. And I instruct you in this case that, for the purpose of comparison, the signature of this note may be used; as the district attorney called your attention to the claimed similarity between the handwriting in the word 'January' in the date of the note and the altered parts of this certificate, that the signature may be used by you as a standard of comparison as well as the signature of the note, for it is admitted that the defendant delivered this note to Ferris as his, the defendant's, own promise note."

The word "January" in the date of the note was written, not printed. These instructions, respecting the use of the signature as a standard of comparison, were excepted to by the defendant.

In regard to the other forged certificates of stock offered to the government, and claimed upon the evidence to have been in the possession of the defendant, and passed by him to other parties as collateral securities for loans obtained by him, the court instructed the jury that these were not admitted for evidence, could they be used as evidence to show that the defendant committed other offences, or that he had obtained money by the pretences of other persons, in order to lead to the inference

he would be more likely to commit the offence charged against him in this indictment; but that the evidence was admitted solely upon the ground that it might tend to show that the defendant had guilty knowledge of the fraudulent character or forgery of the certificates named in the second count of the indictment; and that before the jury would be authorized to make even this use of these certificates, they must be satisfied by the evidence in relation to them that they are false and forged certificates, and that the defendant passed them knowing them to be such.

In further instructing the jury as to the only use they would be authorized to make of these other certificates, and the evidence relating to them, the presiding judge read to them the language of Chief Justice Bigelow, in delivering the opinion of the court in the case of *Commonwealth v. Shepard*, 1 Allen, 575, 581, upon the use to be made of this species of evidence, and the care and caution to be observed in its application; and that if, upon all the evidence, the jury find that the defendant knew this to be an altered and forged certificate when he delivered it to Ferris, they might next inquire with what intent he delivered the certificate to Ferris. For, before they could convict the defendant, they must further find, upon the evidence, that he delivered the certificate to Ferris with intent to cheat and defraud him by means of said false pretences, fraudulently to obtain the loan from said Ferris as set forth in the indictment. In this part of the charge, the jury were instructed that to obtain, by false pretences, the money or property of another upon a loan, is an offence against the statutes, as well as to obtain, by such pretences, the money or property of another with no intention or promise to repay it at any time; in other words, a false representation, designedly and knowingly made as to the security offered for a loan of money, is an offence within the statute punishing the obtaining of property by false pretences. But that the situations of the parties, and the proved facts existing at the time of the transaction, should all be considered by the jury, with all the other evidence in the case, in determining the question as to the fraudulent intent of the party to be charged. The presiding judge then proceeded as follows: "The offence set forth in this indictment consists in obtaining, by false pretences, with intent to defraud, and not by contract, the property of another. And the criminality of the act is to be

determined by the proved facts and situation of the parties at time of the transaction. What the party defendant intended to do afterward cannot purge the act of its criminality, if it was a criminal act at the time of its commission.

"Suppose, in the present case, that Ferris had known at the time the certificate was delivered to him by the defendant, that it was a forged and worthless piece of paper, would he have loaned his money or delivered his check as he did? If he would not, and was in fact induced to make the loan by the delivery of the certificate and his belief in its genuineness and value, and the jury further find, upon the evidence, that the certificate was false and forged, and that the defendant knew it to be so at the time of its delivery by him to Ferris, and he delivered it with the fraudulent intent to obtain a loan of money from Ferris thereby, and by that means did obtain the loan, that would constitute the offence set forth in the second count of the indictment. And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality, or give to it the character of an innocent transaction."

This part of the instructions, relating to the obtaining of money or property upon a loan, by means of false pretences, was accepted to by the defendant.

The jury were further instructed, if they should find that the certificate was an altered and forged one, that the defendant knew it to be such at the time he delivered it to Ferris, and that he delivered it to him as a genuine one, and with intent to defraud Ferris; they must also find upon the evidence, before they would be authorized to convict the defendant, that Ferris was deceived by such false representation as to the character of the certificate, and was induced thereby to make the loan to the defendant, and he did make it, as set forth in the indictment; and that the defendant did, by such false pretence, obtain the check and order from said Ferris, as charged in the indictment. Because, although a false pretence may have been made, and made with intent to defraud Ferris, and although the defendant obtained the property of Ferris, yet, if the false pretence was not the inducing cause leading Ferris to make the loan and part with his property, the defendant cannot be convicted. But is not necessary to sh-

that the false pretence was the sole inducing cause that operated upon the mind of Ferris to lead him to part with his property; the fact that Ferris had formerly loaned money to the defendant which he repaid, that he had confidence in the defendant, that the defendant gave his promissory note at the time of this loan for the amount of the loan, might have had more or less influence upon the mind of Ferris to induce him to make the loan; still, if he would not have made the loan but for the delivery of the certificate by the defendant, and his, Ferris's, belief in its genuineness and validity,—if this had a decisive influence in the matter, and determined Ferris to make the loan, that will make out this part of the charge against the defendant, although, as before stated, there may have been other contributing causes operating to induce Ferris to make the loan and part with his property.

In conclusion, the jury were instructed that before they would be authorized to convict the defendant, they must find upon the evidence, 1st, That the defendant intended to defraud Ferris. 2d. That Ferris was actually defrauded. 3d. That the defendant made or used a false pretence or pretences, as set forth in the indictment, for the purpose of perpetrating the fraud. 4th. That the fraud was actually accomplished by means of the false pretence made use of for that purpose; that is, that the false pretence was the cause which induced Ferris to part with his property, as charged in the second count, and that if the jury had any reasonable doubt as to the proof of any one of these propositions, it would be their duty to acquit the defendant.

B. Dean, for the defendant. 1. The defendant was entitled to have the indictment quashed for the several reasons stated in his motions therefor. Other statements are required than the merely setting forth a copy of the certificate of stock belonging to Ferris, to describe the crime attempted to be charged. *Commonwealth v. Ray*, 3 Gray, 441, 448. *Commonwealth v. Hinds*, 101 Mass. 209. The indictment does not show how Coe could pledge stock belonging to Ferris, nor how property already belonging to Ferris could secure a loan from Ferris, nor that Coe had any right, title or interest in the stock or certificate, or any control over the property described therein. If the certificates were in the name of Coe, it might have been a pretence of property in him, and lead to the belief that he owned the property,

and had authority to pledge it, and give the pledgee a right transfer of the stock ; but standing in other names, other allegations than any contained in the indictment are requisite to set forth an offence. The check and piece of paper ought to be set forth and described in the indictment, otherwise it cannot be proved that anything of value was delivered. The court cannot say that the check was of any legality or value. It is not alleged that the check was paid.

The indictment should be quashed because it alleges that the defendant obtained a loan only of property, or property as and for a loan, that Ferris was deprived of his property, nor how he could be deprived of it. The indictment should have been quashed because the representations related entirely to the ability of the defendant, if it could be ascertained by the indictment that the defendant had claimed to own any property in the stock, and there is no allegation that the representations were in writing. Gen. Sts. c. 161, § 54. The indictment sets forth the tenor of the certificate as it was at a past time, and not the tenor as it is. This is at variance with the forms and practice, and is bad pleading. It does not fix the date when the certificate was of the tenor described. The gist of the note and the note itself ought to be set out as well as the certificate ; they were one transaction, and the note was given for the loan as well as the certificate, and the allegation that the loan was obtained on the faith of the certificate, when it was certified as much upon the note, is erroneous and a variance. The indictment does not correctly describe the offence, and this misdescription is a variance. The indorsement upon the back of the certificate should be set forth ; the indictment undertaking to set forth according to its tenor. The indictment describes the certificate as a certificate of no stock and of no value, whereas it was a certificate of stock and of some value ; it is good for one share, and of one hundred dollars' value. This is a fatal variance. *Commonwealth v. Stone*, 4 Met. 43. *Commonwealth v. Ray*, 3 Gray, 441, 449. The offences are therefore not identical, because the conviction on the indictment could not be successfully pleaded to an indictment describing the offence actually proved, the evidence necessary to one not supporting the other. 2 East P. C. 519. *Commonwealth v. ...* 12 Pick. 503. *Rex v. Vandercomb*, 2 Leach, 816. The identity of the offences can only be proved by the record. *Rex v. ...* 3 B. & C. 502 ; *S. C.* 5 Dowl. & Ry. 422.

The admission of the other forged certificates in evidence erroneous and calculated to unfairly prejudice the defendant. *v. Wyllie*, 2 Bennett & Heard Lead. Crim. Cas. (2d ed.) 26, note. *Jordan v. Osgood*, 109 Mass. 457. *Butler v. Watkins*, 111 Mass. 456. There is no evidence but this and the comparison of the writing in the certificate with an unproved standard tending to prove that Coe knew the certificate to be forged.

The certificate to Ferris was delivered January 4, 1873; all others were delivered afterwards, the nearest date being twenty-six days after, and all, but one, certificates of other corporations. Proof of the uttering of a forged certificate on the Old Colony Railroad, on March 4, can have no necessary tendency to show knowledge of the forgery of an Eastern Railroad certificate on January 4 previous. *Rex v. Taverner*, 4 C. & P. 413, note. "dangerous species of evidence" has never been carried as far as in this case. It is an attempt to prove a case admitted to be weak by another weak case, to strengthen weakness by weakness. It is an attempt to prove a case by subsequent weak events having no connection with the facts on trial. Indictments are pending upon the certificate.

There was no evidence that John Ferris was induced to part with his money relying upon the security. There was nothing about the security. It was delivered after the bargain was made. Ferris had every confidence in Coe, and never believed Coe intended to defraud him. There was no representation as to the value of the property. This is all the testimony, and is not sufficient. "Whatever it is necessary to set forth in an indictment must be distinctly averred by a proper affirmative allegation, and not by way of inference or argument merely. This is an elementary rule in criminal pleading." *Commonwealth v. Lannan*, 109 Mass. 590, 591, per Hoar, J. These averments must be sustained by proof. Every allegation must be proved. The law does not infer that one allegation is proved upon proof of the others; every allegation must be supported by evidence. The law does not infer that Coe made the loan relying upon the security, when he received the money, because it was offered him, after the completion of the bargain for the loan. *Rex v. Dale*, 7 C. & P. 352. The same result would have followed if Ferris had been entirely uncertain as to the truth of these representations. The false pretence must be shown

to have had a decisive influence on his mind, which was not the fact in this case. *Commonwealth v. Drew*, 19 Pick. 179.

4. The ruling that if the defendant, at the time he obtained the money as a loan, intended to repay it, this would not divest the act of its criminality; and the exclusion of evidence of the defendant's ability to pay, and of his intention to pay, were erroneous. *Commonwealth v. Jeffries*, 7 Allen, 548. *Commonwealth v. Hersch*, 2 Allen, 173, 180. *Commonwealth v. Stone*, 4 Met. 43. *Commonwealth v. Drew*, 19 Pick. 179. 2 Whart. Crim. Law, 1445. *Getty v. State*, 3 Yerg. 451. *Rex v. Williams*, 7 C. & P. 298. In the latter case, the getting possession of goods by false pretence to enable the defendant's master to collect a debt, was held not to be an intention to defraud. The presiding judge should have ruled that there was no evidence that the check of Ferris was of value, and the certificate issued to Warren & Co. should have been excluded.

5. The admission of writing in the body of the note as a standard of comparison for the purpose of proving knowledge ought to have been excluded. The note was partly in print and partly written, and was signed by the defendant. It was delivered to the contractor of the defendant. Such delivery is no proof that the body of the note was in his handwriting. It was equally his contract and equally binding, whether written by him, or by some one else; and therefore the fact that it was his contract is of no effect whatever. Such a ruling would make competent the entire written contents of every deed, will, contract or writing of any kind competent to be used as a standard of comparison, to prove the handwriting of the contractor, and would overthrow all the law upon this subject.

6. The presiding judge erred in instructing the jury to consider whether the defendant would have lent the money if he had known the certificate to have been forged. That is not the question at all. Perhaps he would not, because his confidence in the defendant would have been overthrown, just as much as if he had been told many other things of the defendant, whether true or false. Whether he would have made the loan under such circumstances has no bearing whatever upon the question whether he actually relied upon the security in making the loan.

The court may think the indictment should be construed as that the whole transaction of procuring the loan was a fraud to obtain the money of Ferris with the intent to defraud him. This is the only construction that can sustain the indictment, for if the allegation goes no farther than that a loan was procured by the defendant, then the fraud is negated by the fact that Ferris wanted to make the loan, but did not want to be deprived of his property. If the defendant got the money or check of Ferris, to return it when Ferris wanted it, there is no fraud as to Ferris. If the loan was a part of the transaction, and the defendant intended to cheat Ferris of his property, such is the meaning of the indictment, then the instructions given to the jury were wrong, for he ruled that to obtain a loan with the intention of repaying it according to the agreement, does not constitute the fraud alleged in the indictment.

Train, Attorney General, & W. G. Colburn, Assistant Attorney General, for the Commonwealth.

THE COURT. The indictment alleges that the defendant falsely represented that a certain certificate of shares of corporate stock was genuine and of value as security for a loan of money from Ferris was induced to make to him thereon. The pretended certificate is set forth, and purports to be a certificate that the defendant is the owner of the shares of stock which it represents.

The objection raised by the motion to quash is that the indictment does not show how Coe could pledge such stock, or use it to procure a loan from Ferris, or in any way defraud Ferris by the use of it; Ferris being already the apparent owner. The transaction represented by the indictment, if genuine, would be that the borrower prepares his security by causing the delivery of stock, whether owned by himself or procured from another, for the purpose is immaterial, to be transferred to the name of the proposed lender, and a certificate issued accordingly. Upon the completion of the loan, the delivery of the certificate completes the transaction. The certificate, although previously made in the name of the defendant, does not become his in fact until the loan has been performed, the certificate delivered to him in pursuance of its purpose. If the certificate is forged, or false and fraudulent in its substance, it is manifest that he is defrauded when induced to

take it as genuine and advance money in reliance upon it. offer of the certificate for such a purpose is a representation it is what it purports to be upon its face. *Cabot Bank v. M* 4 Gray, 156. *Commonwealth v. Stone*, 4 Met. 43. The indictment sufficiently sets forth in what manner Ferris was defrauded by means of the certificate.

2. The certificate is an instrument complete in itself, and requires no further allegations to fully set forth the right or tract of which it is a symbol, as was necessary in *Commonwealth v. Ray*, 3 Gray, 441, and *Commonwealth v. Hinds*, 101 Mass. And besides, this offence consists in the use of false tokens, not the forgery of a written instrument.

3. It is unnecessary that the indictment should set forth terms, or by description, the check received for the loan. It is presumed to have been given and received as payment of the sum of money agreed to be lent. Its designation as a "check or order for the payment of money" sufficiently indicates its character; and as a description of the property obtained by the defendant, would be good. *Commonwealth v. Brettun*, 100 Mass. 206. But there is also in the indictment an allegation that the defendant did obtain the sum of seven thousand dollars, the property of said Ferris.

4. It is indeed alleged that the defendant procured, and was induced to part with, the money as a loan only. But it is also alleged that he thereby did obtain it with intent to defraud, and defraud. If so obtained, it is none the less a fraud because obtained in the form of a loan. *Commonwealth v. Lincoln*, Allen, 233.

5. Such representations relate only to the validity and value of the security, and not to the means or ability of the party to obtain the money, and are therefore not within the exception requiring a written instrument. Gen. Sts. c. 161, § 54.

6. The allegation that the certificate "was of the tenor following," must be referred to the time when the false representation was made, of which it constitutes the main part. The copy of the certificate correctly sets forth its tenor.

As to the objections taken at the trial:

1. The indorsements upon the certificate form no part of the offence. They are not required to be set out, either as a part of the narrative

as a description of the false token used. Their application upon the certificate when produced does not therefore constitute a variance.

It is only necessary that the indictment set out the false facts upon which the property was obtained. That a certificate was given is a matter of evidence, bearing upon the question whether the money was in fact obtained by means of the certificate. The note forms no part of the offence charged, and its description or otherwise; and no allegation in the indictment is necessary. The offence is the same, with or without the existence of that fact. No variance comes from its appearance in the evidence.

It is an allegation of the indictment that the certificate was not a true and genuine writing and certificate of ownership of the share, but was false, forged and counterfeit, and of no value, and that the defendant used the same as evidence. Even if it might have been of some value, it is not a means of securing to the holder the one share, for which the certificate was originally issued as a genuine and valid certificate, proof of its falsity does not constitute a variance. It is not a descriptive

of the possession and use of other altered and falsified certificates by the defendant, about the same time, whether or not afterwards, was competent to show that his possession and use of which he was indicted, was not casual and accidental.

They were all between the dates of the transactions charged in the two counts. They were admitted and allowed to the defendant to show guilty knowledge. For this purpose the evidence was admissible; and the instructions sufficiently guarded against error. *Commonwealth v. Stone*, 4 Met. 43, 47. *Commonwealth v. Gray*, 472. *Commonwealth v. Edgerly*, 10 Allen,

and the fact that the certificate was offered and received as security for the loan furnishes some evidence upon which it was competent for the jury to find that Ferris was thereby induced to give up his money. It is not necessary that there should have been an explicit declaration or express words to that effect, at the time of the negotiation. It was for the jury to determine from the testimony of Ferris, that he "had every confidence in" the defendant, in reply to the question if he did not rather trust

Coe than any security, was a denial of reliance upon the security.

6. The instruction upon this last point would be objectionable if it bore the significance which the defendant ascribes to it. The presiding judge suggested the query, whether, if Ferris had known it to be a forged and worthless piece of paper, he would have made the loan as he did; and then proceeded to say, "I would not, and was in fact induced to make the loan by the delivery of the certificate; and his belief in its genuineness and value," and the jury find the other facts constituting the offence it would be sufficient; adding also, "And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality."

The judge cannot fairly be supposed to have intended, by these propositions, to suggest the inquiry whether Ferris would have made the loan if he had known or supposed that Coe was guilty of fraudulently altering the certificate which he offered to receive for security. Nor can we suppose that the jury would understand it in that way. If the attention of the judge had been called to the possible danger that the jury might so misunderstand and misapply his remarks, they would undoubtedly have qualified and explained. But there was no suggestion of this kind at the time; and no exception appears to have been taken to the instructions in this respect. On the contrary, the exception to this part of the instructions was expressly limited to those which related to "the obtaining of money or property upon a loan." The objection therefore, as now made, ought not to prevail.

7. The offence consists in obtaining property from another by false pretences. The intent to defraud is the intent, by the use of such false means, to induce another to part with his property and confide it to the defendant, when he would not otherwise have done so. Neither the promise to repay, nor the intention to do so, will deprive the false and fraudulent act of obtaining it of its criminality. *Commonwealth v. Tenney*, Mass. 50. *Commonwealth v. Mason*, 105 Mass. 163. The offence is complete when the property or money has been obtained by the means; and would not be purged by subsequent restoration.

Evidence of ability to make the repayment is there-
erial and inadmissible. The possession of the means
t is entirely consistent with the fraud charged. The
ferred on this point did not touch the question of falsity
of the means by which the loan was obtained ; and was
ected.

vidence would warrant the jury in finding that Ferris
deposited to his credit at the bank where he kept his
d therefore that his check was of value.

only question raised by the exceptions in regard to
considerable difficulty has been felt by the court, is
the admission of the writing in the body of the note
ne loan, as a standard of comparison of handwriting, by
ow that the alterations in the certificate were made by
ant himself.

structions to the jury the judge announced the correct
, as maintained in this Commonwealth ; that " before
g can be used as a standard of comparison, it must be
clear and undoubted testimony, that the specimen of
standard is the genuine handwriting of the party sought
ed." He then proceeded to say that not only the sig-
the word " January," in the written date of the note,
sed for that purpose ; assigning as a reason, " for it is
at the defendant delivered this note to Ferris as his,
ant's, own promissory note." This was after his at-
l been called to the difference in the proof or admis-
ecting the signature and as affecting the body of the

endant's counsel rightly contends that the mere fact
fendant delivered the note as his own would not prove
rt of it, except the signature, was his own handwrit-
o make it a proper standard of comparison. But it is
ved that the question, as thus presented in connection
structions to the jury, related only to the point of ad-

The attention of the court was called to the extent
ious ruling admitting the note as a standard of com-
e counsel insisting that only the signature had been
proved to be submitted to the jury. The court ruled
dy of the note was also shown to be the defendant's

writing, sufficiently to be considered by them. No point was made and no instructions asked as to the province of the jury in dealing with the evidence as laid before them, or the effect to be given to it. The question then is not of the sufficiency of the reason given at that time by the judge for his ruling, but of the correctness of the ruling itself. We think that from the whole bill of exceptions taken together, it does not appear that the ruling of the judge was based solely upon the fact of delivery of the note by the defendant. From the testimony of Ferris it appears that having the money to lend he went to the defendant's office and offered to lend it to him; and that the defendant then and there gave him the note and delivered to him the pretended security. The natural inference would be that the note was written at that time. Whether any one else was present does not appear. No one but Ferris was called, on either side, to testify in regard to the interview or the preparation of the note. What occurred during the trial, either in the manner in which the evidence came in or in the discussions or statements of counsel in regard to the preparation of the note, and the existence or non-existence of other evidence upon that point, does not appear. It is manifest that the unreported occurrences of the trial might give important significance to that which appears to be slight evidence as reported from the verbal testimony of the witness.

Upon the proposition of the government to use the promissory note as a standard the objection was general, not distinguishing between the signature and the other written portions of the note. In admitting it for that purpose, the court assign this as a reason for the ruling, in addition to the proof of delivery, to wit, "the defendant having neither offered, nor proposed to offer any evidence in denial of the claim of the government that the writing on the note was the handwriting of the defendant." This suggestion indicates that, in the view of the presiding judge, the failure to produce any evidence on that point, when such evidence, if it existed, would have been within the knowledge and control of the defendant, left the inference from the testimony of Ferris, that the note was prepared and dated by the defendant at the time of the loan, conclusive as a matter of fact.

Upon the question whether a given writing or written word sufficiently proved to have been written by the defendant to al-

submitted to the jury as a standard of comparison, the trial must pass in the first instance. So far as it is of a question of fact merely, it must be final, if any proper evidence to support it. As in all questions of law, exceptions to the ruling at the trial will be sustained if they show clearly that there was some erroneous application of the principles of law to the facts of the case, or that the verdict was admitted without proper proof of the qualifications of the jury for its competency. *Foster v. Mackay*, 7 Met. 531. *Rich v. Cushman*, 9 Cush. 329. *Gorton v. Hadsell*, 9 Cush. 508. *Quinn v. Bank v. Hobbs*, 11 Gray, 250. *Commonwealth v. Mulden*, 295. *Doud v. Hall*, 8 Allen, 410. *Lake v. Clark*, 346. *Commonwealth v. Morrell*, 99 Mass. 542. *Gott v. Express Co.* 100 Mass. 320. *Presbrey v. Old Colony* 103 Mass. 1. *O'Connor v. Hallinan*, Ib. 547. *Gossler v. Sugar Refinery*, Ib. 331. *Commonwealth v. Williams*, 104 Mass. 62. *Lawton v. Chase*, 108 Mass. 238. *Nunes v. Commonwealth*, 113 Mass.

In applying the rule of law laid down at the trial, we think the jury must have been satisfied from the evidence and the verdict at the trial, and found as a fact, that the written part of the note was in the handwriting of the defendant; and that it was presented as a standard of comparison upon that ground.

It does not appear from the exceptions that he was not warranted in so doing. If so, the writing was competent for the purpose; and the verdict and instructions not erroneous in law. *Richardson v. Richardson*, 21 Pick. 315. *Exceptions overruled.*



L. GIDDINGS & another vs. RICHARD W. SEARS & others.

March 20, 23. — September 5, 1874. AMES & DEVENS, JJ., absent.

It is made by an insolvent debtor of all his property to one creditor, for the purpose of securing that creditor's debt, is not a fraud at common law, although the debtor and the creditor knew at the time of making the preference that the effect of it would be to deprive other creditors of the power of reaching the debtor's property by legal process.

BILL IN EQUITY, under the Gen. Sts. c. 113, § 2, *cl.* 11, by members of the firm of Giddings & Torrey, creditors of the named defendant, against Richard W. Sears, Eben Sears and Adelaide L. Sears, to set aside certain conveyances of the property of Richard to Eben, which was afterwards conveyed by Eben to Adelaide. The prayer of the bill was that the conveyance might be declared void, and that the property might be applied to the payment of the debt of Richard to the plaintiffs.

The case was reserved by *Endicott, J.*, for the consideration of the full court, upon the bill, answers and a report of a master. The reservation stated that "no question is raised upon the master's report, the facts found therein being agreed to by both parties." The material facts appear in the opinion of the court.

F. A. Brooks & F. Morison, for the plaintiffs.

J. A. Loring, for the defendants.

ENDICOTT, J. The only question presented for decision upon the facts found by the master is whether the conveyance to Eben Sears by his brother Richard was merely a preference at common law, and made for the sole purpose of securing the debt to Eben or for the purpose, and with the intent of hindering, delaying and defrauding the other creditors of Richard, in which both grantor and grantee participated.

It appears by the master's report, that when the conveyance was made the liabilities of the firm of E. & R. W. Sears were about \$92,000. The assets of the firm consisted of certain property amounting to about \$33,000, and the individual indebtedness of the two partners; Eben owing the firm about \$28,000, Richard about \$30,000. Richard was insolvent, and unable to pay any of this debt, and was also largely indebted on his private account. The firm, so far as partnership assets were concerned, was also insolvent. Eben was not insolvent, but had sufficient assets to meet all his liabilities, and did in fact, before the hearing was concluded, pay all the debts of the firm; though when available those assets were when the deed was given did not appear. On March 13, therefore, Richard was indebted to the firm and Eben was liable by reason of the insolvency of Richard for a much larger sum on his account than the consideration of the deed.

the state of facts then existing, and well known to both the master finds that Eben required the deed to be made that Richard made it for the protection and security of Eben, being apprehensive that the estate conveyed would be claimed by the plaintiffs; that no money passed between them; that the deed was absolute, without any agreement or promise to hold in trust; that all the evidence was consistent with the purpose that the conveyance was made solely for the protection of Eben, and that it failed to satisfy him that it was made for any other purpose or consideration whatever. The master's decision includes all the findings of the master material to the inquiry; the advances of Eben, as administrator of the estate, to the firm, being included in the estimates of the value of the firm.

The plaintiffs contend that the deed should be set aside as in fraud of the creditors. But the important and decisive fact in this case is that the master does not find fraud, or a fraudulent intent against the other creditors, but does find that the only purpose of the conveyance was to secure and protect his brother, to whom he was personally indebted. The circumstances under which this was done, the relations of the parties, their method of conducting business, and many facts stated by the master, are calculated to excite grave suspicions; but the master, upon all the evidence, including the testimony of all parties, finds no fraud, but only a preference in favor of a particular creditor, and a preference is not illegal at common law.

In *Whipple v. Whipple*, 14 Allen, 13, Bigelow, C. J., says: "If a debtor is unable to pay all his debts, he commits no fraud in the absence of any statute provision regulating the distribution of insolvent estates) by appropriating his property to the satisfaction of one or more of his creditors to the exclusion of all others. Nor does it make any difference that both creditor and debtor know that the effect of such appropriation will be to deprive other creditors of the power of reaching the debtor's property in the legal process in satisfaction of their claims. If there is no agreement or understanding agreed upon or understood between debtor and creditor in favor of the former, but the sole object of a transfer of property is to pay or secure the payment of a debt, the transfer is a valid one at common law. The distinction is

between a transfer of property made solely by way of preference of one creditor over others, which is legal, and a similar transfer made with a design to secure some benefit or advantage to the debtor from the debtor, which is fraudulent and illegal." See *Foster v. Hall*, 12 Pick. 89; *Lupton v. Cutter*, 8 Pick. 298; *Johnson v. Whitwell*, 7 Pick. 71; *Green v. Tanner*, 8 Met. 411; *Bump v. Fraudulent Conveyances*, 213, 226. The right of a debtor to give a preference springs from his ownership and having dominion over his property; and if he acts in good faith, pays an honest debt, and reserves no advantage to himself, the payment is valid. The right of a creditor to secure himself, to obtain payment of his just debt by activity and vigilance, is not affected by the debtor's insolvency, or his knowledge of it, or the fact that by securing himself he defeats another. He is not bound to protect other creditors; if he merely obtains what is due him, there cannot be said to be fraud in the transaction.

The master's finding we think conclusive upon this point; the deed is therefore valid, and the plaintiffs cannot maintain their bill. No objection having been taken by the defendants to the jurisdiction in equity, we have not thought it necessary to consider that question, the case having been fully heard by the master on its merits.

Bill dismissed, with costs.

ISAAC AMES, Judge of Probate, *vs.* ABRAHAM JACKSON
& others.

SAME *vs.* LUCIUS SLADE & others.

Suffolk. March 13. — September 4, 1874. COLT & ENDICOTT, J.
absent.

An administrator who, by verbal agreements with the creditors of an estate, has induced them not to commence actions against the estate within the two years allowed by the Gen. Sts. c. 97, § 5, cannot be required to set up the defence of statute of frauds in personal actions against himself upon his promises, for the benefit of the next of kin of the intestate.

Payments made by an administrator after the expiration of two years from the date of his appointment, in pursuance of promises, made upon valid consideration within said two years, should be allowed him, and may be charged against personal assets in his hands, at any time before the settlement of his final account.

ACTIONS of contract in the name of the judge of probate county of Suffolk on behalf of the widow and next of kin of Thomas L. D. Perkins, on two several bonds given by Abraham Perkins and Lucius Slade respectively, who were joint administrators of the estate of said Perkins. The breach alleged was failure to account. Judgment was entered in each case for the value of the bond.

At the trial in this court before *Wells, J.*, the case was referred to the consideration of the full court upon a report in substance as follows: The case had been sent to an auditor to determine for what amount execution should be awarded. The auditor reported among other things that the defendants were ordered to be allowed for the payment of debts of the estate at the expiration of two years from the time of their appointment. The case was then recommitted to a master to report for what sums, if any, paid by the defendants, were paid in pursuance of any understanding or promise entered into or given by them before the expiration of two years from the time of giving bonds. The master reported that prior to the expiration of said two years, the defendants agreed orally with their creditors, that if their claims should not be sued, nor the defendants represented insolvent, the defendants would pay a percentage as agreed upon, and that in pursuance of said promise the creditors were paid after the expiration of the two years. No exceptions were taken to the master's report. The plaintiff objected to the allowance of these payments by the administrators.

The presiding judge ruled that payments so made in good faith might be charged and allowed to the administrators against the assets in their hands, at any time before the final settlement of their accounts, and ordered the payments in question to be allowed, and awarded execution for the sum found due after allowance, which sum included interest since the expiration of two years.

The payments made as above stated cannot properly be allowed, and it is to be enlarged by the amount of such payments as were not paid by the master; otherwise it is to stand as ordered.

Brown, for the plaintiff.

Jackson, for the defendants.

WELLS, J. The statute limiting actions against executors and administrators, Gen. Sts. c. 97, § 5, is obligatory upon the executor and administrator as well as upon the creditor; and cannot be waived. If the executor or administrator neglects to plead the statute, and thereby judgment is recovered in an action brought after the debt is legally barred; or if he voluntarily pays the debt, it is held to be in his own wrong, and he cannot claim to be reimbursed from the estate. But this limitation is not directly applicable to claims due to the executor or administrator himself, whether for debts originally held by him against his testator or intestate, or arising from advances made or expenses incurred on account of the estate, in the course of administration. Such claims may be charged against personal assets in his hands at any time before the settlement of his final account. *Dickinson v. Arms*, 8 Pick. 394. *Forward v. Forward*, 6 Allen, 494. *Munroe v. Holmes*, 13 Allen, 109.

He is invested with the title to the personal assets, and is accountable for the full appraised value of that which has been appraised, and for whatever amounts he does or ought to receive or collect beyond that. Against this liability his own claims may be offset, whenever he accounts. If they arise from advances made upon liabilities assumed by him, his right to charge them in his account must depend upon the question whether, at the time they were so assumed, it was properly done in the performance of his duties of administration. If his claim is for the payment of debts, the question is whether the debts were settled by him, and discharged as against the estate, before they were barred by the statute; and not whether he made a specific appropriation of any part of the assets in his hands, or paid out his own money to the creditor within the period of limitation. It often occurs that the personal assets are not fully available until after two years have elapsed. The administrator must provide for the debts meanwhile, or the estate be subjected to the expense of numerous suits. If the estate is solvent, he may properly and safely advance his own money, or secure the settlement of the debts by giving his own personal obligation or assurance for their payment. This is often necessary in order to protect the real estate from sale or levy on execution, or to avoid proceedings of insolvency.

case, if there should ultimately prove to be a deficiency of assets for his full indemnity, and there has been no neglect on his part in collecting and converting the assets, in settling his account, he may be allowed, even after the expiration of two years, to sell real estate for repayment of the debt to him upon settlement of his account; provided the estate remains unsold and undivided; or if there has been no unreasonable delay in applying for a license, after the extent of the deficiency became known. *Richmond, Petitioner*, 2 Pick. 567. *Palmer*, 13 Gray, 326. *Munroe v. Holmes*, 13 Allen, 1. The lien of creditors is discharged at the end of two years, if no claim is brought; and a sale of land for payment of debts pending the settlement is held to be absolutely void, though made under the authority of the Probate Court. *Thompson v. Brown*, 16 Mass. 347. *Wells v. Wells*, 5 Pick. 140. *Lamson v. Schutt*, 4 Allen, 347. *Hell v. Packer*, 106 Mass. 347.

The right of an administrator to have the real estate converted into assets to satisfy his claims upon the estate is not so absolute; this right is always determined upon equitable considerations. In view, indeed, of the limitation upon suits by creditors by the bar against his claim, but as indicating a purpose of the law that the final settlement of the estate should be as practicable. Whenever such an application by him is refused, it is on the ground of culpable neglect in the settlement of the estate, or of unreasonable delay in making the application, or some degree of either coupled with a division or conversion of the land by the heirs, or other change in its condition. *Petitioner*, 15 Mass. 58. *Richmond, Petitioner, Palmer* and *Munroe v. Holmes, supra*.

If an administrator has been guilty in this respect, a license may be refused to him, even though the lien of creditors remains undischarged on account of his omission to give the required notice of appointment. *Hancock v. Hancock*, 13 Mass. 162.

Administrators in this case do not stand upon the rights of creditors. Their claim is not for the payment of debts barred by the statute, but for reimbursement on account of debts against the estate which were contracted and settled by them within the period of limitation. In their arrangement with the creditors the estate was to be discharged from the debts; in consideration whereof

the defendants gave their promise, not in their capacity as administrators, but personally, to pay a certain sum to each, proportional to the amount of their respective claims. The arrangement was subject to a contingency, necessary for its success, that suits should not be brought within the two years so as to render proceedings in insolvency necessary. When that period expired and all debts were barred by the statute, the promise of the defendants became absolute. No action could have been sustained upon it against them as administrators, even if the statute bar were not pleaded. To an action against them personally the statute limitation would have been no defence. There was a valid consideration, and they could only resist payment by setting up the statute of frauds. This no man is bound to do, at the requirement or for the benefit of another, in a personal action against himself upon a claim the obligation of which he recognizes as founded in good faith and right. *Cahill v. Bigelow*, 18 Pick. 369. *Browne on St. Frauds*, §§ 128, 130, 135.

If the defendants had taken written discharges of these debts, expressing the condition making them void in case suits should be commenced or proceedings in insolvency take place within the two years, there can be no doubt that the consideration for such discharges, whether in money at the time or in notes or oral promises subsequently met, would be properly chargeable in their account. Such a settlement differs from this only in the absence of the writings. The lapse of the period of limitation would be necessary to perfect the discharge in either case.

The date at which the charges were actually made is of no importance; nor is the date of the actual payment of the money in fulfilment of the previous personal engagements of the defendants. Those engagements having been given and accepted in satisfaction of the claims of the creditors against the estate, the defendants are entitled to be indemnified therefor out of the assets in their hands.

In *Dickinson v. Arms*, 8 Pick. 394, the accountant charged the estate, of which he was administrator, with an amount as paid upon a note at a date more than four years from the notice of his appointment, including interest to that date. The note was due to another estate, of which he was also administrator. No other facts appear, except that the estate was solvent. The court held

was responsible for the amount of the note in his capacity as administrator of the other estate, "he had a right to take so much of the funds as would pay this note, the moment they came into his hands. And the law presumes that he appropriated; for he could not sue himself." His neglect to make the appropriation, and his claim of interest for the time, were not allowed to deprive him of his indemnity. The claim of interest only was rejected.

Forward v. Forward, 6 Allen, 494, 498, objection was made by the legatee that "that no allowance should be made to the executors for the amount paid by them after the lapse of four years from the date of the testator's death." The executors had given no valid notice of their appointment. It was declared, in the opinion of the court, that it could be seen that, by the payment of debts after the testator's death, the legatee ought to have been able to defend against them, the amount paid to the legatees was equal to the amount of the payments, and that it could be a strong reason for disallowing the payments." The objection did not appear, and would not follow as of course in the case of legatees, the objection did not prevail. The court proceeded further to say: "The objection does not apply to the payment of partnership debts; for, as they become the debts of the surviving partner at the decease of the testator, he is liable to pay them at any time before rendering his account in the Court. The limitation of four years does not affect the executor. The executor had been partner with his testator. He is liable for partnership debts long after they ought to have been barred against the estate. It was held that he might properly be liable for the cause of his own liability for the same debts; and that the limitation did not apply to his claim for reimbursement of the amount of such debts due to him from the estate which he administered as executor. It was not a payment in his own wrong, because of his original joint liability and consequent right of contribution. So the payment in *Dickinson v. Arms* was not a payment in the administrator in his own wrong, because of the fact that he was not the creditor estate which he assumed by becoming administrator thereof. In this case the payments by the administrators were not in their own wrong, because of the liabilities they assumed in the adjustment of debts due from the estate within four years from their appointment. The question turns upon

the propriety and validity of the adjustment at the time it was made, and not upon the time when the money was paid in pursuance of the liabilities then assumed.

This arrangement was not for the postponement of the claims, but for their discharge; not to waive or evade the statute of limitations, but to resort to and apply it as the most effectual means to secure a complete discharge of the estate from all claims; not to delay the settlement and distribution of the estate, to the disappointment of the expectations of the next of kin, but to secure a more certain and larger surplus, and avoid delays from suits at law and proceedings of insolvency.

The administrators are entitled to charge the estate in their hands with the amounts required to satisfy the liabilities which they thus incurred in the proper and reasonable adjustments adopted for its settlement.

Execution is therefore to be awarded in accordance with the order of the single justice who heard the case at nisi prius.

115 514
151 315
115 514
154 384

HORACE HASKINS & another *vs.* GEORGE W. WARREN & others.

Suffolk. November 18, 1872, March 21. — September 7, 1874.

An unqualified delivery of goods sold for cash is a release or waiver of the right of the seller to the goods, whether this right is in the nature of a condition affecting the title, or only a lien for the price.

If goods sold are delivered to the purchaser, and there is evidence that the delivery was for the purpose of examination or other special and limited purpose, and not for the purpose of giving absolute possession to the purchaser, evidence is admissible that it was in the usual course of dealing to give opportunity for examination in that mode.

If goods sold are delivered for the purpose of completing the sale, evidence of a usage that the sale is not completed is inadmissible.

A usage that no title passes upon an ordinary sale and delivery, without actual payment of the consideration within a certain number of days, is unreasonable and invalid.

Usage of trade is a matter of fact, not of opinion; it may be proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practised by themselves and others in the trade to which it relates;

conclusions or inferences as to its effect, either upon the contract or the rights of parties, are not competent to show the character or force of

allowed to control the express intention of parties to an agreement ; interpretation and effect which result from an established rule of law applicable ; nor to engraft on a contract of sale a stipulation or obligation different from that intended by the parties ; nor to show that the contract is inconsistent with the rule of the common law on the same subject.

by the seller of goods to rescind the sale on the ground of fraud, evidence of purchases made by the person charged with the fraud, at or about the time, is competent, if the purchases are so connected as to show a general course of business in the transactions, or that the party was conducting business in some manner, indicating an expectation of failure ; and evidence is inadmissible to show that the persons from whom the other purchases were made intended to rescind the sales made by them, and afterwards abandoned them. by a seller of goods to rescind a sale on the ground of fraud, evidence of a party charged with the fraud overdraw his bank account daily at and about the time of the purchase, is competent as tending to show that he must have been aware of his condition.

by the seller of goods to rescind the sale on the ground of fraud, if the fraud was discovered with the fraud soon after the sale went into bankruptcy, the amount of the proceeds at the time of his failure is a fact competent to be proved in the testimony of the assignees of the bankrupt on this point, and on the question of the value of the assets of the bankrupt estate, is admissible.

been obtained from their owner by fraud, the burden of proof is upon the fraudulent purchaser to show that he is a *bona fide* purchaser for value.

of replevin against B. to obtain goods sold by the plaintiff to A., and if the plaintiff seeks to rescind the sale on the ground of fraud on A., evidence that A. filed a voluntary petition in bankruptcy after the sale, and that he was adjudicated a bankrupt thereon, is inadmissible.

and shipped it to B., drawing on him for the amount of the purchase under an agreement by which B. was to sell the cotton, and, after deducting his commission, pay one half the profit to A. B. sold the cotton to C., who sold it to D., that A. was interested only in the profits, and was not a necessary party to the suit by B. against D., in which B. sought to recover the cotton on the ground that it was obtained from him by fraud.

of 70 bales of cotton. Writ dated December 9, 1868. Filed in the Superior Court, before *Devens, J.*, the following appeared : J. N. Brooks, one of the firm of J. N. Brooks and Company, cotton brokers of Boston, who were employed by the plaintiffs to sell this cotton, on Friday, December 4, 1868, went to the defendants, Jenkins Brothers & Chipman, cotton dealers in Boston, and offered the cotton to them for sale ; they made an offer for it, which was communicated by Brooks to the plaintiffs, and by them to the defendants, and the plaintiffs then informed Brooks that he might sell the cotton at twenty-five cents per pound. Brooks then went to Jen-

Jenkins Brothers & Chipman and offered to sell it to them at that price, and they accepted the offer, remarking that the price was the highest in the market, but that they had a place for the cotton. These transactions on the part of Jenkins Brothers & Chipman were conducted by Henry W. Jenkins, a member of the firm, with whom Brooks was well acquainted. Nothing was said as to the time of payment. Brooks, upon returning to his office, directed his partner to enter the sale, and some questions arose between Brooks and his partner whether the name of the purchasing firm had not been changed. Brooks's partner made out a sale note of the cotton on December 4, 1868, and sent it on the same day to the plaintiffs' store in Boston, and they received it on the afternoon of that day, the sale note, when so sent, containing the name of Jenkins Brothers & Co. as purchasers. There was at that time in Boston a firm by the name of Jenkins Brothers & Co., who sometimes purchased cotton; but the plaintiffs did not know that firm except by name, and did not know their place of business, nor who composed the firm, and had never had any dealings with them. There was evidence tending to show that Jenkins Brothers & Chipman, on the afternoon of the same day, sent their cotton sampler, Dennis Driscoll, to the plaintiffs' store, on Broad Street, Boston, to sample the cotton; and that he went there and informed Montague, one of the plaintiffs, that he had been sent by Jenkins Brothers & Chipman to sample the cotton; that Montague replied that it was not usual to sample cotton before it was weighed, and told Driscoll where he could get at the cotton, and that Driscoll sampled it the same day, and took the samples to Jenkins Brothers & Chipman.

Samuel L. Montague, one of the plaintiffs, called as a witness on his own behalf, testified on direct examination that his firm owned the cotton replevied; that on Friday, December 4, he found the sale note on his desk made out to Jenkins Brothers & Co.; that he gave orders that night to have the cotton, which was then in a loft, lowered down and weighed and left in the store; that it was to be weighed by persons employed by his firm; that it was lowered down and weighed the next morning; that he left the store between nine and ten o'clock, and on his return, about one o'clock, the cotton had been delivered on an order signed by Jenkins Brothers & Chipman; that he then went to Brooks &

ed them the order, and told them that the sale note had
en Jenkins Brothers & Co., and he supposed the cotton
sold to them; that Brooks & Co. said they supposed
had been so sold; but on looking at the directory they
it was Jenkins Brothers & Chipman; that the witness
rday afternoon altered the sale note by changing "&
& Chipman." That the practice is, after cotton is
or the weigher to make a certificate and hand it to
; that in this case the certificate was attached to the
ent by mail to Jenkins Brothers & Chipman on Satur-
nday. On Tuesday, December 8, the witness heard
ure of Jenkins Brothers & Chipman, and on Wednes-
ng found the cotton on board a vessel at Constitution

s-examination the bill of the cotton was produced, and
llows: "Boston, December 4, '68. Messrs. Jenkins,
Chipman, To Haskins & Montague Dr. To 70 bales
s. — 7600.50." The witness also testified that the
was so entered on the books of his firm.

Haskins, one of the plaintiffs, testified that on Decem-
vent to the store of Jenkins Brothers & Chipman and
payment for the cotton, and was told by Jenkins that
not pay for it, that his firm had stopped payment.
examination this witness testified that the cotton re-
as bought by a person named Mead in Charleston,
olina, who shipped it to the plaintiffs and drew for the
ount of the expenses; that the plaintiffs were to sell
, and if there was any profit Mead was to have one
if there was a loss the plaintiffs would have to stand
Mead was not a man of pecuniary responsibility, un-
was a profit on another lot.

appeared in evidence that the cotton was lowered down
plaintiffs' loft and weighed on the morning of December
t on the same morning on which it was weighed, Jen-
ners & Chipman directed Johnson & Co., teamsters, to
t the cotton and carry it to the defendants' storehouse
ution Wharf, and Johnson & Co. sent by one of their
an order of Jenkins Brothers & Chipman to the plain-
for the cotton, and the order was delivered on the

same morning at the plaintiffs' store by the teamster, to one Hill, who was in the employment of the plaintiffs, and a part of whose business, generally, it was to deliver cotton from their store. Hill testified that he told the teamster bringing the order that he had no authority to deliver it, and no orders to deliver it; and that the teamster said it was all right, and that the teamsters proceeded to load it, and did load it on their trucks and carted it from the store. That he did not prevent its going because he supposed the plaintiff Montague was then at Jenkins Brothers & Chipman, and might have sent down for it. The evidence was conflicting on this point, the teamsters swearing that nothing of the kind was said, and that there was no refusal to deliver it; and there was evidence tending to show that Montague was at the store when the teamsters went there and delivered the order, and that the lowering down from the loft and weighing and loading were going on at the same time, and that the plaintiffs' men assisted the teamsters; but there was a conflict of evidence on this point.

There was also evidence tending to show, and there was no evidence to the contrary, that the sale note, bill and certificate of weights were received by Jenkins Brothers & Chipman, — a copy of the said sale note * is in the margin.

There was also evidence tending to show, and there was no evidence to the contrary, that the cotton was carried by the teamsters to the storehouse of Warren & Co. on December 5; that nothing further was done by the plaintiffs until the afternoon of Tuesday, December 8, 1868, when the plaintiffs having heard of the failure of Jenkins Brothers & Chipman on that day, the plaintiff Haskins, as testified to by him, applied to them to pay for the cotton, and Jenkins Brothers & Chipman informed him that they were unable to do so; that they had sold the cotton and got their pay for it. On the next day the plaintiffs replevied the cotton.

There was also evidence tending to show that the defendants, prior to October, 1868, had lent money to Jenkins Brothers &

* "Boston, December 4, 1868. Sold to Jenkins Bros. & Chipman. For Marks. account of Haskins & Montague. 70 bales cotton a 25c. J. N Brooks & Co."

on cotton as security, and that in pursuance of an agreement they lent them \$25,000 on cotton as security, on the basis of every \$100, on October 20, 1868, lent them \$5,000, a bill of lading for 42 bales of cotton, and on October 21, 1868, lent them \$10,000, receiving a bill of lading of 101 bales of cotton, and on October 27, 1868, lent them \$10,000, a bill of lading of 100 bales of cotton, making together \$25,000, and the security being 243 bales of cotton; at the convenience of Jenkins Brothers & Chipman, the defendants, in pursuance of an understanding made at the time the loan was made, had from time to time, prior to said December 5, 1868, the cotton, or bills of lading held by them as security, for the purpose of receiving other cotton or the bills of lading therefor, in place of the cotton so delivered; and that on the said December 5, Warren & Co. having 212 bales of cotton as security for this loan, Henry W. Jenkins, in behalf of the defendants, applied to the defendants to give them, Jenkins Brothers & Chipman, a negotiable storage receipt for 94 of the bales of cotton which the defendants thus held as security, promising to send in as security 96 bales of cotton in substitution, and stating that he had agreed to sell the 94 bales. The defendants on the same day directed their clerk, F. A. Hall, to make out and sign such storage receipt, and upon delivery of the cotton in substitution, to deliver the storage receipt to Jenkins Brothers & Chipman; that this clerk accordingly did up the storage receipt and signed it, and upon the receipt of the same on the said December 5, into the defendants' warehouse of 86 South Street, Boston, from Jenkins Brothers & Chipman, in substitution for the 94 bales of cotton (86 the 70 replevied are a part) delivered this storage receipt to the same day to Jenkins Brothers & Chipman, dating the receipt the time when the cotton represented by it came into the warehouse, so that storage thereon would be charged from the date. Jenkins Brothers & Chipman on the same day sold the cotton mentioned in that storage receipt to the plaintiff for \$11,170.46, and indorsed and delivered the said storage receipt to him; and Hall paid on the same day on account of the loan to Jenkins Brothers & Chipman, \$8500; and on December 15, 1868, \$1500; and the balance afterwards to their assignees in full. The defendants on December 7, 1868, delivered to

said Hall 25 bales of the cotton represented by said receipt, and on December 9, 1868, delivered to him the balance. Jenkins Brothers & Chipman failed on December 8, 1868, and their failure became known on the afternoon of that day; and they never paid for the 70 bales.

There was evidence tending to show that the value of the whole 86 bales of which the 70 were a part was about \$9600, the value of the 70 bales replevied being \$7525.

The plaintiffs offered evidence tending to show that at the time of the purchase, Jenkins Brothers & Chipman were hopelessly bankrupt and knew it, and that they had already actually failed, or were using their credit and buying goods in preparation for a failure; that they bought the goods of plaintiffs in fraud, intending not to pay for them, and contended that it was a scheme of fraud and that the defendants participated in it.

There was evidence tending to show that Jenkins Brothers & Chipman at the time of the purchase were and continued in good credit until the day of their failure, and there was also evidence tending to show, as the defendants contended, that they acted in good faith, and at the time when they received the 86 bales and delivered the storage receipt for the 94 bales, believed that Jenkins Brothers & Chipman were the owners of the 86 bales, and had no knowledge or information, or cause of belief to the contrary.

The plaintiffs controverted this evidence; and introduced evidence in contradiction of the defendants' witnesses, and as the plaintiffs contended, tending to prove that the defendants did not act in good faith, and were in fraudulent collusion with Jenkins Brothers & Chipman, and either actually cognizant of the fraud, or having sufficient knowledge of facts to put them upon reasonable inquiry which they did not make. There was evidence tending to show that Jenkins Brothers & Chipman, on December 14, 1868, gave to the defendants the authority set forth in the paper, a copy of which is in the margin,* and that none of the cotton held by the defendants was sold before the time of the

* "Boston, December 14, 1868. Messrs. Warren & Co. Gentlemen: Fearing a decline in the market, and thinking it is for the interest of all parties, we hereby authorize you to sell any and all cotton you hold, upon which you have made advances to us. Jenkins Bros. & Chipman."

In this case, and that all the cotton held by them, except
es, had since been sold, and after applying the proceeds,
remains due to the defendants on said loan \$10,291.49.
aintiffs offered to prove by the clerk of the court of
y, and the original petition and record of adjudication,
ns Brothers & Chipman petitioned in bankruptcy on
26, 1868, and were adjudged bankrupts January 2,
e court admitted the evidence against the objection
endants. The plaintiffs also contended that Jenkins
& Chipman's pecuniary condition had not changed be-
date of said purchase and failure, and the adjudication
ptcy, and evidence tending to show this was afterwards
by the plaintiffs.

aintiffs introduced evidence, without objection, tending
at by the usage and general understanding of the trade,
e that named in the sale note, or where no time was
, was for cash, and the same as if "terms cash" were
n the sale note. The defendants' testimony in reply
show that when a sale was made of cotton for cash, or
made of cotton and nothing said, it meant that pay-
to be made in ten days, and that it was called cash in
that the ten days was a credit and not a mere indul-

aintiffs contended, and offered evidence to show, that
at the time in question a usage in the trade regulating
f cotton for cash in Boston; and that by the usage of
the general understanding among merchants, in cash
goods were delivered or put into the possession of the
out prepayment, or first exacting payment of the money,
understanding that it was not to pass title or be a waiver
dition to pay cash. The defendants objected to evidence
age. The court ruled that evidence to show such usage
etent, and admitted it, and the defendants excepted.
nce as to the alleged usage was stated at length. The
it appears in the opinion of the court.

aintiffs, among other evidence tending to show Jenkins
& Chipman's pecuniary condition, and that they knew
dition, offered evidence which was admitted, tending to
c Jenkins Brothers & Chipman had overdrawn their

bank account at the time of the said purchase, and for a week or more prior to that time, that it had been overdrawn by checks, so that the balance would be against them at the end of each day, they making it good on the next day by deposits of other persons' checks before one o'clock, the hour of returning checks to the clearing-house. This state of things had been going on just before the purchase, and continued each day subsequently. The overdraft on December 8, 1868, exceeding their account to the amount of \$37,363, which they did not make good, and which was not paid at bank. To the admission of this evidence the defendants objected.

The plaintiffs were also permitted, against the defendants' objection and exception, to show by Jenkins Brothers & Chipman's assignees in bankruptcy the amount of Jenkins Brothers & Chipman's liabilities when they failed.

The following question was asked by the plaintiffs' counsel of one of the assignees in bankruptcy, who was introduced as a witness by the plaintiffs: "How much has been realized from the assets of Jenkins Brothers & Chipman that came into your hands as assignees?" The defendants objected; but the court admitted the question. The witness answered as follows: "About \$7000; I could not state exactly; the money has been collected and deposited in bank."

After the admission of evidence as to custom and usage, and as to the amount of Jenkins Brothers & Chipman's liabilities, the defendants introduced evidence tending to show that Jenkins Brothers & Chipman, at the time of their failure, had a large nominal surplus over and above their debts; also, that by the custom and usage in Boston on December 4 and 5, 1868, where sales of cotton were made and no time of payment was specified, ten days' credit was given from the date of sale, and that the cotton was delivered to the purchaser whenever requested by him, and that where payment was made within ten days a rebate of interest was allowed. There was also evidence tending to show that upon a sale, cotton was always weighed and samples taken from it before delivery, called redrawn samples, which were sent to the purchaser and the quality tested by a comparison of these redrawn samples with those by which the cotton was sold; that no other or further examination was usual; that purchasers, until

again, relied upon these redrawn samples and weights not reweigh, and that cotton was frequently sold by the within the ten days before paying for it, changing sometimes three or four times in that period of time.

plaintiffs, on the question of fraud on the part of Jenkins & Chipman, in their purchase of the seventy bales, and in the condition, were permitted to show similar purchases of cotton of other persons, some within a few days of the failure, and one completed subsequent to the purchase of the seventy bales, to wit, on the Monday following, the day on which sale commenced upon the Saturday preceding said Monday. To the admission of this evidence the defendants objected.

The defendants offered to show that some of these other purchases were effected by suits in this court the cotton so sold, and subsequently abandoned the suits, and offered the writs and docket entries in those cases in evidence; but the presiding judge excluded the same.

It was evidence, the truth of which the plaintiffs contended to show that the defendants first heard of the purchase by Jenkins Brothers & Chipman on the afternoon of December 10, 1868, and that Frank Shaw, a member of the defendant's firm, that afternoon took over to Jenkins Brothers & Chipman's memorandum of the cotton the defendants held as security to ascertain about its quality and value, so as to see if they could be safely secured, and that in the course of conversation at that time, he first heard that the seventy bales had been purchased by the plaintiffs and not paid for, and that he told said plaintiffs that he should ship the cotton to the Liverpool house of the defendants for sale, to which Jenkins made no objection, and the next morning the same was, with other cotton, shipped by the defendants in a vessel loading for Liverpool. It was on this vessel when replevied. There was evidence tending to show that it was put on board of this vessel very early, as early as with business hours, on the morning of December 9, 1868. There was a conflict of evidence as to the time the warehouse was entered and the cotton shipped.

There is also evidence as to the plaintiffs' ownership of the cotton, and the defendant's interest or ownership in it, is what is hereinbefore stated in the testimony of Montague and Haskins.

The defendants, before arguing to the jury, requested the court to rule as follows :

1. " If the plaintiffs and William Mead were jointly interested in the profit and loss on the cotton in question in this case, and the cotton was purchased by them on joint account with said Mead, then the plaintiffs cannot recover, because said Mead is not joined as a party plaintiff in this case." The presiding judge ruled that, upon the evidence of the plaintiffs, if believed, it was not necessary that said Mead should have been joined as a party plaintiff.

2. " If this cotton was purchased by Jenkins Brothers & Chipman, to be paid for by them in ten days, and no false pretences or deceptive contrivances were used by them, then the plaintiffs cannot rescind the sale even as against Jenkins Brothers & Chipman, merely because they were insolvent at the time when they made the purchase, and they knew they were insolvent, and purchased the cotton without disclosing that fact to the sellers, and at the time of the purchase had no reasonable expectation of being able to pay for the cotton in the regular and ordinary course of their, Jenkins Brothers & Chipman's business."

3. " To set aside the sale even as between Jenkins Brothers & Chipman and the plaintiffs, the jury must be satisfied that Jenkins Brothers & Chipman bought the cotton, intending, at the time when they bought it, never to pay for it ; that it is not enough that the plaintiffs satisfy the jury that Jenkins Brothers & Chipman bought the cotton not intending to pay for it, or that they had no reasonable expectation of being able to pay for it, and the burden is upon the plaintiffs to satisfy the jury on this point, and if the jury are not satisfied on this point, or are left in doubt on this point, the jury need not go further on this branch of the case."

4. " If the jury are satisfied that the defendants received the cotton in question on December 5, 1868, in substitution for other cotton which they held as collateral security for the loan, then it is not enough that the jury are satisfied that Jenkins Brothers & Chipman bought the cotton, intending, at the time they bought it, not to pay for it, but the jury must go further before they can render a verdict on that ground for the plaintiffs, and must be satisfied by the plaintiffs, and the burden of proof is upon

now that before or at the time when the defendants received the cotton, they knew, or were informed of, or participated in it."

That the defendants subsequently heard or learned is immaterial. It is immaterial what their subsequent conduct was in relation to the cotton on board of a vessel, if, at the time when they received the cotton, they had no knowledge or information in the part of Jenkins Brothers & Chipman in the purchase of the cotton. That the burden of proof is on the plaintiffs to satisfy the jury on both propositions. First, that Jenkins Brothers & Chipman bought the cotton, intending, at the time, to sell it for it; and secondly, that the defendants, when they received the cotton, knew, or were informed, of the fraud; and if the plaintiffs fail to satisfy the jury on either of these propositions, the jury are left in doubt on either of these propositions, and the jury need not consider this branch of the case. The jury, and the defendants, so far as this branch of the case is concerned, are entitled to a verdict. And in that event, the court will proceed to the consideration of the next ground upon which the plaintiffs rely, and that is, that the sale was a conditional sale."

That the jury are satisfied that the sale of the cotton was a sale for cash, no time of payment being stipulated or agreed upon; that it was the custom and usage it was to be paid for in ten days, and the plaintiffs delivered it to Jenkins Brothers & Chipman, insisting upon the payment of the cash at the time of delivery, and thus put Jenkins Brothers & Chipman in possession of the cotton, so that they would appear, and did appear, to others as the owners of the cotton, and they being thus in possession of the cotton, delivered it to the defendants, in substitution for other cotton, and the defendants, as collateral security, and the defendants at the time of the delivery to them had no knowledge, or information, or cause to believe Jenkins Brothers & Chipman's cotton to be defective or invalid, then the plaintiffs are entitled to a verdict."

That a sale for cash is or is not a conditional sale, depending upon the circumstances. If it is a sale for cash to be paid in ten days after the date of sale, and the property is delivered within the ten days, and the purchaser without insisting upon the payment of the

money at the time of delivery, the sale is not a conditional sale, and the title to the property passes to the purchaser, and it cannot afterwards be reclaimed by the seller."

7. "If the cotton was sold and delivered by the plaintiffs to Jenkins Brothers & Chipman, and, by the usage of trade at that time, it was to be paid for in ten days from the date of sale, the plaintiffs cannot recover."

8. "If the sale was made, and no time of payment was specified, and the cotton was delivered by the plaintiffs to Jenkins Brothers & Chipman, without insisting upon the payment of the cash at the time of delivery, and without mentioning any condition, then the title to the cotton passed to Jenkins Brothers & Chipman, and the plaintiffs cannot recover."

9. "Where property is sold for cash on delivery, the seller is not bound to deliver unless the purchaser pays for it at the time of delivery; but if the seller does deliver it to the purchaser without insisting upon the condition, he thereby waives the condition and the title passes to the purchaser, and the seller cannot afterwards reclaim the property."

10. "In order to prevent the title to property, sold for cash on delivery, passing to the purchaser by a delivery, the delivery, as well as the sale, must be conditional; that is, the delivery must be upon the condition that no title to the property shall pass to the purchaser until he pays for the property, and the delivery must be stated by the seller to the purchaser to be made upon such condition."

11. "A custom or usage that the title to property sold to be paid for in ten days from the date of sale, and which has been delivered to the purchaser within the ten days, without any mention made of any condition, shall not pass to the purchaser until paid for, is not a good or valid custom."

12. "A custom or usage that cotton sold and delivered, where no time of payment is mentioned or specified, is to be paid for in ten days from the date of sale, and that a delivery thereof without any condition being mentioned or specified, is a conditional delivery and does not pass the title, is not a good or valid custom in respect to the condition, but such sale and delivery pass the title to the purchaser."

The plaintiffs do not claim that any mention was made of condition at the time of delivery, but they allege a custom among cotton dealers in December, 1868, in sales of cotton, that the time of payment is stipulated, to deliver the cotton at a certain time in ten days from the date of sale when requested by the purchaser, and to give the purchaser such ten days in which to receive the cotton. This time they say is by the usage given for the purpose of examining it, without the title passing until the time expires. Such custom is invalid, and the title to cotton so delivered passes to the purchaser."

An unauthorized delivery may be ratified by the seller, and the seller, after knowing of the delivery, sends to the purchaser a bill of the property in the usual form, and a certificate of the rights of the property, as in this case, and takes no steps to recover the property, until after the purchaser has failed, he ratifies the delivery."

The presiding judge charged the jury, among other things not material, as follows :

The plaintiffs say in this case that this was a fraudulent sale, by Jenkins Brothers & Chipman, at the time they bought the property, bought it intending not to pay for it, and that thus they are entitled to recover the property in the hands of the defendants, and they are so entitled to recover the property if they prove this fact, unless the defendants shall show a title clear and independent of the fraud. In other words, the first instance on this part of the case the burden of proof is on the plaintiffs, but if they have sustained that burden of proof and shown you that the goods were got from their possession by fraud, then it is for the defendants to show a title which is independent of fraud, and which, notwithstanding the fraud, will entitle them to hold the goods. The plaintiffs say that it was obtained by fraud by Jenkins Brothers & Chipman, and the title which they allege against Jenkins Brothers & Chipman is, that the property was purchased by them with the intention of not paying for it. In the matter of intention, they rely, as parties are or often are obliged to in many cases, upon collateral evidence for the purpose of showing what that intent was. It does not necessarily follow that because a party is insolvent, or because a party is borrowing money at large and usurious

interest, his purchase is a fraudulent one ; but those circumstances are circumstances to be considered in determining what his intent was ; and in the present case, taking all those circumstances together, the mode in which they were conducting their whole business, their transactions with others, the state of their finances, the mode in which they were making purchases and transfers, and the whole detail of their business which has been laid out before you, the plaintiffs contend that you must be satisfied that this was a fraudulent purchase by Jenkins Brothers & Chipman. If they have failed to satisfy you of that, of course they cannot recover ; but if they have satisfied you on that point upon a review of the whole evidence, — if you come to the conclusion that the plaintiffs have made out that this was a fraudulent purchase on the part of Jenkins Brothers & Chipman, then the plaintiffs are entitled to recover unless this can be met by the defendants. The defendants endeavor to meet it in this case by showing that they had a title which was clear of fraud, and that they were *bonâ fide* purchasers for a valuable consideration. The defendants must in order to maintain their title, show that the purchase was an honest one, and that it was made in good faith ; and they must further show that it was made for a valuable consideration.

“ If the defendants made a loan of \$25,000 to Jenkins Brothers & Chipman, to be secured by the pledge of collateral security, and from time to time as it was found convenient, they permitted them to change one piece of security for another, one lot for another ; and on the date in question they permitted Jenkins Brothers & Chipman to receive out of their hands the ninety-four bales of cotton, and the defendants received those eighty-six bales ; and at the time had no further knowledge of the transfer ; then, assuming that the transaction was an honest transfer, and that the only ground of claim against the defendants is upon the ground that the sale was a fraudulent sale, they would maintain their title ; because, in that case, they would show a title, in good faith and for a valuable consideration, and at the time when they received into their hands the seventy bales, they parted with other property of equal value.

“ That in regard to conditional sales, the law is, that where a sale is made upon condition, that condition must be complied with before the title passes, and that if property be delivered

condition that the property is not to pass to the person it is delivered, except upon the performance by him of a particular act; then the property does not pass until that act is performed; in other words, that the condition continues with and is a part of the article itself. And in this case the condition claimed by the plaintiffs is, that this was a sale made for cash, upon condition that cash should be paid to them at the time of delivery of the goods, and that even if you should find that the plaintiffs did not receive the cash, and that even if you should find that the plaintiffs did not receive the goods (because as to the delivery there is a dispute), that delivery was made under a usage of trade by which it was held to be a waiver of the condition. Ordinarily, if a party makes a sale upon a condition, and delivers the property without reservation or agreement in reference to the continuance of the condition, it would be construed as a waiver of the condition, and it would be the presumption of law, that if he delivered the article without reservation or agreement that the condition should continue, he intended to waive the condition. But in this case, the plaintiffs set up that there was a usage of trade existing in this city known to Jenkins & Chipman, as well as to themselves, under which this sale, which is called a cash sale, made upon the condition of payment of cash, and it was not a waiver of the condition to deliver the article to the purchaser; but that the condition was to be complied with it, until a compliance by the purchasers with the condition.

In the first place, it is necessary to consider, as a preliminary question, whether or not there was a delivery of the goods. The plaintiffs contend, in the first instance, that they received those goods; and if a party gets possession of goods, that is not delivery. If a party by a trespass, there is no contract of sale between him and another party, and he has no right to the possession of the goods, wrongfully taking possession of them, that is a trespass and not a real delivery. It is therefore necessary to consider in the first place whether there was a delivery of the goods in question. A delivery is not complete until the completion of every sale. A sale is imperfect until there is a delivery, and that delivery may be made, either actually by handing over the article, or it may be made constructively by handing over a bill of lading, or a receipt, or any of those things which are constructively deliveries, which would give the party holding this evidence

of title the right to receive the goods. The plaintiffs in this case contend that a delivery was never made by them, but that by a wrongful act on the part of some of the servants of Jenkins Brothers & Chipman, they obtained possession of these goods. The circumstances under which they obtained possession of these goods are for you to consider. And you will determine on the evidence whether or not there was an assent by Haskins & Montague, made either by themselves or through their servants intrusted with the goods, to the taking of them by Jenkins Brothers & Chipman; because if there was such assent, that was a delivery of the goods.

“Further, whether there was or was not any assent to the taking of the goods, when the circumstances came to be known to the plaintiff Montague that the goods were actually gone (even supposing that he had intended that they should not be delivered actually into the possession of Jenkins Brothers & Chipman), did he or did he not assent to that delivery? because if he assented to that delivery or consented that the goods should remain in the possession of Jenkins Brothers & Chipman, that was a sufficient delivery, although the original act of the party who permitted them to go away had been in violation of Montague’s orders, or in violation of his intention. In order to determine, then, whether Montague assented, you will consider the circumstances which have been testified to in regard to the time when Montague knew it, and the time which elapsed between that time and the time of the failure, which is the first time when Montague took active measures to get possession of the goods; and you will consider the act done by Montague, or under his direction, in the way of sending bills or weigher’s receipts. If, on this testimony, the plaintiffs have failed to satisfy you that there was no delivery (because, the goods being actually in possession of Jenkins Brothers & Chipman, it is for them to show you that they were there wrongfully); if they have shown you that they were there wrongfully, that the whole thing was a trespass, as they say, and that they never assented to it, then they are entitled to a verdict upon that statement of the case. If, however, these goods were delivered to Jenkins Brothers & Chipman by the plaintiffs, or having been delivered, that delivery was assented to, then you come to the consideration of the questions which will arise under the matter of conditional sale, to which this matter of delivery is essentially a preliminary question.

agreed in this case that there was nothing said upon the when these goods were to be paid for; that the written so far as evidenced by the bill of sale, makes no mention and there is no evidence that anything passed at the the plaintiffs contend that by the custom and usage of in Boston, it was a conditional sale; that it was a cash if it was a cash sale, it would be a conditional sale; cash sale strictly and legally, (I am not using now any meaning which may be given to the words "cash sale" here,) a cash sale means, if you pay me so much money, such an amount of goods; the one is conditional upon

plaintiffs contend that this was a conditional sale, and the terms of that condition they were entitled to have the the delivery of the goods. And they further contend now that there was a delivery by them), that by the the trade as it existed in this city, that was not a waiver condition. By the presumption of law a delivery would with the intention of passing the title, and there being ent as to condition, and there being no usage, it would title so as to give the title to the person to whom the was made. But the plaintiffs set up in this case a consale; and they further set up a usage that it is not a that condition to deliver over the goods; but that by of merchants in this city, the goods are first delivered order to give the purchaser an opportunity to inspect the nselves more accurately, and of comparing the samples ts; and then, as a matter of indulgence, it is customary him some little time for payment; but that the payme at once; and that, although as matter of usage it is for immediately, as a general thing, yet that the seller s the right to call for it at the moment of the delivery ods. On the other hand, the defendants in this case at that there is no such usage, and that where nothing is the time of payment, at the time of the sale, a credit of s allowed; that that is the usage of the merchants of and that a party cannot be called upon until the ex- that ten days; or if called upon before the expiration days, he is entitled to a rebate of the interest, because

the amount he pays is calculated upon the fact that he is to have a time equal to ten days, and that when called upon within the ten days, he is not under obligation to pay until the expiration of that time. You are to consider whether or not this custom, as it is contended for by the plaintiffs, is made out here, because they are to make out this custom that the sale is for cash, and that it is not a waiver of that condition to deliver and transfer the actual custody of the property to the other party.

“Then if you find in this case that the plaintiffs have made out that this was the usage, to deliver the goods, that this was a sale for cash according to the usage of the trade, for cash strictly, and that although in point of fact indulgence was permitted, it was indulgence only and not credit, and that by the same usage of the trade and as a part of the same usage, the seller could pass over and deliver the goods to the buyer, and yet not waive the condition of payment, then upon this part of the case the plaintiffs would be entitled to your verdict, and it would be unnecessary to go further; because if they proved a conditional sale, they would in that case have further proved that their goods were delivered over under such circumstances that the delivery could not be interpreted into a waiver of the condition, and therefore the goods would have been theirs at the time when Jenkins undertook to transfer them to the defendants, and the conditions being still annexed to them, Jenkins could not transfer them to the defendants any more than he could transfer any other piece of property from Haskins & Montague, and the plaintiffs would be entitled to recover.

“If you find that the plaintiffs are entitled to recover, either upon the ground of a conditional sale, or on the ground of a fraudulent sale, you will render a verdict for them for nominal damages; otherwise the defendants are entitled to a verdict for a sum which would be equal to the interest upon the value of this property from the time it was taken from them to the present time.”

The presiding judge, before charging the jury, requested the counsel, that if in charging the jury he did not cover in the charge the subject matter of the prayers, either by charging for or against the party, they would call his attention to it at the close of the charge. After finishing the charge, the presiding judge inquired of the counsel on both sides whether there was

omitted, and the counsel made no response to that in-
the counsel for the defendants stated that he excepted
sal to give the instructions requested, and to such part
rge as related to the subject matter of the requests.

y found a verdict for the plaintiffs, and the defendants
ceptions.

e was argued in November, 1872, by *J. D. Ball*, for the
, and *A. A. Ranney*, for the plaintiffs; and reargued
1874, by *B. F. Brooks & M. Storey*, for the defendants.
Ranney, for the plaintiffs.

J. Upon the facts stated in the bill of exceptions, in-
ly of the evidence relating to usage, there was a sale of
by which the title passed to Jenkins Brothers & Chip-

e of chattels, when the specific articles are set apart, or
for the purpose, and there is no stipulation for credit,
s between the parties, takes effect at once to pass the
purchaser, unless there is some agreement to the con-
d the price is also due at the same time. The seller
tain assumpsit for goods bargained and sold, without
r delivery. Until the delivery is complete and absolute
lien for the purchase money, and may retain possession
ment. *Morse v. Sherman*, 106 Mass. 430. *Arnold v.*
Cush. 33. *Rowley v. Bigelow*, 12 Pick. 307.

mise to deliver, involved in an agreement of sale, and
e to pay the purchase money, are mutually dependent.
rty is bound to perform without cotemporaneous per-
by the other. Payment of the price is the condition
h alone the purchaser can require the seller to complete
r delivery of the property. But it is so at the option of

If he proceeds to deliver without insisting upon pay-
without qualifying the act in some way, the condition
dependence is waived or severed. The contract is exe-
ly on his part, and he retains no lien upon the property.
f possession, unqualified, is a release or waiver of his
her it be in the nature of a condition affecting the title,
lien for the price. *Farlow v. Ellis*, 15 Gray, 229.
Dennie, 6 Pick. 262. *Carleton v. Sumner*, 4 Pick. 516.
sale is upon credit the seller ordinarily retains no lien,
special agreement.

The agreement of sale in this case was complete in all respects. Aside from the delivery, there were memoranda of the agreement in writing, sufficient to satisfy the statute of frauds. There being no provision for credit, the terms of payment are presumed to be cash. The principal question arises upon the point of delivery. There was a transfer of possession to the purchasers, with the assent or acquiescence of the sellers, such as to constitute a delivery that would discharge any condition or lien which attached to or grew out of the original transaction; unless controlled by some evidence to show that it was not for the purpose of enabling the purchaser to exercise the full rights of ownership. That the goods were bought by a trader, or for the purpose of a resale, may have an important bearing to show that an absolute delivery was intended. *Smith v. Dennie*, 6 Pick. 262, 266. *Burbank v. Crooker*, 7 Gray, 158.

To overcome the effect of such a delivery of possession to purchasers who were dealers in cotton, the plaintiffs relied mainly upon evidence of an alleged usage of trade. The offer of proof, held to be competent, was stated as follows: "That by the usage of trade and the general understanding among merchants, in cash sales, the goods were delivered or put into the possession of the buyer without prepayment, or first exacting payment of the money, with the understanding that it was not to pass title or be a waiver of the condition to pay cash."

The testimony of the plaintiffs' witnesses varied as to the details and effect of this alleged usage. The witnesses agreed, however, substantially, that it is to allow ten days "in which to have the cotton turned out, weighed, and for the purchaser to examine it and see if the weight is correct, and see if the cotton is in every way merchantable;" that in this process the goods pass into the hands of the purchaser, without reference to payment at the time; that in sales for cash "the custom and understanding is that the title vests in the seller until the cotton is paid for;" that the delay for ten days in such cases is not a credit; and that delivery is not a waiver of the condition of payment. Whether the delay of payment for ten days is a right of the purchaser, or an indulgence which may be withheld in the discretion of the seller, the testimony does not clearly indicate; but in the instructions to the jury it is assumed to be an indulgence merely, unless they should find that credit was given.

the part of the defendants there was testimony that the sale is always made from redrawn samples before delivery, that the allowance of ten days is a credit, for which a re-advance of interest is allowed upon earlier payment; and that the defendants frequently resell within the ten days, and before making payment.

The instructions given to the jury allowed them to find, upon the evidence, that the sale was a conditional one, by which no title passed to the purchasers; that the delivery, although made in compliance with the contract, was no waiver of the condition; and that the goods were not the property of the plaintiffs at the time Jenkins Brothman undertook to sell and transfer them to the defendants. It is not clear, upon the report, that the instructions did not further, and in effect direct the jury that the plaintiffs were entitled to a verdict if they had proved the usage to be as alleged by them.

It is the opinion of the court that the effect thus given to usage, and the proof admitted to establish its existence and operation, are within the limits within which such evidence may properly be received, and do not influence the interpretation of contracts and dealings between parties.

Usage is a matter of fact, not of opinion. Usage of trade is a mode of dealing; a mode of conducting transactions of a particular kind.

It is proved by witnesses testifying of its existence and operation from their knowledge obtained by observation of what is done by themselves and others in the trade to which it applies. But their conclusions or inferences as to its effect, either upon a contract or the legal title or rights of parties, are not to be drawn to show the character or force of the usage. Neither is it competent for them to testify what is the understanding of the parties with regard to its effect. The effect is to be determined by the court, or by the jury under its direction. Like other facts and circumstances attending a transaction, usage serves to aid in interpreting and applying the words and acts or conduct of parties in their dealings with each other, when the words and acts themselves are equivocal or not explicit and decisive. Their dealings are to be understood as to be conducted with reference to, or at least in accordance with the usage, and it may therefore be resorted to for supplying the unexpressed terms of their agreements, on

the ground of presumed intention and mutual understanding. In this way it may modify the application of general rules of law. But it cannot be allowed to control the express intention of the parties to an agreement; nor the interpretation and effect which result from an established rule of law applicable to it; nor to engraft on a contract of sale a stipulation or obligation different from or inconsistent with the rule of the common law on the same subject. *Dickinson v. Gay*, 7 Allen, 29. *Dodd v. Farlow*, 11 Allen, 426. *Boardman v. Spooner*, 13 Allen, 353. *Reed v. Richardson*, 98 Mass. 216. *Odiorne v. New England Ins. Co.* 101 Mass. 551. *Snelling v. Hall*, 107 Mass. 134. 1 Greenl. Ev. § 294. 2 Ib. § 252. 8 Kent Com. (12th ed.) 260, and note *c*.

The understanding of a community, or of a class, as to a legal effect or an implication of law, is not a valid usage; and evidence to prove it is not competent to determine legal rights under contracts. So, too, the intent or understanding with which parties enter into a particular contract, or conduct in its execution, is not properly shown by evidence of the intent or understanding with which others perform like transactions, although the evidence is sufficiently comprehensive to establish a custom or usage, if its nature would admit of it.

The evidence, upon which the question of delivery in this case was submitted to the jury, was objectionable on one or both of these grounds.

Usage in regard to the mode of carrying out the transaction of a sale of cotton may be shown, upon a disputed question of delivery. If there is any evidence tending to show that, in the particular instance, the turning out of the cotton and allowing it to go into the hands of the other party was, in fact, for the purpose of examination, or other special and limited purpose, and not to give them possession as purchasers, then proof that it was in accordance with the usual course of dealing to give opportunity for examination in that mode would be competent, in aid of the other evidence, and might become significant that such was the real character and purpose of the transfer of possession. If in fact there was no other purpose than to complete the sale by delivering the goods to them as owners by the purchase, the title would thereby become absolute in them, by operation of law; and any supposed usage to the contrary would be invalid.

facie, the voluntary transfer of possession is delivery ; effect of the usage which the testimony tended to prove, competent and valid, would be to give to the purchasers to rescind for cause discovered within the ten days, and sellers the right to treat the contract as rescinded if the goods are not accepted and paid for within that time ; or per-
 to revoke the delivery and restore their lien, if they could possession. If the allowance of ten days for examination of the goods is a matter of indulgence merely, at the discretion of the seller, it is then not inconsistent with the general rule of delivery of possession is a waiver of the seller's lien for payment, and a waiver of payment as a condition precedent. If the seller intends to insist upon either he must refuse the indulgence, or protect his right by a special and qualified delivery. On the other hand, to give to the supposed usage the full effect for it, to wit, that no title passes upon an ordinary sale of goods every without actual payment of the consideration, would make all such transactions to be construed as mere bailments or leases, giving to the purchaser no right to control or deal with the goods in any manner except for the special purpose of examination. The expiration of ten days without payment would make the condition and vest the title. What kind and extent of remedies afterwards on the part of the seller might serve the purpose, and what exactly would be the relations of the parties, the rights of those who should purchase the property while the condition lasts are questions full of difficulty. The inevitable uncertainty of all titles to goods transmitted from hand to hand in the various methods of sale and purchase, and the embarrassments to commercial transactions would be constantly exposed from the operation of a usage which should so restrict the effect of a sale of goods apparently executed by delivery, are sufficient to show that it is not to require its rejection as unreasonable. *See Commercial Ins. Co. 10 Allen, 305.*

Delivery alone will not convert a voluntary and unqualified delivery of goods without payment, of goods sold for cash, into a mere deposit or loan. Such a deposit of goods that are the subject of a contract of sale to the depositary may exist, and be proved by the evidence. We do not think it was so proved in this

We cannot anticipate what the evidence may be upon another trial. Judging from what now appears, the only right of the plaintiffs was to revoke the delivery, or to rescind the contract of sale. But as the property has passed into the hands of others upon a valuable consideration, the right to regain possession of the property by recovery against them will depend upon the question whether they hold in good faith and without being chargeable with notice of the defect of title in Jenkins Brothers & Chipman.

Upon the other ground of fraud and deceit on the part of Jenkins Brothers & Chipman, in procuring the sale to be made to them, several exceptions are taken, mostly to the admission of evidence.

Other purchases made by them of other parties about the same time may be competent, if they are so connected as to show a general purpose in their transactions, or that they were conducting business in some unusual manner, indicating an expectation of failure. *Rowley v. Bigelow*, 12 Pick. 307-311. *Jordan v. Osgood*, 109 Mass. 457, and cases cited. The exceptions do not show that such was not the case here.

That some of the other parties, of whom they had so purchased, had brought suits and abandoned them was clearly incompetent, and rightly excluded as *inter alios*.

The state of their bank account and their mode of overdrawing, for a week or more before the purchase, was competent, as tending to show that they must have been aware of their condition. *Jordan v. Osgood*, *supra*.

The amount of their liabilities at the time of their failure was a fact competent to be proved in the case. It had some tendency to show what their financial condition was four days previously, when the purchase was made. It might be shown by the assignees in bankruptcy, if they had the means of knowing what it was. The exceptions do not show that they had not.

The amount realized from the assets of the firm might have aided in showing their value at the time of the failure, in connection with other evidence. The exceptions do not show that this testimony was incompetent or prejudicial.

The original petition in bankruptcy was in the nature of a subsequent declaration impeaching the sale previously made by them; and the record of adjudication was *inter alios*. Neither could

affect the defendants, and both were wrongly admitted.
v. Carleton, 1 Allen, 109, 115.

ing as to the burden of proof was substantially right.
 Defendants undertook to set up a title better than that of
 Brothers & Chipman, from whom they acquired it, it was
 upon them to make out the facts to sustain that prop-
Morgan v. Morse, 13 Gray, 150. The burden was upon
 least to show that they were *bond fide* purchasers for
Easter v. Allen, 8 Allen, 7.

se shows that Mead was not a partner having an inter-
 capital or in the property held by the firm. He had
 contingent interest in the profits. He was not a neces-
 y to the suit.

Exceptions sustained.

CENTRAL NATIONAL BANK vs. JOSEPH PRATT.

March 9. — September 10, 1874. COLT & ENDICOTT, JJ.,
 absent.

the constitutional power of Congress to fix the rate of interest which a
 ank may take upon a loan of money and to determine the penalty to be
 or taking a greater rate, and such power when exercised by Congress is
 of state legislation.

on of the U. S. St. of 1864, c. 106, § 30, limiting the forfeiture for the
 urious charges by national banks to the interest, applies as well to
 ublished in states where a rate of interest is fixed by law, as to banks in
 ere no rate is fixed.

New York imposing penalties for taking usury do not apply to national
 ublished within the limits of that state.

ACT by a national bank organized under the national
 acts of the United States, and having its place of business
 y of New York, against the indorser of a bill of exchange
 y Joseph M. Strong of New York upon Matt Ellis of
 payable to the order of the defendant, and by him in-
 the plaintiff, and accepted by Ellis. Trial in the
 Court, before *Devens*, J., who reserved the case for the
 tion of this court on the following report :

bill of exchange was discounted by the plaintiff in New
 the day of its date, upon presentation for discount by
 ng. It was agreed by the defendant at the trial that the

plaintiff was entitled to recover, unless the plaintiff took or reserved a greater rate of interest for discounting said bill than seven per centum per annum, and unless the bill of exchange was void by virtue of the laws of the State of New York against usury. The defendant's answer set up that in discounting the bill of exchange, the plaintiff lent to the drawer a sum of money for which it received usurious interest contrary to the laws of New York, and that by so doing the bill of exchange was void.

"The plaintiff contended that the laws of New York against usury were controlled by the national banking acts, and that the bill of exchange sued upon would not be void even if usurious interest had been reserved or taken by the plaintiff in discounting said bill; and this question is reserved, at the request of both parties, for determination by the Supreme Judicial Court. If the court shall hold that such usury does not render the bill of exchange void, then judgment is to be rendered for the plaintiff; if such usury does render the bill of exchange void, the case is to stand for trial in the Superior Court."

D. E. Ware & J. T. Morse, Jr., for the plaintiff.

E. Avery & R. C. Lincoln, for the defendant. 1. The question whether the effect of usury is a forfeiture of the whole debt or bill, under the law of the State of New York, or of the interest merely, under United States law, depends upon the construction and operation of the U. S. St. of 1864, c. 106, § 30. It is contended for the defendant that the consistent and correct construction of this section leaves the case to be governed by the New York usury laws; and further, that if its operation were such as to supersede the state law, it would be unconstitutional. This is the ground taken by the New York Court of Appeals, in a case like the present one. *First National Bank of Whitehall v. Lamb*, 50 N. Y. 95. See also *In re Wild*, 11 Blatchf. 243. But, independently of that case, the question may admit of a further consideration. It is submitted that any provision of the banking act which is not necessary, i. e. conducive or useful to the end proposed by the act, especially if in conflict with a state law upon the same subject, is unconstitutional, and that the provision concerning forfeiture, if connected with the first paragraph of § 30, is, so far, unnecessary and incongruous. That construction, therefore, which avoids such result (as the structure of the

admits equally of two interpretations) may properly be
ed the better expression of the intention of the framers.
en, contended for the defendant, that the enactment of a
re and penalty for usurious loans and discounts in all the
s unnecessary. It is manifest from the general tenor of
and from § 30 itself, that the sole purpose therein was to
n banks of issue, to provide for the circulation of a na-
urrency, and to legislate for the other functions of a bank,
t and deposit, only so far as such legislation was "neces-
d proper" to carry out that sole purpose. The banks
protected in the lawful exercise of their powers; but is it
e necessary and proper for carrying into execution these
that Congress should prescribe punishment for an exercise
powers, arising in purely private dealings, which may be
l merely because so ordained by state laws, unless such
cts hinder the usefulness of the banks in accomplishing
pose for which they were established? It is submitted
ordaining a rate of interest on loans and discounts, and,
vents, a punishment for taking a greater than the fixed
not necessary or appropriate to promote the sole purpose
h these national banks were established,—the circulation
ional currency. In some states there are no usury laws,
the usefulness of these banks has not been impaired.
aws are made solely for the benefit and protection of trade
community, and not of the banks. And inasmuch as
s evidently favored the existence of usury laws, the for-
or, which the national banking act has provided may well
ained as enacted for the purpose of protecting the public
y oppressive dealings of these United States agents in
ates where there are no usury laws. In other states, Con-
s expressly left this protection to be afforded by the legis-
of the states themselves. A further explanation of this
n with regard to forfeiture may be that, since without it
discounted by a bank, at more than seven per cent., in a
ere no rate is fixed, would be void, under the common
purpose is also to modify the common law in those states
has not already been changed by state enactment.
also contended that this provision, if made to apply to
loans and discounts in all the states, is, so far, incongru-

ous. The utility of usury laws is a matter which each state determined for itself ; and if it does not militate against the purpose of the creation of these national banks, that state law should determine the rate of interest on their loans and discounts. Can it operate against this purpose, that state law should determine the penalty or forfeiture? Certainly, the power that establishes the maximum rate of interest which can legally be charged or taken, is the proper power to ordain the penalty or forfeiture which is to compel observance of the law. Therefore it is understood that Congress is not to be supposed to have meditated or decreed incongruous a thing, as to impose a penalty for the violation of state law. The penalty of the section is not cumulative, there is no concurrent power in this matter between the States and the United States ; and the first paragraph of the section is declaratory merely, and not a reënactment of the various state laws on the subject of interest. The last amendment agreed to in the House of Representatives was, that " each bank should be governed by the state law regulating interest in the state where it is to be located ; " and such is manifestly the meaning and design of the section in its present form.

2. If any enactment of Congress, under an implied power, being in direct conflict with the laws and unsundered powers of the states, is not necessary or conducive to the end proposed, the state law is not to yield, but the enactment is unjustified and unconstitutional. In *National Bank v. Commonwealth of Massachusetts*, Wall. 358, 362, the court say of the banks of the United States, " They are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and controlled by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts are all based upon state law. It is only when state law incapacitates the banks from discharging their obligations to the government that it becomes unconstitutional." It certainly seems, then, that any qualification of that right should be made, and the effect of any invalidity of their contracts in the acquisition of property should be determined, by state law.

8. It is manifest that a uniform rate of interest for the whole country, as was established by the bank acts of 1791 and

considered by Congress essential to the purpose for which national banks have been established, although the principal function of lending money was so considered. How can a uniform penalty for violations of diverse state laws be so conducive to such purpose? In the bank act of 1863 the entire provision is, that the Bank of the United States shall not take more than at the rate of six per cent. upon its discounts, not adding any penalty. In the case of *the United States v. Owens*, 2 Pet. 527, 538, the legal effect of this provision was held to be, to make void a note discounted in Kentucky at a rate of interest greater than six per cent. in force of the common law. But the *S. C. nom. Bank of the United States v. Waggener*, 9 Pet. 378, was decided with reference to an usury act of the State of Kentucky. The penalty of the usury act was applied to a contract which violated the above provision of the United States bank act, and "the court made the decision exclusively upon the question of usury, precisely as if it had been given to an individual." See the *Commercial Bank of Manchester v. Nolan*, 7 How. Miss. 508. Much more, could the penalty fixed by a state law apply to a contract made only because violating a provision of that state law.

ON, J. The thirtieth section of the act to provide a uniform currency is as follows: "Every association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at a rate not exceeding the rate allowed by the laws of the state or territory where the bank is located, and no more, except that where by the laws of the state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state under this act. And when no rate is fixed by the laws of the state or territory, the bank may receive, reserve or charge a rate not exceeding seven per cent. and such interest may be taken in advance reckoning the time from which the note, bill or other evidence of debt has to run. Any bank knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged a trustee of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid in advance. And in case a greater rate of interest has been paid,

the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided that such action is commenced within one year from the time the usurious transaction occurred. In the purchase, discount or sale of a *bond fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." U. S. St. 1864, c. 106.

The first question in this case is as to the true construction of this section. The defendant contends that in the provision "the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged to be a forfeiture of the entire interest," the word "aforesaid" refers to the rate established by the paragraph immediately preceding. If this be so, then the act of Congress provides no penalty for usurious interest when the rate of interest is fixed by the law of the state or territory where the bank is located, and the plaintiff contends that the penalty is to be determined by the law of the state. On the other hand if the true construction of the statute is, that the penalty therein provided applies uniformly to all banks which take more than a legal rate of interest, it follows that it supersedes the state law so far as repugnant to it. It cannot be contended that Congress intended to expose banks located in states wherein the rate of interest is fixed by law to a double penalty; but if the act imposes a uniform penalty on all banks, this excludes the power of the states to legislate on the same subject, and annuls or renders inoperative the state law in their application to banks established under the act.

In construing statutes it is to be assumed that the framers intended the meaning which the words used naturally convey to the reader. And this rule determines the construction unless it can be found something in the context, or in the nature and reason of the subject matter, which clearly shows a different intention. In the act in question it seems clear to us that, by the plain and obvious meaning of the language, the penalty of a forfeiture of the entire interest applies to all cases where a rate of interest is charged in excess of the legal rate.

ed by any bank greater than the rate which the bank is
 ed to take by the previous provisions of the section.
 pression "a rate of interest greater than aforesaid" refers
 to the rate established by adopting the rate allowed by
 of the states or territories, as to the rate fixed at seven
 . if no rate is fixed by such laws. There is no rule of
 tical construction which limits its reference to the para-
 mmediately preceding. We think, in view of the whole
 the policy of Congress clearly was to keep within its
 trol the penalties to be imposed upon the banks for vio-
 ne provisions of the act. This view is confirmed by the
 of the legislation upon this subject. The original cur-
 t, of February 25, 1863, of which the act of 1864 is a
 and amendment, provided that every association might
 uch rate of interest as was the established rate in the
 ere it was located, and that the charging a greater rate
 e held a forfeiture of the debt, thus making the rate con-
 the laws of the state, but establishing a fixed and uniform
 for a violation of the act, and showing that it was the
 the legislation upon this subject to keep the matter of
 alties to be imposed upon the banks for usurious trans-
 within the control of Congress.

ns to us therefore, that considering the natural meaning
 nguage, the context, and the history of legislation, by the
 sonable interpretation of this section, a bank located in a
 erein the rate of interest is fixed by its laws, which takes
 e rate of interest, is subject to the penalty of a forfeiture
 ntire interest provided by the act, and is not subject to a
 or different penalty provided by the state laws against

efendant also contends that the provision, thus construed,
 the constitutional powers of Congress, and is invalid.

ettled, as a judicial question, that the Constitution con-
 a Congress the power to establish a bank or a system of
 s necessary instrumentalities for executing the powers
 y given it and performing the duties imposed upon it.
 s decided by the Supreme Court of the United States in
 the case of *M'Culloch v. Maryland*, 4 Wheat. 316.
 ustice Marshall, in delivering the opinion of the court,

puts the case upon the ground that a national bank was convenient, useful and essential instrument in the prosecution of the fiscal operations of the government.

In the later case of *Osborn v. United States Bank*, 9 Wheat 859, the question was reconsidered, and the doctrine reaffirmed that a national bank was an instrument which was necessary and proper for carrying into effect the powers vested in the government; that Congress had the power to create a bank for national purposes and to endow it with such faculties and functions as were necessary to enable it to effect its object, and that among these is the faculty of lending and dealing in money.

The precise question in these cases was as to the right of the state to tax the national bank, but the principles upon which the question was decided are decisive of the case at bar.

The power of the government to create a bank is supreme. From its nature it includes the power to endow it with all the faculties as are appropriate to accomplish its object. It is, as stated in *Osborn v. United States Bank, supra*, that the faculty of lending and dealing in money is an appropriate and necessary faculty for a bank, and that without it the bank would be incapable of performing its public functions in the most efficient manner. The rate of interest to be charged for the use of money is a necessary incident of a loan, and the power in Congress to authorize a bank to lend money involves the power to fix the rate of interest and the penalty for taking a greater rate. If Congress may fix the rate of interest, it may practically destroy this faculty of the bank. The power to create a bank includes the power to fix the limitations within which it may exercise its functions and faculties, and to determine the causes for which and the manner in which it may be destroyed. This power vested in Congress is inconsistent with a power in any state or territory to affix penalties upon the bank for taking unlawful interest, or for any violation of the act of Congress. We are of opinion that it is within the constitutional power of Congress to fix the rate of interest which a national bank might take upon a loan of money, and to determine the penalty to be imposed for taking a greater rate; that such power, when exercised by Congress, is exclusive of state legislation; that the provision of the thirtieth section of the act of Congress we are considering, imposing a penal-

unlawful interest, applies as well to banks established in
 where a rate of interest is fixed by law, as to banks in
 where no rate is fixed, and therefore that the laws of New
 imposing penalties for taking usury do not apply to national
 established within its limits. The Supreme Court of Ohio
 in the same view of the constitutionality and construc-
 the statute which we entertain. *First National Bank of*
s. v. Garlinghouse, 22 Ohio St. 492. We are aware
 Court of Appeals of New York has decided differently
 on points. *First National Bank of Whitehall v. Lamb*,
 95. But, notwithstanding the great respect we have
 for the eminent tribunal, we are unable to concur in the con-
 sideration reached.

Judgment for plaintiff.

JOSEPH M. DAVIS, receiver, vs. GEORGE H. RANDALL.

March 9. — September 11, 1874. COLT & ENDICOTT, JJ.,
 absent.

Sections of the U. S. St. of 1864, c. 106, § 30, imposing penalties upon na-
 tional banks for taking usury, supersede the state laws upon that subject.

In a suit against the acceptor of a draft which has been discounted,
 in which money has been advanced by the plaintiff, that the draft was ac-
 commodated by the drawer.

It is within the authority of the president of a national bank to bind the
 bank by an agreement, with the acceptor of a draft which is discounted by the
 bank, to enforce the draft against him, yet oral evidence of such an agree-
 ment is not competent, in defence of a suit by the bank against the acceptor.

Verdict against the acceptor of two bills of exchange. Trial
 in the Superior Court, before *Devens*, J., who reported the case
 for the consideration of this court in substance as follows: The
 defendant to maintain the issues on his part, proved that the Ocean
 National Bank, of the city of New York, a national banking asso-
 ciation organized pursuant to the laws of the United States, and
 in the city of New York, having failed to redeem its cir-
 cular notes, when payment thereof was legally demanded at
 the office of said association, he was on December 12, 1871, duly
 appointed by the comptroller of the currency of the treasury de-
 partment of the United States, receiver of said Ocean National

Bank ; that he accepted said office, took possession of the of the bank, and that the drafts in suit had come into his sion as such receiver as part of the assets of said bank ; that liam B. Fiske & Company, a firm doing business in New city, made the bills and drafts in suit, payable to their order, and indorsed the same to said Ocean National Bank, presenting the same for discount at New York city, accepted defendant ; that said bank discounted one of the drafts for \$6 on September 16, 1871, and the other for \$843.07, on November 11, 1871, and passed the proceeds to the credit of said Fiske & Co., less the discount ; that said drafts were so unpaid. The drafts were put in evidence, and the plaintiff rested his case.

The defendant, to sustain the issues on his part, proved, objection, the evidence being admitted to be considered if content ; that on or about August 1, 1871, said firm of W. B. Fiske & Co. obtained a loan of five thousand dollars of said Ocean National Bank, through C. S. Stevenson, its president, and secured the same by a mortgage to the bank of real estate to the amount of five thousand dollars, agreeing to pay twelve per cent. per annum, the rate required by said bank for said loan ; that the amount of said loan was passed to the credit of said W. B. Fiske & Co. who were entitled to draw the same at sight ; that on application to the bank for the money on said loan, the bank, through its president, requested Fiske & Co. not to draw out said loan at once, but to present drafts or bills to said bank on sixty and ninety days, or other short periods, as they might need the money, for said five thousand dollars, so that the same would look more like a loan, and that said bank would discount the same at the rate of twelve per cent. per annum, and keep on discounting drafts as fast as the same matured ; that Fiske & Co., in order to borrow or accommodate the bank, through its president, in this regard agreed to avail themselves of the loan in this way, but informed the president that such paper would have to be accommodated by other parties ; that they knew several parties, amongst others the defendant in this action, who might be willing to accept for their accommodation, but it must be understood and agreed by the bank that the parties so accepting drafts or bills were not to be looked to for payment, or to be held liable thereon in any way ; but

to look to its mortgage security for the amounts received from said bills or drafts, so to be presented to said bank agent, and that the acceptors must be informed of this arrangement to induce them to accept; that the president replied that the bank will discount such paper for you; that therefore Fiske & Co. informed the defendant fully of the loan secured above stated, and of the understanding and agreement with said bank, and Fiske & Co. solicited the defendant to have drafts to be drawn by said firm upon the defendant, in which he said the bank had agreed not to look to him for payment, and knew that his acceptances were to be wholly for the accommodation of Fiske & Co., and being in no ways indebted to them, and having no effects of said firm in his possession or control, and to enable said bank to oblige the bank in the respect above stated, and to avail himself of the same, and believing and relying on the fact that he was not required to be paid upon for payment as acceptor or otherwise, by said bank, or any other person, did accept in all some four or five bills at different times, including the two drafts in suit.

The manner of acceptance was as follows: Drafts or bills with which the bank had no account for which same were drawn and on which the name of Fiske & Co. did not exist, were by Fiske & Co. presented to the defendant, and the word "accepted," with the name of the defendant, were written thereon, the same returned to Fiske & Co. and thereafter Fiske & Co. filled up said drafts, putting in the name of the defendant, making them payable to their own order, signing, indorsing and presenting the same to said bank for discount, the president of the bank said that the drafts had been accepted by the defendant for the accommodation of Fiske & Co. under said arrangement, and the bank never sending any notice to the defendant for acceptance at any time, or having any communication with the defendant; that all the drafts accepted by the defendant except those in suit, had been taken up or paid by Fiske & Co. at maturity, and that the defendant had never been required to pay the same, or had paid the same in any manner, and the defendant regarding and believing his acceptance would be sufficient to discharge him, and that he should hear of the same; that the drafts or bills in suit were presented to him for collection after said bank had failed, or after the same had come to the hands of the plaintiff as receiver, and that when

called upon for payment, he declined to pay the same on ground that his acceptance was for the accommodation of Fiske & Co.; that he had no funds of theirs, and that the Bank had agreed not to look to him for payment; that the amount obtained by Fiske & Co. on bills discounted by said bank, including these in suit, was about five thousand dollars, the amount of the original loan, and that the receiver of the bank still held the mortgage given by Fiske & Co. as part of the assets of the bank; that the defendant had never received any consideration in payment, benefit or advantage, in any way for his acceptance, and held any security indemnifying him for the same from any one.

That all drafts on which his name appeared as acceptor, including those in suit, were presented by Fiske & Co., and were counted by said bank in the city of New York. The defendant further proved that at the times of the discount of the bills and drafts in suit, the rate of twelve per cent. per annum was demanded by said bank and agreed to be paid by said Fiske & Co. on the discount of same by said bank; that seven per cent. was deducted at the time of their discount and thereafter and before the maturity of either, and on November 23, 1871, the bank paid to Fiske & Co. for the additional five per cent. which was paid by said firm, making twelve per cent. in the whole, paid on the bills or discounts on said bills or drafts.

That under the laws of the State of New York, seven per cent. per annum is the legal rate of interest, and that all bonds, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whether before or whereby these shall be reserved or taken or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods or things in action, than is above prescribed (seven per cent.) shall be void; and the statute being an act to prevent usury, passed May 15, 1837, relating thereto, was read in evidence to the jury and may be referred to.

The plaintiff not controverting the evidence on behalf of the defendant as to the circumstances under which the notes were discounted and negotiated, and it appearing that no fact was in dispute between the parties, the presiding judge directed a *verdict* to be entered for the plaintiff for the amount

its, and reported the case for the consideration of this
 such verdict to stand or be amended to a verdict for the
 nt as this court should determine.

Reed, for the plaintiff.

Randall, pro se.

ON, J. The defence that the drafts in suit are void un-
 laws of New York against usury, cannot be sustained.
 of Congress to provide a national currency supersedes the
 rs upon this subject so far as applicable to national banks.
 t. 1864, c. 106, § 30. *Central National Bank of New*
Pratt, ante, 539.

ther defence relied upon is in substance that the defend-
 pted the drafts in suit for the accommodation of W. B.
 Co., and that before they were accepted the president of
 k orally agreed that the defendant should not be called
 pay the drafts, but the bank would look to other securi-
 ch it held.

act that the defendant accepted the drafts for the accom-
 n of the drawers is immaterial. They were discounted by
 k and the money advanced upon them. This was a suf-
 nsideration for the acceptance, and the defendant is liable
 tor, unless the alleged agreement not to enforce them
 him is a defence. But, if it was within the authority
 resident to bind the bank by such an agreement, (which
 be decided,) we are of opinion that oral evidence of such
 nt is not competent. It violates the rule of law that oral
 is not admissible to control or vary the terms of a writ-
 tract.

acceptance of the defendant was an absolute promise to
 is not competent for him to contradict the written con-
 proof of an oral agreement that he accepted the drafts
 condition that he should not be called upon to pay them
 g to their tenor. *Wright v. Morse*, 9 Gray, 387. *Allen*
sh, 4 Gray, 504, and cases cited.

ding to the terms of the report, there must be

Judgment on the verdict for the plaintiff.

| | |
|-----|-----|
| 115 | 552 |
| 147 | 473 |
| 115 | 552 |
| 152 | 136 |

NANCY D. LEGGATE vs. ELBRIDGE G. MOULTON.

Suffolk. March 12. — September 30, 1874. COLT & ENDICOTT
absent.

The question whether a cause of action survives after the death of the plaintiff
be raised by demurrer.

An action for fraudulent representations by means of which a person was in-
to part with real estate, does not survive by force of the Gen. Sts. c. 127, §
An action for wrongful and fraudulent acts of the defendant which induced
to set aside a verdict obtained by the plaintiff, if ever maintainable, does n-
vive, after the death of the plaintiff, by force of the Gen. Sts. c. 127, §
damage is alleged to have been done to any specific estate of the intestate.

TORT. The defendant demurred to the declaration ;
before the demurrer came on for hearing the plaintiff died
her administrator came in to prosecute the action ; where
the defendant assigned as another ground of demurrer that
causes of action set forth in the declaration did not sur-
Hearing before a single justice of this court, who sustained
demurrer and ordered judgment for the defendant. The pla-
appealed to the full court. The nature of the declaration
forth in the opinion.

W. F. Slocum & W. S. Slocum, for the defendant.

C. Cowley, for the plaintiff. 1. The question whether
action does or does not survive the plaintiff's death cannot
raised upon demurrer.

2. When the wrong has been the source of profit or pecu-
advantage to the wrongdoers, or has caused a loss or dimin-
of estate to the aggrieved person, the right of action sur-
independently of any statute. *Pitts v. Hale*, 3 Mass. 321.
len v. Baldwin, 4 Mass. 480. *Stetson v. Kempton*, 13 Mass.
Cravath v. Plympton, 13 Mass. 454. *Wilbur v. Gilmor*
Pick. 250. *Middleton v. Robinson*, 1 Bay, 58. *Nettl*
D'Oyley, 2 Brev. 27. *Hambly v. Trott*, Cowp. 371.

DEVENS, J. The question whether the causes of action v-
either count of the declaration survive to the administrator
has come in to prosecute the suit, the original plaintiff h-
deceased, may properly be presented by demurrer. The c-
ration shows upon its face that the suit is for injuries alleg-
have been done to the property of the intestate in her lifeti-

first count is for an alleged imposition upon the intestate, of false and fraudulent representations to her of the personal and pecuniary ability of one McLaughlin, by which she was induced to part with her real estate to McLaughlin, who defrauded her of the value of it. That the action on this count is one which would survive by the common law or the English law, in aid of it which have been adopted here, is not conclusive.

But it is argued that it may be maintained under the *Rev. Sts. c. 127, § 1*, which provide that in addition to the actions which survive at common law, actions for "damage done to real estate" shall also survive; and that, within the scope of the statute, it is a damage done to the estate of the intestate, because she was induced by the fraud of the defendant to part with it to one who unjustly deprived her of the payment.

The statute was however intended to give a remedy which should survive only for injuries of a specific character to the personal estate, and not to include actions for damages for fraud committed upon the intestate, by which she might have been induced to part with her property at less than its value, or to mislead herself on account of the confidence reposed by her in the party thus deceiving her as to diminish her property. The action in the present count is the fraud; the real estate was sustained no damage or injury; but the fraud of the defendant induced the intestate to part with it under circumstances which prevented her from receiving its value.

See *Head v. Hatch*, 19 Pick. 47, an action brought for fraud in recommending one as in good credit, by which the plaintiff was induced to sell him goods on credit, was held not to be within the provisions of the *Rev. Sts. c. 93, § 7*. The difference between that and the present case is that there the question was on the death of the defendant; but the principle upon which it was decided, that "a mere fraud or cheat by which one is induced to part with his property at less than its value, or to mislead himself on account of the confidence reposed by him in the party thus deceiving him as to diminish his property, is not a pecuniary loss cannot be regarded as a damage done to the estate," conclusively settles that the cause of action set forth in the first count does not survive. To the same effect are *Tower*, 14 Gray, 183; *Stillman v. Hollenbeck*, 4 Allen, 346; *Cummings v. Bird*, *ante*, 346.

Other considerations compel us to hold that the cause of action set forth in the second count (assuming that such count does

set forth a cause of action) does not survive. It alleges wrongful and fraudulent acts to have been done by the defendant the effect of which has been to induce the court before which the certain action had been tried in which the intestate had obtained a verdict, to set that verdict aside ; but it alleges no damage to any specific estate, either real or personal, belonging to the intestate. The diminution of her means to which she may be exposed by the expense to which she would be subjected in order to obtain another verdict is not " a damage to real or personal estate within the meaning of the statute.

Judgment for the defendant affirmed.

115 554
157 495

WEED SEWING MACHINE COMPANY vs. SAMUEL P. EMEY

Berkshire. September 8. — 9, 1874. MORTON & ENDICOTT, for plaintiff, absent.

Where property is conveyed to a married woman, and by her, on the same day, is mortgaged back to the grantor, the mortgage is void unless her husband joins in the conveyance or assents to it under the Gen. Sta. c. 108, § 3.

A deed of assignment of a mortgage, without covenants of warranty, does not bind the assignor, or those claiming under him, to set up an after-acquired title.

A recital in a conveyance, that the property is subject to a mortgage, and the acceptance of the mortgage from the covenant of warranty therein, does not bind the grantee to dispute the validity of the mortgage as against the holder thereof.

WRIT OF ENTRY, dated May 27, 1872, to foreclose a mortgage on a certain parcel of land in the town of Florida. In the Superior Court, the case was referred to an arbitrator, who reported the following facts.

On February 13, 1867, William H. Sanford conveyed the premises by deed of warranty to Clarissa G. Harrington, and ever since the wife of William G. Harrington, and living with him in this Commonwealth. On the same day, Clarissa G. Harrington executed and delivered to Sanford a mortgage deed of the same premises to secure the payment of her note for the sum of fourteen hundred dollars, given for a part of the purchase money due Sanford for said premises. The execution and delivery of said deed and mortgage were simultaneous, and were recorded February 14, 1867. The husband of Clarissa

join in said note or mortgage. This note of \$1400 remains unpaid.

and assigned the note and mortgage January 15, 1868, to H. Hutchins, who on January 16, 1868, assigned them to defendant "as collateral security, and to hold subject to its until redeemed by the said assignee or mortgagee, his heirs, according to law." The debt due from Hutchins to defendant, for which it holds the note and mortgage as security is now represented by three promissory notes, Hutchins and payable to the demandant, one for \$250, June 1, 1868, at six months; one for \$300, dated June 1, eight months; and one for \$282.30, dated October 1, four months. There is due on these notes, August 28, sum of \$1063.39.

Martha G. Harrington and her husband by quitclaim deed conveyed the demanded premises to Horatio H. Hutchins by deed and recorded May 26, 1868. Hutchins by warranty deed June 25, 1868, and recorded June 26, 1868, conveyed the premises to Charles S. Blivin, "the said property subject mortgage of fourteen hundred dollars, also mortgage of four dollars." It was agreed that the \$1400 mortgage remain in the deed, was the same \$1400 mortgage given by defendant to Sanford.

Charles S. Blivin conveyed said premises to Benjamin F. Hutchins dated July 23, 1868, subject to said \$1400 mortgage. Benjamin F. Hutchins, August 19, 1870, conveyed said premises to Martha, wife of said Horatio H. Hutchins, subject to two sums of \$1900, which sum includes said \$1400 mortgage.

Martha Hutchins (her husband, Horatio H. Hutchins, joined in the deed to release "dower and homestead") conveyed by deed dated July 14, 1871, the said premises to Samuel Barker, the tenant.

The arbitrator found for the tenant, subject to the opinion of the court upon the question whether the demandant was entitled to the premises on the foregoing facts. The Superior Court ordered judgment for the demandant, and the tenant appealed to this court.

Barker, for the demandant. 1. The deed from Samuel Barker to Marlarissa G. Harrington and her mortgage back for the

purchase money, being simultaneous in execution and delivery, and relating to the same subject matter, were dependent upon each other, and constituting one transaction, and to be construed together as one instrument. So construed the two papers are, together with the deed poll of Sanford to Clarissa G. Harrington, and the parts of both are equally binding upon her, her heirs and assigns, not as her deed, but as the deed poll of Sanford to her. This deed poll is then to be so construed, whatever its form, as to effectuate the true intent and meaning of the parties. It is to be construed as the covenant of Sanford to stand seised to the use of himself, his heirs and assigns, until the said Clarissa should marry to him, "his executors, administrators or assigns, or either of them," the full contents of the "note given for the purchase money" according to its tenor, and thereafter to the use of the said Clarissa, her heirs and assigns. That note having never been paid, the plaintiff as assignee of Sanford is entitled to be put in possession of the demanded premises, Sanford having, in his assignment of the mortgage, conveyed to Hutchins "the estate therein mentioned and described." It is admitted that the mortgage of Clarissa G., if it stood alone as the deed of a married woman without her husband not joining, would be void; and that the court would hardly sustain the demandant's position without overruling the case of *Concord Bank v. Bellis*, 10 Cush. 276, in which the opinion of the court was given by the late Chief Justice Shaw. In reference to this case it is respectfully submitted: 1st. That the opinion in that case decides that the conveyance and reconveyance were dependent acts, to be deemed to relate to each other and to constitute one transaction, and that they should be construed together. But when the learned chief justice comes to construe the two conveyances, instead of construing them together, using the first maxim of construction, "that a liberal construction is to be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties," he, in fact, construes them separately, as "an absolute conveyance in fee to the grantee, and a reconveyance void in law, made by one having no legal authority to contract." 2d. That the question whether the two conveyances might not be construed together as the deed of Wheeler, does not appear to have been discussed in the case of *Concord Bank v. Bellis*. 3d. That long since the time of the

Concord Bank v. Bellis, this court has decided, against the doctrine in England and the implied opinion of the court on an earlier date, that a covenant to stand seised can be supported by a money consideration as well as by a consideration of blood and marriage, and that between strangers in blood. *Traflet v. Lawes*, 102 Mass. 533, and cases cited. The doctrine is established that "a conveyance of land may always be construed of what kind or species of conveyance which may be necessary to give the title according to the intention of the parties, if such construction is not repugnant to the terms of the grant." *Chester v. Stevens*, 97 Mass. 77, 86. *Marshall v. Fisk*, 6 Mass. 24, 25. *Washb. Real Prop.* 146. *Shep. Touch.* 87.

The demandant is entitled to recover because the tenant, as shown through mesne conveyances, and privy in estate of Horatio H. Hutchins, is estopped to deny the validity of the demandant's mortgage. Horatio H. Hutchins assigns the mortgage to the demandant, for a valuable consideration, January 6, 1868, and, by at least, warrants that it is a valid mortgage. Subsequently, on May 16, 1868, he acquires a title expressly made subject to the mortgage, and this, his after-acquired title, comes in to support his warranty that the mortgage was a valid mortgage, and is not supported from denying it, as are also his grantees privies in estate. And when he conveys, June 25, 1868, to Bliven, he makes the land subject to the mortgage, as do also the subsequent grantors in the deed to Emerson. All these deeds were of record, and the tenant, if he has any title, took it with notice from the records that this mortgage was outstanding, made valid by the deed, and the deeds of his mesne grantors, if in no other way. *Skinner*, 3 Pick. 52. *White v. Patten*, 24 Pick. 324. *White v. Gilbert*, 9 Mass. 510. *Dyer v. Sanford*, 9 Met. 395,

Potter, for the tenant.

C. J. In order to maintain this action, the demandant must show a legal title. *Adams v. Parker*, 12 Gray, 53. And no title is shown.

The mortgage made by Mrs. Harrington, her husband not assenting or joining therein, was absolutely void. *Gen. Sts. c. 103*. *Concord Bank v. Bellis*, 10 Cush. 276. *Lowell v. Warner*, 2 Gray, 161. *Warner v. Crouch*, 14 Allen, 163. In

Concord Bank v. Bellis, it was adjudged by this court, for fully stated in the opinion delivered by Chief Justice Shaw, such a mortgage was not made valid by being executed and delivered at the same time as the deed by which the wife acquired the estate. The rule, thus declared twenty years ago, cannot be reversed by the court without the danger of unsettling titles which have been taken in reliance upon it.

The assignment from Hutchins to the demandant, containing covenants of warranty, was of such title only as he then had in the mortgage, and did not estop him to set up any title afterwards acquired. *Merritt v. Harris*, 102 Mass. 326. The description of the premises, in his subsequent deed thereof, as subject to the mortgage, and the exception of the mortgage out of his covenants in that deed, were for the purpose of protecting him from liability upon his covenants, and can have no effect to charge his grantor in this action.

Judgment on the award for the tenant.



JOHN LEABY vs. EDMUND REAGAN.

Berkshire. September 8. — 9, 1874. MORTON & ENDICOTT, absent.

An action was commenced in a police court in which the pleadings showed that title to real estate was brought in question. The defendant claimed that the court had no jurisdiction, but neither party requested that the case should be removed to the Superior Court under the Gen. Sts. c. 120, § 13. The presiding judge thereupon ordered the defendant to remove the case to the Superior Court and to recognize with a surety to enter the case in that court. The defendant complied with the order, and in the Superior Court moved to dismiss the case for want of jurisdiction in that court, on the ground that the proceedings in the court below were void. *Held*, that this motion was rightly overruled.

TRESPASS brought in the Police Court of Williamstown. It appeared by the pleadings that the title to real estate was brought in question, and the defendant objected that the court had no jurisdiction. Neither party requested the removal of the case to the Superior Court; but the presiding judge of the Police Court ordered the defendant to remove it and to recognize with a surety therefor. The defendant protested against this order.

as ordered, and removed the case to the Superior Court; the term when it was entered moved to dismiss it "for jurisdiction in the court, because the proceedings of the law in removing this action to the Superior Court were void and of no effect." This motion was overruled, the defendant submitted to a default, and alleged exceptions of the court on the motion to dismiss.

Potter, for the defendant.

Browne, for the plaintiff.

C. J. The record shows that, although the defendant used so many words request to have the case removed from the Police Court to the Superior Court under the Gen. Sts. c. 120, it did so in substance and effect; for he not only objected to the jurisdiction of the Police Court, but he recognized to the jurisdiction of the Superior Court, and did enter it, in the Superior Court. If he wished to have the case removed, he had only to refuse so to do, and it would then have been the duty of the Police Court to hear and determine the case as if there had been no removal; Gen. Sts. c. 120, § 14; and thus the same result would have been immediately attained, which would be the ground of now sustaining his motion to dismiss from the Superior Court the action which he had himself entered there.

Exceptions overruled.

MIN F. WILLEY & another vs. GEORGE BEACH.

September 8. — 9, 1874. MORTON & ENDICOTT, JJ.,
absent.

Whether a sewing machine is a necessary for a wife, in such a sense that the husband can be sued for it, is a question of fact for the jury.

FACT for the use of a sewing machine. At the trial in the District Court of Southern Berkshire, it appeared that the plaintiff had let a sewing machine to the defendant's wife; that she had used it for household purposes; that the rent therefor had not been paid; and that the contract had been entirely unenforced, the wife, the husband not having been consulted in regard

to it. The judge ruled that a sewing machine was not necessary as, if furnished to the wife by a third party at request, would make the husband liable therefor. To this ruling plaintiffs alleged exceptions.

H. J. Dunham, for the plaintiffs.

N. W. Shores, for the defendant.

BY THE COURT. The question whether the sewing machine was a necessary for the wife, in such a sense that the husband could be sued for it, was for the jury. *Raynes v. Bennett*, Mass. *Exceptions sustained.*

FANNY WINCHELL *vs.* WILLIAM L. CAREY & another

Berkshire. September 8. — 23, 1874. MORTON & ENDICOTT absent.

If goods are sold and delivered to A. and B. on the Lord's day, the sale induced by the false representations of A. on a previous day, and subsequently on the Lord's day, the seller demands the price of A. and he promises to pay it, this amounts to a sale to him, and he is liable for the price.

CONTRACT against William L. Carey and Charles Kingsley. At the trial in the Superior Court, before *Allen, J.*, evidence was introduced tending to show that Carey had falsely represented to the plaintiff that he was a partner of Kingsley, that the plaintiff was thereby induced to sell four head of cattle to Carey, that the sale and delivery of the cattle was completed on the Lord's day, that Carey, after the delivery of the cattle, and not on Sunday, slaughtered the cattle and sold the beef to his own use, and the plaintiff, not on Sunday and after such slaughter and sale, demanded pay for the beef of Carey, and he then promised to pay for it.

The plaintiff asked the court to instruct the jury that if they found that such were the facts the defendant Carey was liable. The court refused to give the instruction requested; the jury returned a verdict for the defendants, and the plaintiff excepted.

A. J. Waterman, for the plaintiff.

C. W. Van De Mark, for the defendants.

z, C. J. If the plaintiff was induced to make the contract sale of her property by the false representation of n a previous day that he was a partner with Kingsley, at to avoid the contract would be wholly independent of stion whether the sale and delivery were made on the day, the property would remain hers, and a subsequent by her of payment, and promise of Carey to pay for the y, would amount to a sale from her to him, and support n against him; and by the Gen. Sts. c. 133, § 5, he may d liable, although Kingsley is not. Upon such a state of e action would not be in any degree founded upon a con- ecuted on the Lord's day, or upon any rights growing out any deceit then practised, nor in any way seek to relieve ntiff from the consequences of her own illegal contract; ating that contract as never having been her contract at eason of the fraud practised on her upon a previous day, est wholly upon her previous right of property and the ent lawful sale, and would not therefore be affected by l's day act. *Stebbins v. Peck*, 8 Gray, 553. *Hall v. Cor-* 107 Mass. 251. *Cranson v. Goss*, 107 Mass. 439. The judge who presided at the trial having declined to instruct to this effect, the

Exceptions are sustained.

ONROE WILCOX vs. PATRICK CONWAY & others.

SAME vs. PATRICK CONWAY.

ire. September 8.—23, 1874. MORTON & ENDICOTT, JJ.,
absent.

on of tort in the nature of trespass *quare clausum fregit*, it should be alleged defendant "forcibly broke and entered" the plaintiff's close; but the of the word "forcibly" may be cured by an amendment; and the de- if he wishes to avail himself of such a defect, should specifically point out et at the trial, and if this is not done the defect cannot be taken advan- n this court on a bill of exceptions which states that the defendant asked t to rule that the declaration did not set forth a legal cause of action. hat a portion of the time described in one of the declarations in two by the same plaintiff against the same defendant, for trespasses com- on the same close, is also included in the other, does not give rise to a

presumption of law that the trespasses charged in the two declarations were the same.

An exception to a refusal to rule cannot be maintained which does not show that there was evidence in the case from which the jury might find the facts on which the request was based.

TWO ACTIONS OF TORT in the nature of trespass *quasi* *sum.* At the trial in the District Court of Southern Berks the following facts appeared :

The declaration in the first case alleged that the defendant "on divers days and times between the first day of January last past and the date of this writ, broke and entered the plaintiff's close." The declaration in the second case alleged that "the defendant, on divers days and times between the first day of November last past and the date of this writ, broke and entered the plaintiff's close." The close described was the same in each case. The second count of the declaration in the second case charged the defendant with "breaking and entering" another close of the plaintiff. At the trial, the plaintiff claimed to recover in the first case for acts committed by the defendant Conway in connection with the other defendants; and on the first count of the second case for acts committed by Conway alone at a different time. The plaintiff introduced evidence of such acts. Under the second count of the second case the plaintiff introduced evidence tending to show that Conway occupied and claimed to own land, which other evidence in the case tended to show belonged to the plaintiff. Upon these facts, the defendant asked the court to instruct the jury :

1. "That neither of the declarations in said cases states a legal cause of action against the defendants or either of them.
2. "If the jury shall find that the fence and premises referred to in the first action are the same fence and premises referred to in the first count of the second action; and if they shall find that all the acts charged to have been done by said Conway in the second count of the declaration in the case against him alone were done, if at all, within the time alleged in the writ against the three defendants, then as a matter of law the plaintiff is not entitled to recover against said Conway, in the action against the three defendants, and also in the first count in the action against Conway alone.

3. "If the jury shall find that the defendant Conway bears title to that his title extended to and covered the land described in

unt of the second declaration, and so claimed to the plain-
the plaintiff acquiesced in the claim either ignorantly or
e, then said defendant would not be liable to the plaintiff
tion brought against him for such occupancy or entry on
nises."

instructions the court refused to give in form or sub-
The jury found for the plaintiff in both actions, and the
t Conway alleged exceptions.

lmer, for the defendant.

vey, Jr., for the plaintiff.

J. In order to maintain an action of trespass *quare*
it should be alleged and proved that the defendant for-
ke and entered the plaintiff's close. But the omission of
l "forcibly" is a defect which might be cured by an
ent. It is true that in a trial before a justice of the
defendant may plead orally, but in order to avail himself
ely formal defect in the plaintiff's declaration, he should
manner make such defect a specific ground of objection.
not appear that this particular omission was brought to
tion of the court at the trial, and it is too late to take
ction now for the first time.

h of these actions, the declaration charges trespasses com-
n divers days and times between certain dates, and a por-
ne time described in one of them is included in the other.
no legal presumption that both declarations refer to the
espases. They are sufficiently identified and distin-
from each other by the evidence that one was the act
defendant alone, and the other the joint act of the same
t and two others, besides being distinct in point of time.
were separate and distinct acts, both actions might well
ained.

bill of exceptions we find no evidence tending to show
ence on the part of the plaintiff in the acts of the other
and therefore the instruction requested in relation to the
such acquiescence was properly refused.

Exceptions overruled.

**JAMES McDONNELL vs. PITTSFIELD & NORTH ADAMS
ROAD CORPORATION.**

Berkshire. September 8.—26, 1874. MORTON & ENDICOTT
absent. COLT, J., did not sit.

**Animals which escape from the control of persons having charge of them on
way and enter an unfenced lot abutting thereon, without the knowledge or
of the owner thereof, are not lawfully upon the lot.**

**A railroad corporation is not liable for killing animals which being unlawfully
lot of land go thence upon its track, and are there killed by a passing train,
though it was the duty of the corporation to maintain a fence between its
and said lot, and it did not do so, unless the killing was wanton or malicious.**

TORT to recover for the loss of two colts which were run
and killed by the defendant's engine. At the trial in the Superior
Court, before *Brigham*, C. J., the following facts appeared:

The colts, being on the highway, in the care of the plaintiff
son, escaped from his control, and, the fence being insufficiently
entered, without the consent of the owner, a lot known as the
Wells lot, and passing over that entered upon the track of the
defendant's railroad and were there struck by the engine of a
passing train and killed. There was no fence between the
lot and the railroad. At the trial the question whether it was
the defendant's duty to maintain a fence between its track and
the Wells lot was gone into, but the point on which the defendant
turns makes its consideration immaterial.

The defendant asked the court to instruct the jury: "The
defendant is not liable for an injury to horses coming on the
road through the land of Wells, if the horses were not on the
land of Wells with the knowledge or consent of its lawful
pant." This instruction the presiding judge refused to give. The
jury returned a verdict for the plaintiff, and the defendant asked
exceptions.

J. M. Barker, for the defendant.

J. C. Wolcott & A. J. Waterman, for the plaintiff.

DEVENS, J. We are not required to consider whether the
defendant is under an obligation to maintain a fence between the
road and the Wells lot, as even if we assume that it is under
an obligation, the plaintiff is not in such a situation that he
complain of the neglect to maintain the fence.

a railroad corporation is obliged to fence as against the lot, this, so far as that lot is concerned, is only for the protection of the owner or rightful occupier thereof. It is not obliged to fence for the benefit of landowners, whose lands do not adjoin the railroad and whose cattle may stray thereupon through such lots, without the consent of its owner, by reason of the insufficiency of the fence. In *Eames v. Salem & Lowell Railroad*, 98 Mass. 560, the court held that if the owner of animals permits them to be upon lands from which they stray through an unsuitable track of an adjoining railroad, where they are killed by a passing train, the railroad corporation is not liable in damages, although the fence was one it was bound to make and maintain.

Only ground, therefore, upon which the plaintiff can sustain his claim is that his cattle were rightfully upon the Wells lot; and the evidence wholly fails to show. It is true that no action can be brought by the owner of the lot for a trespass committed by the cattle entering upon his land, if they were properly managed along the highway, and his fences were insufficient; which facts and circumstances must be deemed to have been so found by the jury.

The principle of the common law, which requires that each owner keep his cattle on his own land, is so far modified as to render the owner not liable for the trespass of his cattle which strays along the highway, and being properly managed therein, wander into the unfenced lots bounding thereon, provided he removes them with reasonable promptness. But the owner is not in such case lawfully upon such lots. They are only lawfully under such circumstances that their trespass, being such as could not have been prevented by reasonable diligence, is held excusable, and this is all. That they should be lawfully and lawfully upon land, the authority or consent of the owner of the close is necessary, and even if he is without authority for the injury they may cause him, the owner of the close does not acquire his rights as against the owners of adjoining closes. If, after entering upon his close, they proceed into an adjoining thereto, they are there trespassers, and an action may be maintained for such trespass, by the owner of the adjoining close, even if his fence was insufficient, and if he was also

bound to fence as against the owner of the first close. But thus bound he is only bound to fence against cattle right on the first close. *Rust v. Low*, 6 Mass. 90. *Stackpole v. He* 16 Mass. 33.

In *Lord v. Wormwood*, 29 Maine, 282, cattle were considered to be lawfully in the highway, they being permitted to go at large and feed there, by vote of the town; and being thus upon it, having passed therefrom into the unfenced land of an adjoining proprietor, it was held that, although he might not be able to maintain any action, they were wrongfully upon such land, having passed therefrom to and upon the plaintiff's unfenced land not bordering upon the highway, he might maintain trespass. He was under no obligation to fence as against them. This decision is in conformity with one of the cases considered by Chief Justice Parsons in delivering the opinion in *Rust v. Low*, supra, wherein he holds that if A. be bound to fence against B., and against C., and beasts escape out of the land of C. into the land of B. and thence into the land of A., A. may maintain trespass against C.

The colts in entering upon the lands of the railroad corporation were there trespassing, and while they could not be injured violently or maliciously, the defendants were entitled to run their trains according to the exigencies of their own business. *Maynard v. Boston & Maine Railroad*, ante, 458.

The case at bar is readily distinguishable from that of *Kelley v. Connecticut River Railroad*, 107 Mass. 411. There the injury to which the action was brought, escaped from the lot, where it was rightfully pastured, by reason of the insufficiency of the fence which the defendants were bound to maintain, passing over the land of a third person, found her way upon their track by reason of the insufficiency of the fence which the defendants were there also bound to maintain. It was not for this to object that she was wrongfully upon the land from which she entered upon their track, as her presence there was entirely owing to their own neglect of duty.

We are of opinion therefore that the instruction of the learned judge upon the point we have considered was erroneous.

Exceptions sustained.

ARY B. NICHOLS vs. ERASTUS MUNSEL & wife.

a. September 15, 1874. WELLS & MORTON, JJ., absent.

of proof is on the demandant in dower to show that she is the lawful
the deceased, and it is not shifted by the establishment of a *prima facie*

the discretion of a judge presiding at a trial, to recall the jury after they
red, and to restate the law and evidence to them, although the jury when
they desired any instructions on the law, said that they did not.

OF DOWER. At the trial in the Superior Court, before
the fact of the seisin of Danforth Nichols was admitted,
only question in dispute was whether Danforth Nichols
demandant were lawfully married; it being contended
nants that the demandant had a husband living at the
her alleged marriage with Nichols.

record of the demandant's marriage with Danforth Nichols
proved, and was legal in form, and also the fact that
with him as his wife most of the time from 1856 to his
1871. The tenants introduced a record of a marriage of
ndant with Michael Longinotti in Italy, in 1847, and
that he was alive at the time of the trial, not having
divorced.

residing judge ruled that the burden of proof was on the
nt to prove that she was the lawful widow of Danforth
that the fact of her marriage with Nichols in 1856,
made a *prima facie* case for her, yet the burden of proof
change; and that notwithstanding she went through the
n of marriage in 1856, the burden still remained on her
nt; although the demandant contended that the burden
the tenants to prove that the marriage in 1856 was il-

he jury had been out over night, some eighteen hours,
e into court at the request of the judge, and being asked
was any prospect of their agreeing, the foreman said
not. They were asked if they desired any instructions
law? The foreman said they did not. Thereupon the
judge proceeded to review the case and to restate the
to the jury at length. The jury, at the request of the

court, then retired to their room, and in a few minutes rendered a verdict for the tenants, and the demandant alleged exceptions.

C. C. Conant, (S. O. Lamb with him,) for the demandant.

A. De Wolf, for the tenants.

GRAY, C. J. 1. The single issue presented by the plea was whether the demandant had been lawfully married to John Nichols. Upon that issue, the burden of proof rested throughout the trial. Evidence that she had gone through legal form of marriage with him made a *prima facie* case for her, and so the judge ruled. But it did not change the burden of proof. *Powers v. Russell*, 13 Pick. 69. *Delano v. Bartlett*, 3 Cush. 364. *Central Bridge v. Butler*, 2 Gray, 130.

2. We can see no foundation for the argument that the action of the presiding judge was compulsory in its nature, and an improper interference with the deliberations of the jury. The proper mode of communication between the judge and the jury is in open court. It is within the discretion of the judge to call the jury brought in at any time for the purpose of ascertaining whether they have agreed or desire additional instructions; to restate the evidence and the principles of law applicable to it, so far as he considers necessary or fit to assist them in deciding the case, even if they do not request it. *Gen. Sts. c. 132, Sargent v. Roberts*, 1 Pick. 337. *Commonwealth v. Snelling*, 1 Pick. 321. *Florence Sewing Machine Co. v. Grover & Sewing Machine Co.* 110 Mass. 70. *Exceptions overruled.*

RUSSELL E. GOODNOW vs. ALONZO DAVENPORT.

Franklin. September 15, 1874. WELLS & MORTON, JJ., absent.

A. sold a farm to B., and afterwards B. agreed in writing to quit the premises before a certain date, and to leave all tools, implements, &c., which were received with said place, thereon in as good a condition save wear and use as when first received. *Held*, that this agreement included only those tools, implements, &c., which belonged to A., and to which B. had no other title than by having received them with the place from A., and not such as had become B.'s by subsequent dealings with A.

The submission of a question of legal construction to the jury affords no ground for exception, if they decide it aright.

ACT to recover pay for three two year old cattle, about of hay, one stone boat, one horse sled, one sink and bench.

trial in the Superior Court, before *Brigham*, C. J., the put in evidence the following contract in writing, signed plaintiff and defendant:

indenture made on the one part by Russell E. Goodnow, the other part by Alonzo Davenport, witnesseth, that I, ., for and in consideration of a quitclaim deed given and Davenport, agree and bind myself to deliver unto Davenport certain notes given and signed by him for said which I now hold against him, relinquishing all interest ne; and also I, Alonzo Davenport, agree to quit said n or before the 20th day of May next, and to leave all lements, &c., which were received with said place as good a condition save wear and use as when found, let said Goodnow have a certain spotted cow to satisfy a said notes, which are specified; and to be kept until by said Goodnow, or till the expiration of the occupancy Davenport of said farm. Dated this ninth day of April.

plaintiff also introduced evidence tending to show that in g of 1871, the plaintiff sold to the defendant a farm n the town of Rowe, and gave him possession of the ch he held until the date of the written contract; that o left on the place at the time the defendant took pos- the farm, the said sled, stone boat, sink and bench, as e cattle, then calves, and hay, and also a grindstone, an , a ladder, and a harrow made of wood, and some other hat they were the property of the plaintiff and received endant; and that after the date of the contract, when ant left the farm in the spring of 1873, he carried away farm the horse sled, stone boat, meat bench and sink, ny leave of the plaintiff.

ove facts, as to what things were left on the premises in of 1871, and were received with the place, and what ed away, were not in dispute. To meet this part of the efendant, against the objection of the plaintiff, was per- introduce oral testimony tending to show that subse-

quently to the time when the defendant took possession of the premises in the spring of 1871, and had received the articles above enumerated, and prior to the time of making the written contract in 1873, he had by separate and independent bargain bought a part of the tools and implements mentioned in the plaintiff's declaration, and had paid the plaintiff for them, and that other of said articles had been given to the defendant by the plaintiff. These facts were denied by the plaintiff.

In his instructions to the jury the presiding judge, against the objection of the plaintiff, instructed the jury as follows :

"The jury are warranted in presuming and in finding that the written agreement was not intended to apply to and did not apply to articles of property in which the plaintiff had no interest or property, although such articles are described in that written agreement ; and also in presuming and in finding that the written agreement was not intended to apply to and did not apply to property described which the defendant, while upon the farm in question, had purchased of the plaintiff, or had received from him by gift, or in barter."

The jury found for the defendant, and the plaintiff alleged exceptions to the above instruction and admission of evidence.

S. T. Field, for the plaintiff.

C. C. Conant, for the defendant, was not called upon.

GRAY, C. J. The agreement of the defendant "to lease the tools, implements, &c., which were received with said place" includes, upon the reasonable construction of its terms, only those which once belonged to the plaintiff, and to which the defendant had no other title than by having received them with the plaintiff from him ; not such as the plaintiff never had any property in, or which had become the defendant's by subsequent dealing with the plaintiff. The presiding judge might properly have ruled as matter of law. But the submission of a question of construction to the jury affords no ground of exception, if the jury decide it aright. *Ricker v. Cutter*, 8 Gray, 248.

Exceptions overruled.

RY A. COOK vs. INHABITANTS OF MONTAGUE.

September 15. — 16, 1874. WELLS & MORTON, JJ., absent.

a highway, with which a traveller does not come in contact or collision, is not an incumbrance or obstruction in the way of travel, is not to be defect, for the reason that its bright appearance causes a horse to take consequence of which he momentarily escapes from the control of his driver and causes damage.

to recover damages for a personal injury sustained by the plaintiff on the highway.

On the Superior Court, before *Brigham, C. J.*, who referred the case for the consideration of this court as follows: The plaintiff offered evidence of the following facts: That alleged in the declaration consisted of a stone, within which was wrought part of a highway in the defendant town. The stone had been split from a boulder on the side of said highway. The surveyor of highways of the defendant town, and the plaintiff, had deposited in a ditch which was within the wrought part of the highway, at a point in the same where said way was wide enough for two ordinary carriages to pass abreast, without coming in contact with the stone. Opposite to the stone, on the line of the highway, was a railing, and outside of it a rising embankment; the highway was hilly and built on the side of a hill, and the plaintiff was ascending it, when her horse, driven by a female companion, took fright at the bright appearance of the freshly split part of the stone in the ditch, and backed suddenly to the right, and entirely about, and the carriage in which the plaintiff was riding was thereby upset and the plaintiff thrown out of the same upon the ground, and injured. Thereupon the driver jumped out of the carriage and succeeded in immediately stopping the horse as it was descending the hill. Neither the horse, carriage or the plaintiff, when thrown upon the ground, came in contact with the stone. The horse was gentle and easily controllable, the driver was careful and the buggy and harness sufficient, and the horse was properly harnessed, and the plaintiff and the

person driving were exercising ordinary care at the time accident described.

"The presiding judge ruled that the facts in evidence, if would not authorize a verdict for the plaintiff, and that these facts and their legal effect this action could not be sustained. Thereupon, by the request and upon the agreement of the parties, the evidence and facts are reported to the Superior Judicial Court, judgment to be entered in the Superior Court for the defendants, if the aforesaid ruling of the Superior Court is sustained; otherwise, the plaintiff is to have a new trial in the Superior Court."

W. S. B. Hopkins, for the plaintiff. This case comes in line with the principle of *Lund v. Tyngsboro*, 11 Cush. 563. It is distinguished from the cases where the accident resulted from the unmanageableness of a frightened horse, and its likeness to *Lund v. Tyngsboro* is recognized in the case of *Cook v. Charlestown*, 13 Allen, 80. So also the cases where the accident has happened during a momentary loss of control are in principle like *Babson v. Rockport*, 101 Mass. 93. The case of *Horton v. Rockport*, 97 Mass. 266, well illustrates the difference between the case of a frightened horse becoming unmanageable and this case.

A. De Wolf, for the defendant.

GRAY, C. J. There was no evidence that the horse was in any danger of coming in contact with the stone. It was the brightness of the stone, which was the cause of the fright of the horse that resulted in the injury to the plaintiff. There was therefore no defect in the highway for which the town was liable in this action. *Keith v. Easton*, 2 Allen, 552. *Kimball v. Dedham*, 18 Allen, 186. *Cook v. Charlestown*, 13 Allen, 80. *Judgment for the defense.*

ATHOL SAVINGS BANK vs. ABBY J. POMROY.

September 14. — 26, 1874. WELLS & MORTON, JJ., absent.

tion of a mortgage was that if the grantor should pay to the grantee one year with interest, or otherwise pay such notes as the grantee should this accommodation during said term, the deed, as also a promissory col- note whereby the grantor promised to pay to the grantee \$2500 with in- ten per cent. should be void. The grantee, the day the mortgage was signed one note for \$2500 for the accommodation of the grantor, and t maturity. Held, on a writ of entry to foreclose the mortgage, that the al judgment should be for the amount of the note paid by the mort- th legal interest from the time of payment.

OF ENTRY to foreclose a mortgage of land the title to as in the defendant, given by the defendant and her hus- Daniel Pomroy, since deceased, to Damon E. Cheney, and ey assigned to the plaintiff.

ase was submitted for the consideration of the Superior d of this court on appeal, on agreed facts in substance as

mortgage is dated May 29, 1867; and the assignment , 1871. The condition of the mortgage is as follows: ed nevertheless that if the said grantors, their heirs, ex- or administrators, shall pay unto the said grantee or his , administrators or assigns, the sum of twenty-five hun- ars, in one year from date, with interest, or otherwise uch bank notes as said Cheney may sign for said Pom- ommodation during said term, then this deed, as also a romissory collateral note bearing even date with these signed by said Daniel and Abby J., whereby they prom- y the said Damon E. Cheney the said sum and interest, me aforesaid, shall be absolutely void to all intents and "

ollowing is a copy of the note referred to in the mort- \$2500. Orange, Mass., May 29th, 1867. One year e, we promise to pay to the order of Damon E. Cheney, r, twenty-five hundred dollars, value received, with in- 10 per cent. Daniel Pomroy, Abby J. Pomroy."

e same day Cheney signed a note for \$2500, payable in ths, with interest, to the order of Daniel Pomroy, which

note was negotiated by Pomroy, and at maturity was Cheney ; no other notes were paid or signed by him for accommodation during the time mentioned in the condition of the mortgage, and there was no other consideration of mortgage and mortgage note than the note of even date the mortgagee paid.

C. C. Conant, for the plaintiff.

S. O. Lamb, for the defendant.

DEVENS, J. It is agreed that there was no other consideration for the mortgage and mortgage note than a note of date signed by Daniel Pomroy and indorsed by Cheney. Cheney paid. The transaction cannot be treated as a loan of \$2500 to the defendant and Daniel Pomroy, nor can the mortgage note be regarded, as contended by the plaintiff, as the principal debt secured by the mortgage, especially when it is observed that while the mortgage and mortgage note are signed by the defendant and Daniel Pomroy, the note to secure the mortgage was given and indorsed by Daniel Pomroy alone. The object of the transaction was simply to insure the mortgagee for the liability which he might incur by signing certain accommodation notes, and the amount of the liability to be ascertained by determining how much he has been compelled to pay upon such notes, with legal interest from the date of such payment. It would hardly have been argued if the mortgage note signed and paid by the mortgagee had been one of the same amount, that judgment should have been rendered for the amount of the mortgage note of \$2500: the amount due would then have been \$1000, with legal interest from the date of payment, and the same principle must be applied although the mortgage note signed by Cheney and the mortgage note were the same amount. This was the rule adopted by the Superior Court.

Judgment affirmed.

ALFRED L. STRONG vs. JOHN CONNELL.

re. September 16, 1874. WELLS & MORTON, JJ., absent.

the discretion of the judge presiding at a trial to exclude evidence offered
al, which might have been introduced, by the party offering it, in putting
se.

n to recover for an injury sustained by a horse through the alleged negli-
the defendant in taking the horse on slippery ground, the presiding judge
eral instructions not excepted to as to what constituted due care. The
then requested the court to rule, "that if the ground was slippery, or the
shoes so smooth that they slipped with no load, common prudence required
defendant greater care in the use of the horse than if its shoes had been
the ground not slippery." This instruction the court declined to give,
that the jury were to consider all the circumstances, and these among
Held, that the plaintiff had no ground of exception.

for the conversion of a horse. At the trial in the Su-
court, before *Wilkinson, J.*, the plaintiff offered evidence
sent the defendant with the plaintiff's horses to draw
logs on level ground, and told the defendant not to take
es upon a hill, and that the plaintiff had engaged oxen
ich to draw the logs on the hill down to level ground;
defendant took the horses upon the hill to drag a log
re, about sixty feet, to a steep bank, where the log would
n to level ground, and in attempting to draw the log
ravine about twenty feet from where the log was first
hind leg of one horse was broken; that there was a thin
snow then on the ground, that the shoes on the horses
ooth, and that the horses slipped considerably in going
hill with no load, before being hitched to the log, and
defendant knew the horses' shoes were smooth; and that
nd in the direction opposite to that from which the de
attempted to draw the log was level, with no obstruction
e practicable.

efendant testified that the place to which he attempted
the log was more convenient for rolling it down; that
atiff told him, the evening before the breaking of the
eg, that the logs on the hill were to be drawn down to
und with oxen, but that the plaintiff the next day told
adant to draw those logs down with the horses if he could.
testified that the leg was broken by the slipping and fall-

it in the most direct course to the highway, give the demandant a boundary of twenty-five feet on the highway, and allow the tenant as long a boundary upon the highway as his late owner had from the same grantor called for.

It does not appear on the bill of exceptions that the grantor who once owned all the land in question, ever made any deed thereof, or whether the whole evidence is reported. It was not contended for the tenant at the trial, nor at the argument here, that the description was too vague and uncertain to be located at all; but it was assumed by both parties that the land was capable of being defined either by the court or the jury.

The only exception taken was to the refusal of the presiding judge to instruct the jury that the demandants' deed did not run more than one foot on the highway, and could not include more than twenty-five feet as they claimed. We are of opinion that the instruction was rightly refused. The first line could not be given any construction of the deed as applied to the evidence. The line due north, without striking the land of Clark west of the highway, and thus wholly rejecting the highway as a monument, is described in the demandants' deed not as running due north but "northerly," and its direction, even according to the demandants' claim, is northerly, though inclining considerably to the east. *Bond v. Fay*, 8 Allen, 212, 215. How far it inclines to the east does not appear as matter of law upon the facts of the deed.

Exceptions overruled.

115 578
158 538

ELECTA M. BUTLER vs. WILLIAM PRICE.

Hampshire. September 15. — 26, 1864. WELLS & MORTON, JJ.,

A part payment made by a woman on her husband's promissory note will take it out of the statute of limitations, in the absence of evidence that he authorized her to make the payment.

Evidence that the holder of a promissory note wrote to the maker demandant, and that in reply the wife of the maker wrote a letter inclosing a part payment of the note, is not sufficient evidence that the maker authorized the payment, to take the case out of the statute of limitations, or that he authorized the writing of the letter, so as to make its contents admissible against him.

ACT on a promissory note dated April 9, 1860, signed defendant, and payable to Roxanna Blinn or bearer. and October 1, 1870. The answer set up the statute of s.

the decision of this court reported 110 Mass. 97, the case in the Superior Court before *Wilkinson, J.* The plain- purpose of taking the case out of the statute of limita- ed upon a part payment of \$25 made on February 11, introduced evidence that the \$25 were sent to Roxanna who was then the holder of the note, in a letter written by defendant's wife. This letter, dated February 8, 1865, ap- the report of the case, 110 Mass. 97. There was also that this letter was written in reply to a letter sent to defendant, demanding money.

defendant asked the presiding judge to instruct the jury mere fact that a letter was sent to the defendant asking y upon the note, and that a letter came back containing and purporting to be signed by his wife, with a request applied in part payment of the note, was not enough t the jury in finding that the defendant authorized such

presiding judge declined so to rule ; but submitted the case y upon instructions not excepted to, leaving it to the determine whether the defendant authorized the payment n by the plaintiff. The jury returned a verdict for the and the defendant alleged exceptions.

Stearns, for the defendant.

Bond, for the plaintiff. The court rightly refused to there was no evidence in the case to warrant the jury a verdict for the plaintiff. The fact that the wife had session the letter written to the defendant asking for the note, is evidence that she was authorized to act rence to it. *Streeter v. Poor*, 4 Kansas, 412. *Erick v.* 6 Mass. 193. The fact that letters were written to the t demanding money on the note, and that in due course plies came from the wife, is evidence that the money at the request of the husband. The fact of the pay- \$25, on February 8, 1865, being made at a time when the benefit of the defendant, may be considered by the

jury on the question of the request from the husband to the jury. The jury had a right to consider the relationship of the in connection with the other evidence in the case. *Mer Plumley*, 99 Mass. 566, 573. 1 Greenl. Ev. § 185. 2 Greenl. Ev. §§ 64, 65.

DEVENS, J. This case does not differ in any respect from which was presented when it was last before the court, that it now appears that the letter introduced was in reality that addressed to the defendant by Mrs. Blinn. But in that the reply of Mrs. Price or anything contained in it to affect the defendant, it is necessary first to show that she was in writing it by his authority or as his agent. As no such authority or agency can be inferred from the relationship of husband and wife, there is no evidence of any unless the letter is permitted to furnish it. Until some evidence of authority to the defendant to Mrs. Price to write the letter is offered, it cannot be examined or considered, and we cannot therefore rely on anything contained in it, and until then the fact that he replied to a letter addressed to the defendant is immaterial.

Exceptions sustained.

JUDSON T. PARKER vs. MASSACHUSETTS RAILROAD COMPANY

Hampshire. September 16. — 26, 1874. WELLS & MORTON, JJ.

Under the St. of 1873, c. 353, § 1, a person, to whom a debt is due for labor performed in constructing a railroad, by virtue of an agreement with a contractor whose contract with the owner of the railroad was made before the passage of the statute, has not a right of action against such owner, although the labor was performed after the statute took effect.

CONTRACT under the St. of 1873, c. 353,* to recover for labor performed by the plaintiff in the construction of a railroad.

* The St. of 1873, c. 353, § 1, which took effect July 11, 1873, provides that "Any person to whom a debt is due for labor performed, or for materials furnished and actually used in constructing any railroad by virtue of an agreement with the owner of such railroad, or with any person having authority from or rightfully acting for such owner in procuring or furnishing such labor or materials, shall have a right of action against the owner of such railroad to recover such debt with costs."

by the defendant corporation. Writ dated December 10, The case was submitted to the Superior Court, and after t for the defendant, to this court, on appeal, on agreed substance as follows :

defendant made a contract with N. G. Munson to build e of its railroad, and Munson made a sub-contract with ggood to build a section of the railroad. Both of these were made before the passage of said statute. The labor d by the plaintiff was in the months of September, Oc- d November, 1873, and was done under an agreement rood. The plaintiff filed the necessary statements and his action within the time required by the statute.

Allen, for the plaintiff. 1. The St. of 1873, c. 353, eemingly retrospective in its operation, as to the con- Osgood with Munson, and Munson with the defendant, ecessarily unconstitutional, being remedial in its nature. om. (12th ed.) 455, and note. *Foster v. Essex Bank*, 16 5, 271, and cases cited. *Garfield v. Bemis*, 2 Allen, 445. islature has a right to pass remedial statutes notwith- they affect private contracts, and such statutes "should t liberal construction." *Smith v. Morrison*, 22 Pick.

e statute under which this action was brought created a edy, sufficiently guarded as to time and form of notice. a lien, and should not be governed by the same rules of ion. The case of *Donahy v. Clapp*, 12 Cush. 440, does rn this case, that being a petition under a lien law, creat- umbrance on land similar in nature to a mortgage, and e decided that the statute under which the action was id not create an incumbrance on the lands so as to affect ting contract of the landowner.

Pelton, for the defendant, was not called upon. NS, J. It is not intended by the St. of 1873, c. 353, § 1, ich this action is brought, that a party who does work ho had contracted with a railroad corporation previously ssage of the act, or for his sub-contractor also contracting y, shall be enabled to maintain an action against the cor- for the work which he thus does, even if it is actually d for and performed subsequently to the passage of the

act. The corporation must pay those with whom it contracts according to the terms of its obligations as made at the time of the contract; from these it is not to be released; and on the other hand it is not to be afterwards exposed to a liability which it did not then incur. In contracts made after the passage of the statute, as all parties have legal knowledge of it, they are presumed to have full regard to it in any obligations upon which they enter.

Nor can the construction contended for by the plaintiff be supported upon the ground that the act, so far as it enables the plaintiff to sue the corporation for the work done for its contractor or sub-contractor, affects his remedy only. It gives him a new and distinct right and exposes the corporation to a new liability.

The reasons upon which it was held in *Donahy v. Clapp*, 1 Cush. 440, that payment for labor performed under a contract with a person employed by the owner of land to erect a building thereon could not be secured by a lien on said land under the act of 1851, c. 343, if the contract with the landowner for the erection of the building was made before that statute took effect, even though the contract for the labor was made and the labor actually performed after the statute was in full force, apply directly to the case before us.

Judgment affirmed.

115 582
167 332

GEORGE D. ROBINSON, executor, *vs.* EDMUND BRENNAN.

Hampden. September 21.—22, 1874. MORTON & ENDICOTT, attorneys for plaintiff, absent.

Where a deed is signed by the mark of the grantor, and the attesting witness testifies that he drafted and witnessed the execution thereof in the usual course of business, that his recollection of the transaction is general, and that he does not say whether or not the defendant asked him to attest the mortgage, or knew that he signed his name as attesting witness, there is sufficient evidence of execution to be submitted to the jury.

Where a mortgage deed describes the property conveyed as "the tract of land on this day conveyed by A. to B., and by B. to me by deed of this date," and does not name the town, county or state in which the land is situated, the deeds from A. to B. and from B. to the mortgagor, which contain descriptions of the land, may be admitted in evidence, on the trial of a writ of entry to foreclose the mortgage, although said deeds were not on record when the mortgage was executed.

OF ENTRY to foreclose a mortgage held by the plaintiff, under an assignment from one Mrs. Friel. At the the Superior Court, before *Wilkinson, J.*, the following occurred :

Mortgagor signed the mortgage and notes by making his The attesting witness, an attorney at law, who drafted gage, testified that he witnessed the execution of the by the mortgagor, on September 22, 1856, but that his on of the transaction was general ; that he could not say the defendant asked him to attest the mortgage and not ; and could not say from his recollection whether or defendant knew that he signed his name as attesting wit- that he made and witnessed the paper, in the usual business. The tenant contended that this testimony sufficient to prove the execution of the mortgage and But the presiding judge ruled that there was sufficient to go to the jury.

nant also objected to the plaintiff's reading the mortgage ce, upon the ground that it contained no description of the only description being as follows : " That tract of day conveyed by her [the mortgagee] to Daniel Mc- and by Daniel McKinney conveyed to me by deed of " These deeds were not at that time on record. The did not name the town, county or state in which the situated, and the tenant objected to the introduction of *aliunde* to show what land was meant to be conveyed mortgage. But the presiding judge overruled the objec- allowed the demandant to introduce the deed from Mrs. e mortgagee, to Daniel McKinney, and the deed from McKinney to the tenant, which deeds contained a descrip- ne land.

ury found a verdict for the demandant, and the tenant exceptions.

Copeland, for the tenant.

Robinson, pro se.

THE COURT. The attestation, with the testimony of the witness, was sufficient evidence of execution to be sub- the jury. The deeds referred to in the mortgage make caption certain, and were rightly admitted in evidence.

Exceptions overruled.

DANIEL D. WARREN vs. WILLIAM CHAPMAN.

Hampden. September 21. — 22, 1874. MORTON & ENDICOTT
absent.

If the defendant is called as a witness for the plaintiff and testifies to facts true are conclusive against the plaintiff's case, and the plaintiff puts in contradicting the defendant's testimony, the question at issue must be submitted to the jury.

The signature of an attesting witness placed below the body of a note and a date thereof may apply to the whole note if shown to have been made for the purpose after the note was completed.

CONTRACT on a note for \$500, dated December 15, 1848, was presented to the plaintiff. The writ was dated March 12, 1869. The note purported to be attested by one Horace Bartlett, the "attest, Horace Bartlett," being written below the body of the note, and directly above and over the date of the note.

The answer stated that the suit was not brought within twenty years nor within twenty years from the date of the note, and denied the making of the note. And the answer also denied the attestation of the note, and also had it in the statement that the consideration of said note was spirituous and intoxicating liquors, sold by the plaintiff and said firm to the defendant in violation of law, whereby said note became voidable and void. The answer also contained a general denial of the matters in the declaration and the writ. The firm mentioned in the answer was the firm of D. D. Warren & Co., hereinafter mentioned.

At the trial in the Superior Court, before *Allen, J.*, after a decision reported in 105 Mass. 87, it appeared by the testimony of the plaintiff that in the year 1848, he and others were engaged in business in Springfield, under the firm name of D. D. Warren & Co.; that in February, 1848, and at various times thereafter, near the time of the date of the note in suit, they sold goods on credit to the defendant; that payments were made from time to time by the defendant, and that on the day of the date of the note the firm claimed that the sum of \$562.85 was due from the defendant to the firm. The plaintiff also testified that at a time previous to the date of the note, he purchased of his firm the indebtedness of the defendant to the firm to the amount of

at a subsequent date he purchased the balance of the note and that the amount of the note was to be applied by the account of his firm against the defendant.

The defendant was called as a witness by the plaintiff, and he testified that he had read from the bills of sale of goods sold by the defendant before the date of the note, the accounts of certain quantities of spirituous liquors sold by said defendant at various times between February 18 and March 18 of the note, in quantities of less than twenty-eight gallons any one time, amounting in all to the sum of \$61.65; and the defendant testified that certain errors and overcharges, and a miscomputation which appeared in said bills, reduced the value of the firm at the time of the date of the note to the sum of \$548.85; of which sum \$61.65 was for the spirituous liquors sold by the plaintiff to the defendant, leaving due to the defendant at the time of making the note, the sum of \$487.20 for the other than said liquors so sold. The plaintiff denied this and produced evidence to show the contrary.

The defendant called the clerk of the courts for the county of Hampden, who testified that he had examined the records of the Commissioners for the county of Hampden, in his charge, and that it appeared by the records that neither the defendant, D. Warren & Co. nor the plaintiff were licensed to sell spirituous liquors in the year 1848.

The defendant asked the court to rule that upon the evidence the plaintiff could not recover. This ruling the presiding judge refused to make.

The defendant being called by the plaintiff, testified that the name of Horace Bartlett was not written upon said note in his own hand or with his knowledge or consent, and said name was not on the note when he delivered it to the plaintiff. Upon this there was also evidence from the defendant that a mortgage was made at the same time with the note in suit to secure it, and that the mortgage was witnessed by Horace Bartlett, and that the mortgage was mentioned in a former trial of this suit he had entirely forgotten that it was ever made, or that any other person than the defendant made or executed on that occasion, and that the mortgage was exhibited to the jury for comparison of the handwriting of the witness upon it with that upon the note, and

it was contended by the plaintiff that the ink in which the ture of the defendant was written upon the note and mo and also that in which the said Horace Bartlett signed upon was of the same kind and color, and unlike that in which the of the note was written, and the plaintiff testified that evening of the day on which the note was made, Bartlett brought the note to him, and it then had on it the name of Bartlett.

The defendant prayed the court to rule that upon the evidence the plaintiff could not recover. But the court refused so to do.

The defendant also prayed the court to instruct the jury that the words "attest Horace Bartlett," had no reference to any part of the note but the words that were above or preceded the signature of Bartlett, and that the date of the note, being below the signature of Bartlett, was not affected by it, and the plaintiff could not recover. The court declined to give the instruction, but instructed the jury in terms not excepted to. The jury found for the plaintiff, and the defendant alleged exceptions.

W. Chapman, pro se. 1. The bills of sale of the goods sold to the plaintiff to the defendant having been produced and read at the trial, and their contents not contradicted, the first prayer of the defendant should have been granted. *Warren v. Chapman*, 105 Mass. 87.

2. The introduction of the mortgage and the testimony of the plaintiff was not a contradiction of the testimony of the defendant that Bartlett's name was not on the note when delivered to the plaintiff. The second prayer of the defendant should have been granted. *Smith v. Dunham*, 8 Pick. 246.

3. The place of attestation of any writing is at the end of the note. *Jackson v. Jackson*, 39 N. Y. 153.

G. M. Stearns & M. P. Knowlton, for the plaintiff.

GRAY, C. J. All the instructions requested were refused. Upon the subject of the two first there was conflicting evidence which was rightly submitted to the jury. The attestation, though not in the usual place, might apply to the whole note if proved to have been made for the purpose after the note had been completed. *Richardson v. Boynton*, 12 Allen, 138. The instruction upon this point, not having been excepted to or requested, must be deemed to have been correct. *Exceptions overruled.*

OF SPRINGFIELD vs. MARCELLUS D. SLEEPER.

SAME vs. A. M. SLEEPER.

SAME vs. P. W. BREWSTER.

n. September 21. — 22, 1874. MORTON & ENDICOTT, JJ.,
absent.

the discretion of the judge presiding at a trial to order several actions on the same subject matter, brought by the same plaintiff against several defendants, to be tried together, although the defendants employ distinct counsel, if the evidence in the several cases is different.

THE ACTIONS OF CONTRACT upon the following instrument signed by the defendants and others: "Provided the city shall place granite curb-stones around the large trees on Main Street, for the purpose of protecting them, we the defendants hereby agree to pay to the city the cost of the curb-stones placed opposite our land on our side of the street." The trial in the Superior Court, *Aldrich*, J., ordered, the judge objecting, that the cases should be tried together. The evidence against the defendants was different, and they employed distinct counsel. The presiding judge directed the jury to consider and decide each case separately, and called their attention to the evidence applicable to each case, and gave them instructions which were not excepted to. The jury found a verdict for the plaintiff in each case, and the plaintiff alleged exceptions.

Smith, for the plaintiff.

Stearns & H. Morris, for the defendants.

C. J. It was within the discretion of the court to order the cases to be tried together. The difference in the evidence and the employment of distinct counsel by the defendants, under the circumstances to be considered by the court below, but did not deprive the plaintiff as of right to separate trials. *Witherlee & Sons*, 24 Pick. 67. *Kimball v. Thompson*, 4 Cush. 1. *Commonwealth v. Robinson*, 1 Gray, 555. *Commonwealth v. Powers*, 99 Mass. 438. *Commonwealth v. Powers*, 109 Mass. 438. *Exceptions overruled.*

WILLIAM GORDON vs. WARE SAVINGS BANK & another

Hampden. September 22. — 23, 1874. **MORTON & ENDICOTT**
absent.

Money paid to a mortgagee by an insurance company, in pursuance of its agreement with the mortgagor, cannot be applied by him to the payment of the debt secured by the mortgage, if it be not due, without the consent of the mortgagor.

Where mortgaged premises are injured by fire and the amount of the loss is paid by an insurance company, in pursuance of its agreement with the mortgagor, the first mortgagee, who pays the amount to the mortgagor to be applied in repairing the premises so as to make them as valuable as before the fire, and he applies it, the holder of a second mortgage on the premises has no equity to have the amount so received applied in reduction of the debt secured by the first mortgage.

BILL IN EQUITY by the holder of a second mortgage on a parcel of land in the town of Ware against the Ware Savings Bank and to whom the land had previously been conveyed in mortgage by Daniel Holden, the owner of the equity of redemption. The bill alleged that the sum of \$780 dollars had been paid to the principal defendant by an insurance company in payment of a loss by fire of buildings on the land, and that this sum had been indorsed by the defendant corporation on the note secured by the mortgage to said corporation; that the lot of land had been conveyed by the corporation under a power in the mortgage, and that it refused to account for and pay over to the mortgagor or his assigns the surplus remaining after the payment of its debt.

Hearing before *Colt, J.*, who reported, that no question of jurisdiction was raised upon the pleadings, or at the hearing, that he found the following facts, and reserved the case for the consideration of the full court.

On December 10, 1868, Daniel Holden gave a mortgage, recorded, of certain real estate, with power of sale, and an agreement therein "to keep the buildings thereon insured against fire in a sum not less than \$5,000 for the benefit of said corporation to the Ware Savings Bank, to secure a note of \$3,300 of date, payable on demand to said bank. Holden also procured insurance on the buildings, by a policy in which this clause was inserted: "Payable in case of loss to the Ware Savings Bank mortgagee, as its interest shall appear."

In the winter of 1870-1, the buildings were partly destroyed by fire, and February 1, 1871, the insurance company paid

the sum of five hundred dollars, which sum was then indorsed upon said note by a teller in the bank, as received on account of the principal, and also entered upon the books of the bank. The payment, soon after indorsement and entry, came to the knowledge of the treasurer, who had the general charge of the business of the bank. Holden did not know of the indorsement at the time it was made, but did soon after. When he obtained it he claimed the money for the rebuilding of the damaged property, but it was not paid him then, it being agreed that it should remain as it was, the money to be held by the treasurer until the buildings should be rebuilt, if they should be rebuilt, and then the matter should be adjusted.

The buildings, of equal or greater value, were afterwards rebuilt, and then on or about July 12, 1871, the bank paid to Holden \$500, and Holden then erased the indorsement of said note, and made the following memorandum on the back of the note: "This indorsement on principal erased by me, and the amount of the note is the same as originally made, \$3,300." At the time no actual demand had ever been made for payment of the note, and no interest was unpaid. The corporation took no action upon the matter, and it was never brought before it in its corporate capacity.

On June 23, 1873, the bank sold the mortgaged premises by exercise of the power of sale for \$3,580, and paid to Holden, or the plaintiff, as the balance due after paying their note, interest and expenses, \$136.60. The amount of their note was considered by the bank in making such balance to be \$3,300.

On January 5, 1870, Holden gave to the plaintiff a mortgage of the same premises to secure a note of \$1,579 for money borrowed by him of the plaintiff, payable to the plaintiff, or order, on demand, no part of which note has ever been paid, except the \$136.60 above specified; this last mortgage and note were in the handwriting of the treasurer of the Ware Savings Bank, and the acknowledgment taken before him as magistrate, and the same attested by him. Said mortgage was duly recorded, January 12, 1870, and contained covenants that the premises are free of all encumbrances "except a mortgage deed to the Ware Savings Bank to secure the payment of \$3,300."

The defendant Holden made no defence, and the bill was decreed for confessed as against him.

H. B. Stevens, for the plaintiff. 1. The money was paid to an insurance company to the bank, received by the teller, in payment on the note by him as applied to the principal, and was entered upon the books of the bank. All the proceedings were in the regular course of business of the bank. When the treasurer, having general charge of the business knew of the transaction, he approved and thereby made it his own, that is, the transaction was the act of the bank. And the indorsement remained on the note, and was entered on the bank books, and the money in the bank, until July 12, following, more than five months, and then the bank paid Holden \$500, and Holden erased the indorsement of said note. When Holden claimed the money to rebuild, it was refused, but the treasurer told him that when the buildings should be rebuilt, provided they should be rebuilt, the matter should be adjusted, thereby making any further adjustment dependent upon the contingency of Holden's rebuilding. The principal, then, on the note was reduced to \$2,800, February 1, 1871, and remained so until July 12, 1871, and during that period of more than five months, the mortgage secured a debt to the bank of \$2,800; and the mortgage was discharged by operation of law *pro tanto*, and no act of the parties could revive it. *Holden v. Bailey*, 3 Met. 55. *Richardson v. Cambridge*, 2 Allen, 118. *Will v. Chase*, 3 Allen, 339. The mortgage, therefore, at the time of the sale secured a note of \$2,800, and any unpaid interest, and being the only sum remaining unpaid on said note, the plaintiff must account for the proceeds of sale upon that basis.

2. It cannot be objected that the plaintiff has not suffered, therefore is not entitled to the relief sought. As well might it be said, if the whole \$3,300 had been paid and the mortgage discharged, and a month afterward the bank had again lent Holden \$3,300 on mortgage of the same land, such lien should have the precedence of the plaintiff's, provided only the premises remained of the same value. The plaintiff's lien attached as a first lien just so fast as the prior incumbrance was reduced, and to the extent of such reduction, that is, every payment on the principal of Holden's note to the bank, enured to the benefit of the plaintiff, and no subsequent act of Holden or the bank could prejudice the vested rights of the plaintiff, thereby creating a first lien.

J. G. Allen, for the defendant.

S, J. The plaintiff, by virtue of his second mortgage, no right to, or interest in the policy of insurance. His equity must be maintained, if at all, upon one of two; 1st, that the receipt of \$500 by the defendant operated absolute payment, *pro tanto*, of the debt secured by the mortgage; or, 2d, that in equity the money received from the insurance ought to be appropriated for the relief of the second mortgagee. We are of opinion that the bill is maintainable upon either ground.

The insurance was for indemnity to the mortgagor as well as the mortgagee. To the mortgagee it was for protection of his property, not for payment of the debt. It was collateral to the debt. Money received from the insurance took the place of the property destroyed, and was still collateral until applied in satisfaction of the debt, by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment, to convert the securities.

There was no such consent by the mortgagor; and the facts do not show that the money was received and indorsed upon the note with any intention to exercise the right to convert the securities for payment of the debt. The indorsement was erased from the note, the money appropriated to its original purpose, to wit, the satisfaction of the security. Both mortgagor and mortgagee were mistaken in the indorsement as a mistake or as unauthorized; and we cannot see why they might not properly do so.

The money having been properly applied to the restoration of the impaired security, for the benefit alike of all parties interested, there are no equities in favor of this plaintiff which entitle him to appropriate that benefit exclusively to his own use. On the contrary, it would be inequitable even if such were his legal right, by reason of the indorsement of the money, in the first instance, upon the note.

Bill dismissed.

N. G. GIBBS & another vs. L. C. SMITH.

Hampden. September 21. — 26, 1874. MORTON & ENDICOTT
absent.

An agreement not to bid or to influence any one else to bid for the service of the inmates of a house of correction is against public policy and void. No action will lie upon it, even if the party letting the services has sustained loss by reason of the making of the agreement.

CONTRACT to recover for the breach of the following agreement signed by the parties thereto: "An agreement made this day between N. G. Gibbs, S. A. Cornell, L. C. Smith and J. C. Kingsley, that the said Gibbs and Cornell will not influence any one to bid, and will not accept the contract of one else; and further, the said Kingsley agrees to pay to the said Gibbs and Cornell the sum of five hundred dollars if he gets the contract of the jail for the coming three years; and further, the said Smith agrees to pay said Gibbs and Cornell eight hundred dollars if he accepts the contract of the jail for the next three years and runs it."

At the trial in the Superior Court, before *Wilkinson*, the plaintiffs offered to prove that the agreement related to the bids upon bids advertised for by the overseers of the house of correction of Hampden County, for the services and labor for three years, of the inmates of the house of correction of the county. That they fully performed their agreement, and that the defendant accepted the contract of the jail as specified in the agreement and runs it, and although requested by plaintiffs to pay them the sum of eight hundred dollars, according to the terms of the said agreement, refuses so to do; that the plaintiffs, by reason of favoritism, would not have obtained the contract if they had made bids therefor; and that the county was, therefore, in its manner injured by the agreement of said parties.

Upon these offers the presiding judge ruled that the plaintiffs could not maintain their action, on the ground that the agreement was against public policy and void, and directed a verdict against the defendant, and the plaintiffs alleged exceptions.

E. B. Gillett & H. B. Stevens, for the plaintiffs. The court, of the court, that the plaintiffs could not maintain their

ground that the agreement was against public policy and was wrong. Although *prima facie* it might be considered objectionable to this objection, the offer of the plaintiffs to prove favoritism which would prevent the plaintiffs obtaining the contract, whatever their bid might be, relieves the agreement of this objection, and introduces a praiseworthy motive on the part of the plaintiffs, and such proof would unquestionably be against public policy and public morals. Besides, the case expressly finds that the county was in no manner injured by the contract of the parties as contained in said agreement, which relieves it altogether of any possible taint of being in contravention of public policy. *Phippen v. Stickney*, 3 Met. 384.

M. Stearns & M. P. Knowlton, for the defendant.

WATKINS, J. An agreement between two or more persons that they will make a small bid for the benefit of all upon property about to be sold at public auction, which they desire to purchase together, either jointly or as they propose to hold it together, or afterwards to divide it into such parts as they wish individually to hold, neither designed to deprive the whole, or for any similar honest or reasonable purpose, is valid in its character and will be enforced; but such agreement, made for the purpose of preventing competition and reducing the price of the property to be sold below its fair value, is against public policy and in fraud of the just rights of the party offering it and therefore illegal. *Phippen v. Stickney*, 3 Met. 384, 387. 100 Mass. Eq. Jur. § 293. Story Sales, § 484.

The contract in the present case is manifestly of the latter class. The labor of the inmates of the house of correction was to be sold at public auction. The plaintiffs contracted with the defendant not to bid for it if the defendant would pay them a certain sum if he obtained it. The only consideration for the defendant's promise was that the plaintiffs should abstain from bidding. Competition would thus be destroyed so far as these parties were concerned, and the labor might thus be obtained at a rate lower than its fair market value. The contract thus made being against public policy, no action can be maintained upon it by the parties. *Fuller v. Dame*, 18 Pick. 472. *Rice v. Wood*, 118

Mass. is it any answer to show that no injury has been done to the party selling. That which renders the contract illegal is not

the injury the parties have actually occasioned, but the p
which they must have contemplated when it was made ;
lidity is tested not by its results, but by its objects as sho
its terms. *Exceptions overruled.*

GEORGE W. SWAZEY *vs.* EDMUND C. ALLEN.

Hampden. September 21. — 28, 1874. MORTON & ENDICOTT
absent.

When the maker of a note four years after the time at which he signed it
surance of an agreement made at that time, acknowledges, to a person who
see him sign the note, that the signature to it is his, and requests such p
sign it as a witness in order to prevent the operation of the statute of lim
the question whether the note is "signed in the presence of an attesting
within the Gen. Sts. c. 155, § 4, is for the jury.

CONTRACT on a promissory note, dated April 11, 185
purporting to be signed by the defendant, and witnessed
H. Allen. Writ dated May 24, 1873. The answer set
statute of limitations.

At the trial in the Superior Court before *Wilkinson*,
plaintiff's counsel stated in opening that the note declar
was signed by the defendant at the time of its date ; that r
son being present but the parties, it was not then witness
the parties agreed it should subsequently be signed by
person as a witness ; that some four years afterwards the
being together, the defendant, in the presence of A. H.
acknowledged that the signature to said note was his, a
parties then requested Allen to sign it as a witness, to p
the operation of the statute of limitations, and he did so.
proof of these facts the plaintiff's counsel said he shoul
tend that the note was not barred by the statute of limit
The presiding judge ruled that if the facts were proved, the
could not be maintained, and a verdict was thereupon tal
the defendant, and the plaintiff alleged exceptions.

E. B. Maynard, for the plaintiff.

G. M. Stearns, for the defendant. 1. With the attestati
note is in fact a different legal contract from what it wo

at. *Smith v. Dunham*, 8 Pick. 246, 249. It was not com-
to show by parol that the parties, as an additional contract,
at the time of making, that the note should thereafter be
ed into a different legal contract than it purported to be.
gs v. *Billings*, 10 Cush. 178. *Kelly v. Cunningham*, 1 Allen,
Tower v. Richardson, 6 Allen, 351. *Currier v. Hale*, 8
47.

The case then stands upon a subsequent meeting of the par-
the note and the signing of the same by the witness, as
with the consent of both parties. "In order to constitute
estation of a note, the witness must put his name to it
y and under circumstances which reasonably indicate that
signature is with the knowledge of the promisor and is a part
same transaction with the making of the note." *Drury v.*
var, 1 Cush. 276. *Smith v. Dunham, supra*. No agreement
sent that the note shall be deemed or considered an attested
even if written upon the note, will take it out of the statute
itations. *Walker v. Warfield*, 6 Met. 466. There was no
of evidence that the parties undertook to deliver the note
it was witnessed, as a new and original note, but they un-
k by their act to engraft upon the old note the character of
ested note.

ELLS, J. The note in suit purported to bear the attestation
itness, so as to come within the exception to the general
es limiting such actions to six years. Gen. Sts. c. 155, § 4.
the question of the legal sufficiency of such an attestation,
e purpose of giving it that effect, all the facts and circum-
s relating to it are competent to be proved by parol testi-
To prove that it was subscribed to the note with the
edge and assent of the maker, and in pursuance of the
ment or understanding of the parties at the time the note
igned, is no more to vary or add to the terms of a written
act, than it is to prove that it was not written at the time
ports to be upon the face of the note. The proposition to
ablished by the plaintiff is that the witness put his name to
ote "openly, and under circumstances which reasonably in-
that his signature is with the knowledge of the promisor,
s a part of the same transaction with the making of the
' *Drury v. Vannevar*, 1 Cush. 276. *Smith v. Dunham*,
k. 246.

That the witness did not see the maker actually sign the bill, and that his attestation was at a subsequent interview, and not bearing upon the question; but they are not conclusive. *v. Dunham, supra. Pequawkett Bridge v. Mathes*, 7 N. H. 1. The length of time intervening affects the degree of weight to be given to the fact that the signature of the witness was not at the same time with that of the maker.

We are of opinion that upon the statements of the bill of exceptions it was a question for the jury, and therefore was decided by the court. *Exceptions sustained.*

SEYMOUR GATES vs. JAMES RYAN.

Hampden. September 22. — 28, 1874. MORTON & ENDICOTT, for the plaintiff, absent.

A. by an agreement in writing sold a building to B. and agreed to remove it from the land. In consideration thereof B. sold a building to A. to be removed from the land. A. agreed to pay A. \$200. To the performance of the agreement each bound himself in the penal sum of \$100. A.'s building, in removal, fell down in the street, and A. thereupon abandoned his efforts to remove it, and used the fragments for his own. B. did not pay the sum of \$200 though it was demanded. B. thereupon for breach of contract and recovered as damages the amount of the penalty. *Held*, in a suit by A. against B., that the stipulations of the parties were binding, that the failure of A. to perform his part of the agreement rendered the action for breach of contract, and that the action would not lie.

CONTRACT on the following agreement in writing signed by the plaintiff and defendant:

"This agreement, made this second day of December, 1874, and between Seymour Gates of Holyoke, Hampden County, Massachusetts, and James Ryan of said Holyoke, witnesseth, that in consideration of the sum of \$200 to him by the said Gates paid, the consideration hereafter expressed, and the agreement hereby made, the said Ryan, the said Gates, do hereby agree to sell and transfers unto the said Ryan one yellow house, now situated on land of said Gates, in the west side of the highway passing said Gates's homestead, being the first house south of said homestead, and also agrees to move said house from its present location into the lot of land of said Ryan on the plains (so

id Holyoke, the same to be moved in a workmanlike and
r manner, on or before the first day of February, 1872. In
deration whereof, the said Ryan hereby sells to the said
s his shanty standing on land of the Holyoke and Westfield
oad Company, near Alexander Day's, the same to be re-
d by the said Gates; and further, the said Ryan agrees to
o the said Gates the sum of two hundred dollars, in four
payments of fifty dollars per year, and secure the same by
gage upon real estate, with interest at the rate of eight per
and to this agreement each of said parties binds himself, his
and legal representatives, in the penal sum of one hundred
rs. The stone and brick under the yellow house are to be-
to said Ryan, who is to draw them away, if he wishes them."
e case was submitted to the Superior Court, and after judg-
for the defendant, to this court, upon the following agreed

the execution of the contract is admitted. The plaintiff soon
wards commenced to move the yellow house named in the con-
to the land of the defendant at the place stipulated, but it fell
in the highway while in process of removal, and the plain-
thereupon abandoned his efforts to remove it, and took the
ments and used them as his own.

the defendant in this action afterward brought a suit against
plaintiff to recover upon the same written contract, and the
ion of the breach of the contract was the only issue submitted
e jury. The damages were by agreement of parties assessed
e court. Evidence was submitted to the court as part of the
ure of damages of the loss suffered by the plaintiff by reason
e failure of the defendant to deliver to him the house men-
d in said contract, and as showing that the value of the
e was put in evidence and computed in making up the dam-
and in said suit he recovered damages to the full amount of
enal sum named in the contract, viz., one hundred dollars,
hich execution was issued and satisfaction received.

the defendant in this suit has never paid to the plaintiff the
of two hundred dollars named in the contract, or any part
of, or given any note or security therefor, although the same
demanded by the plaintiff.

ter the house had fallen, and before the bringing of either of

the suits, the plaintiff in this action gave written notice to the defendant that on account of the taking by him of the window of the shanty named in said written contract, he considered his liability under the contract at an end, but the defendant contended that he had a right to take the windows, and paid no further attention to the notice.

If upon these facts, the plaintiff is entitled to recover, judgment is to be entered for \$100 and interest from the date of the verdict, otherwise, for the defendant.

M. P. Knowlton, for the plaintiff.

A. L. Soule, for the defendant.

DEVENS, J. The promise of the defendant Ryan was in consideration of the sale to him of the yellow house and agreement to deliver the same on his land. The stipulations of the parties to the contract cannot be considered as independent; the object was to exchange the house owned by Gates for the shanty of Ryan, and the sum of \$200 to be paid by Ryan. When therefore the house fell down during the process of removal, and the materials were appropriated by Gates to his own use, an action was brought by Ryan against him for the non-performance of the contract, it was necessary, in order to ascertain the damages sustained by Ryan, to consider that Ryan would be released from the further performance of his stipulations by the failure of Gates to perform; and the measure of such damages would be the fair value of the contract broken by Gates, over and above that which Ryan had still to pay or perform in consideration for it; an issue was given which of course included an examination of the comparative value of the house and shanty as well as the amount of money paid by Ryan. It must be presumed that the court adopted the true rule in rendering damages in favor of Ryan to the full amount of the penal sum named in the contract.

The plaintiff apparently proceeds upon the idea that, because he in the former action paid damages for the non-performance of the contract on his own part, he is now in substantially the same situation that he would be if he had performed it, and is therefore entitled to call upon the present defendant for the notes amounting to \$200. This is erroneous; the damages which he has sustained must have been computed upon the theory that the contract was broken and that the defendant was not bound further to perform.

either the taking of the windows from the shanty, which the plaintiff after the falling of the house assigned as a reason considering his liability under the contract at end, justified him in doing, was a matter necessarily passed upon and settled by former suit.

Judgment affirmed.

JACOB JENKINS vs. L. E. DAWES.

Decided. September 21.—28, 1874. MORTON & ENDICOTT, JJ.,
absent.

Attesting witness, within the statute of limitations, Gen. Sts. c. 155, § 4, must be one who at the time of the attestation would be competent to testify in court to the facts which he attested.

A promissory note was attested by the wife of the payee of the note. At the time of the attestation a wife was not a competent witness in an action to which her husband was a party. In an action on the note by the payee, *held*, that the wife was not properly attested, although at the time of trial the wife was a competent witness.

CONTRACT upon a promissory note dated August 1, 1858, made by the defendant, payable to the order of the plaintiff, and attested by the wife of the plaintiff. Writ dated August 15,

The answer set up the statute of limitations.

At the trial in the Superior Court, before *Wilkinson, J.*, it was *held* that the liability of the defendant depended upon the legal force and binding force of the attestation. The defendant asked the presiding judge to instruct the jury as follows:

That as the note was witnessed by the wife of the plaintiff, payee of the note, the attestation was not such as would take the note out of the statute of limitations. 2. That the statute of limitations was a bar to the action.

The presiding judge declined so to rule. The jury found for the plaintiff, and the defendant alleged exceptions.

A. Leonard, for the defendant.

M. Stearns, for the plaintiff. 1. The note was an attested

The wife might be a competent witness at the trial. The note was negotiable, and she was a competent witness for an indorser. If a competent witness for anybody, she was a witness

for all purposes. 1 Greenl. Ev. § 842. *Henman v. Dicki* Bing. 183. She might become by statute (as she did) a competent witness at the time of trial. Where the cause of incompetency is removed by operation of law, as by the bankrupt statute of limitations, the person becomes a competent witness. *Murray v. Judah*, 6 Cowen, 484. *Ludlow v. Union Insurance*, 2 S. & R. 119. *United States v. Smith*, 4 Day, 121 might become a competent witness by the death of her husband in a suit brought by his administrator. *Litchfield v. Merri* Mass. 520. In cases of incompetency of attesting witness handwriting of the witness may be proved. *Godfrey v. L* 1 Stra. 34. *Buckley v. Smith*, 2 Esp. 697. *Haynes v. Rut* Pick. 242.

2. The rule that a witness must be competent at the time of attestation applies only to wills. Under that rule an incompetent person was equally incompetent with a wife to attest a will. *Hawes v. Humphrey*, 9 Pick. 350. The rule is so held in relation to wills for special reasons stated in that case; and because of the language of the statute which "directs the mode of executing and attesting a will." It requires it shall be attested by "three or more competent witnesses;" therefore the quality of competent witnesses is necessary at the time of attestation. Lord Mansfield's opinion, even in cases of wills, that it was sufficient if the witnesses were competent at time of probate of will. *Wind* *Chetwynd*, 1 Burr. 414. The statute of limitations does not apply to notes "signed in presence of an attesting witness," in case of wills in presence of a "competent witness," "witness." This plainly refers not to the disposition and creation of rights, as in case of wills, but the method of proving facts in court of justice. The Gen. Sts. c. 155, § 4, provide a means of proof to take cases out of the statute. The wife may do so at the trial, and, if competent then, stands like a witness for a party interested but whose interest has been removed. The attestation is not necessary to the execution as in the case of a will, but is a means of proof when the execution shall be a question in a court of justice. Therefore, if the attesting witness is competent at the time the question arises in court, nothing more is required.

GRAY, C. J. In order to take a promissory note out of the general statute of limitations limiting actions to six years, it

ned in the presence of an attesting witness," and the
rought by the original payee or his executor or adminis-
Gen. Sts. c. 155, § 4. An "attesting witness," under
ute, as under the statute of wills, Gen. Sts. c. 92, § 6,
one who at the time of the attestation would be compe-
estify in court to the matter which he attested; and not
might or might not be competent to testify upon a trial
future time. The statute of limitations puts the instru-
duly attested, on the footing of a bond or other specialty;
character of the instrument in this regard depends upon
lity of the attestation at the time it is made, and not
ture contingencies. A person whom the law declares to
petent to testify is not a lawful witness for any purpose.
Dunham, 8 Pick. 246. *Amherst Bank v. Root*, 2 Met.
Murdain v. Sherman, 6 Cush. 139. *Haven v. Hilliard*, 23
D. *Sparhawk v. Sparhawk*, 10 Allen, 155. *Sullivan v.*
, 106 Mass. 474. *Pease v. Allis*, 110 Mass. 157. At the
the execution and attestation of the note in suit, a wife
a competent witness in an action to which her husband
rty. St. 1852, c. 312, § 60. *Barber v. Goddard*, 9 Gray,
rlen v. Shannon, 14 Gray, 433. It follows that the note
duly attested, and that the instruction prayed for should
en given.

Exceptions sustained.

SUPPLEMENT.

115 002
150 591

Under the Constitution of the Commonwealth, a woman may be a member of a committee.

THE Justices of the Supreme Judicial Court respectfully submit the following answer to the question upon which their opinion was required by the order of the Honorable House of Representatives of the sixteenth day of the present month.

The question is stated in these words: "Under the Constitution of this Commonwealth can a woman be a member of a committee?" The question is limited to the effect of the Constitution upon the capacity of a woman to hold this office, and involves no interpretation of statutes.

If the Constitution prevents a woman from being a member of a school committee, it must be by force of some express provision thereof, or else by necessary implication arising either from the nature of the office itself, or from the law of Massachusetts existing when the Constitution was adopted and in the light of which it must be read.

But the Constitution contains nothing relating to school committees; the office is created and regulated by statute; and the Constitution confers upon the General Court full power and authority to name and settle annually or provide by fixed law the naming and settling all civil officers within the Commonwealth, the election and constitution of whom are not in the Constitution otherwise provided for. The common law of England, which was our law upon the subject, permitted a woman to fill any office of an administrative character, the duties attached to which were such that a woman was competent to perform them. The duties of a school committee relate exclusively to the education of children and youth in the town or city for which it is elected, and they consist of the general charge and superintendence of the schools, including the employment of teachers, the selection

books, the regulation of the attendance of scholars and the
 tion of school registers and returns; and they are in no
 of such a nature that they cannot be well and efficiently
 ed by women.

necessary conclusion is that there is nothing in the Consti-
 of the Commonwealth to prevent a woman from being a
 of a school committee, and that the question proposed
 respectfully answered in the affirmative.

HORACE GRAY.

JOHN WELLS.

JAMES D. COLT.

SETH AMES.

MARCUS MORTON.

WILLIAM C. ENDICOTT.

CHARLES DEVENS, Jr.

N, FEBRUARY 20, 1874.



INDEX.

ACCEPTANCE.

**BILL OF EXCHANGE ; INSURANCE, II ; MARRIED WOMAN, 1 ;
ORDER.**

ACCOUNT.

See EXECUTOR AND ADMINISTRATOR, 3.

ACCOUNT ANNEXED.

Contract upon an account annexed will lie for labor at a rate agreed by the
and for materials furnished at reasonable prices. *Lowe v. Pimental*, 44.
Where the plaintiff sues upon an account annexed for work done and ma-
terials furnished, and the defendant contends that there was a special contract
for a round sum, and the judge rules that if the jury find a special contract,
the plaintiff is not entitled to recover on his declaration, evidence of the
existence of the special contract, and of the value of the work, if such contract
has been completed, is immaterial. *Id.*

ACTION.

Owner of a building with a roof so constructed that snow and ice col-
lecting on it from natural causes will naturally and probably fall into the
traveling highway, is not liable to a person injured by such a fall upon him,
travelling upon the highway with due care, if the entire building is at
all times let to a tenant, who has covenanted with the owner "to make all
usual and proper repairs both internal and external," it not appearing that
the tenant might not have cleared the roof of snow by the exercise of due
care or that he could not by proper precaution have prevented the accident.
Storer v. Storer, 86.

Question whether a cause of action survives after the death of the plain-
tiff may be raised by demurrer. *Leggate v. Moulton*, 552.

Action for fraudulent representations by means of which a person was
induced to part with real estate, does not survive by force of the Gen. Sts.
c. 1, § 1. *Id.*

Action for wrongful and fraudulent acts of the defendant which induced
the plaintiff to set aside a verdict obtained by the plaintiff, if ever maintainable,
does not survive, after the death of the plaintiff, by force of the Gen. Sts. c.
1, § 1, if no damage is alleged to have been done to any specific estate of
the plaintiff. *Id.*

5. A right of action for libel does not survive by force of the Gen. Sta. § 1, even if the party injured lost thereby a valuable office. *Cum Bird*, 346.

See BAILMENT; NEGLIGENCE, 5; PARTY WALL; PAYMENT; PLEA; RAILROAD, 2, 4, 12; REMOVAL OF ACTIONS; SALE, 5; TRESPASS.

ADOPTION.

1. The provisions of the Gen. Sts. c. 110, § 7, declaring that an adopted child "shall be deemed, for the purposes of inheritance by such child and the legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in natural wedlock," is not unconstitutional unless it interferes with vested rights. *Sewall v. Roberts*, 262.
2. Under the Gen. Sts. c. 110, if the parents of the child to be adopted are dead, and the Probate Court on the petition of the guardian of the child leave to adopt it, which is assented to by the petitioner as guardian, and a decree in accordance with the prayer of the petition, the fact that a guardian *ad litem* was appointed, even if such appointment should have been made, does not make the decree void, but voidable only, and it can be avoided by a stranger to the injury of the child. *Ib.*

See TRUST AND TRUSTEE, 3.

AFFIDAVIT.

See ARREST.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

1. Under the Gen. Sts. c. 129, § 41, an amendment may be allowed at any time before final judgment. *Horne v. Meakin*, 526.
2. If during the trial of a cause the court rules that the plaintiff cannot stand on his declaration, and allows him to amend, and suggests that the plaintiff proceed and that the amendment be filed thereafter, and no objection to this course, it is too late to object at the argument in this court if the amendment was not filed until after the verdict. *Ib.*

See TRESPASS, 2.

ANIMALS.

Animals which escape from the control of persons having charge of them, and enter a highway and enter an unfenced lot abutting thereon, without the knowledge of the owner, are not liable for damage.

nt of the owner thereof, are not lawfully upon the lot. *McDonnell v. Eld & North Adams Railroad*, 564.

See RAILROAD, 7, 8 ; WAY, 1.

APPEAL.

ate appeal may be taken from the final decree of a single justice to court at any time within thirty days ; but if it is taken before the on of thirty days, the full court has cognizance of it in ten days after n. *Mason v. Lewis*, 334.

appeal is taken from the decree of the probate court on matters of at a hearing before a single justice of this court the appellant does ar and is defaulted and the decree affirmed, and he thereupon ap- the full court, no evidence having been taken before the single and no report made of the hearing before him, his decree cannot be n matter of fact. *Ib.*

appeal from the decree of a single justice to the full court in a case or probate, this court cannot order evidence to be taken when none n and reported before the single justice. *Ib.*

See COMPLAINT ; EQUITY, 18, 19.

APPOINTMENT.

See TRUST AND TRUSTEE, 6.

ARBITRAMENT AND AWARD.

se is referred to arbitration to determine the boundary line between es, and an award is made accordingly, it is competent to show that ee has made a mistake on his own theory ; but it is not competent that he has erred in judgment, or that he has made a mistake in his as to the true starting point. *Spoor v. Tyzzer*, 40.

ARREST.

rit necessary for the arrest of a debtor under the Gen. Sts. c. 124, ot required to be sworn to before a magistrate within the county in e arrest is to be made, or in which the debtor has a residence or business. *Francis v. Howard*, 236.

ARREST OF JUDGMENT.

See INDICTMENT, 5.

ASSAULT.

ctment for a felonious assault with the malicious intent to maim and a verdict that " each defendant is guilty of an assault without the alleged in the indictment," operates as a conviction of a simple *Commonwealth v. McGrath*, 150.

See INDICTMENT, 4 ; SENTENCE.

ASSENT.

See CONTRACT, 2, 3.

ASSESSMENT.

See BETTERMENT, 2-4; LEASE, 3, 4.

ASSIGNMENT.

See TRUSTEE PROCESS, 3.

ATTACHMENT.

See ATTORNEY, 1, 2; BILL OF LADING, 4; BOND, 1, 2.

ATTORNEY.

1. An attorney at law has authority, by virtue of his employment release before judgment an attachment of real estate. *Moulton* 36.
2. Where in an action brought by a writ of entry it appeared that mandant claimed title through a sale on execution of premises been attached on mesne process in a suit against W., and that claimed through a conveyance made by W., after the attachment dissolved by the attorney of the plaintiff without his knowledge in the suit against W. *Held*, that the tenant, in the absence of fact, part, was entitled to judgment. *Ib.*

See EQUITY, 25, 26, 30; EXCEPTIONS, 10; POOR DEBTOR,

AUCTION AND AUCTIONEER.

See SALE, 1, 3.

AUDITOR.

An auditor appointed to hear the parties, examine their vouchers and state the accounts between them, and make report thereof to the court authorized to consider and determine whether or not work was done on materials furnished under a special contract; and his report is prima facie evidence of all the matters submitted to him. *Lowe v. Pimental*,

See EXCEPTIONS, 8.

AWARD.

See ARBITRAMENT AND AWARD.

BAIL.

1. A default of a defendant is a breach of a recognizance given by him, which fixes the liability of his bail. *Commonwealth v. Dowdican's Bail*, 1.
2. When an indictment has been laid on file, the Superior Court has authority to take up the case and order a new recognizance. *Ib.*

BAILMENT.

the duty of a livery stable-keeper to provide a horse suitable for the purpose for which it is let, and on the question of his liability for an injury caused by the horse's running away it is immaterial that he did not know the horse was unsuitable. *Horne v. Meakin*, 326.

A stable-keeper lets a horse to A., knowing that it is to be used by him to take his family to a funeral, he is liable to the son and any member of the son's family for an injury caused by the unsuitableness of the horse for the purpose for which it was hired. *Ib.*

If an accident is caused in part by the fault of a horse unsuitable for the purpose for which it is let, and in part by a defect in the highway, the stable-keeper who let the horse will be liable for the damage to the parties injured. *Ib.*

A person hires of a stable-keeper and by mistake takes a horse not intended for him, and the stable-keeper, knowing that he has taken the horse, for the purpose for which he intended to use it, does not make a reasonable effort to notify him of his mistake, he will be liable for any damage caused by the unsuitableness of the horse for the purpose for which it was used. *Ib.*

BANK.

The provision of the U. S. St. of 1864, c. 106, § 30, limiting the forfeiture for making usurious charges by national banks to the interest, applies as to banks established in states where a rate of interest is fixed by law, and to banks in states where no rate is fixed. *Central National Bank v. Pratt*, 547. *Davis v. Randall*, 547.

The laws of New York imposing penalties for taking usury do not apply to national banks established within the limits of that state. *Ib.*

It is within the authority of the president of a national bank to bind the bank by an agreement, with the acceptor of a draft which is discounted by the bank, not to enforce the draft against him, yet oral evidence of such agreement is not competent, in defence of a suit by the bank against the acceptor. *Davis v. Randall*, 547.

See CONSTITUTIONAL LAW, 1, 2.

BANKRUPT.

A claim of tort to recover damages for slander and malicious prosecution, against a defendant after verdict against him and before judgment is adjudged that he is bankrupt under the U. S. St. 1867, c. 176, such a claim is not provable against his estate, under § 19 of said act, and he is not entitled to a continuance of the action to await the proceedings in bankruptcy, but the plaintiff is entitled to judgment. *Zimmer v. Schlechauf*, 52.

See EVIDENCE, 19, 20; JUDGMENT, 3.

BETTERMENT.

The provisions of the St. of 1866, c. 174, do not permit the set-off of benefits accruing from the damages to a land-owner, caused by taking part of his land for the widening of a street. *Bancroft v. Boston*, 377.

2. Where a street is widened under the provisions of the St. of 1866 the whole benefit and advantage to an estate thereon, so far as it by the widening of the street, should be determined for the purpose of assessment under the provisions of the St. of 1868, c. 276, but an increase in value per foot of the land, owing to a change in form or size caused by taking part of it for the street, should not be included. If an increase is considered in estimating the damages paid to the owner of the land taken. *Ib.*
3. A jury in revising an assessment for the betterment to an estate on the widening of a street, made under the provisions of the St. of 1866, cannot alter the proportional share of the benefit assessed upon the question in common with all the estates benefited and liable to the assessment, unless they find the whole cost of the widening to be less than the amount assessed by the board of aldermen. *Ib.*
4. An order of the board of aldermen made under the St. of 1871, c. 276, reducing the amount of an assessment for a betterment, is not a nullity. *Blake v. Baker*, 188.

See LEASE, 3, 4.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILL OF EXCHANGE.

1. An oral acceptance of a bill of exchange is binding upon the acceptor. *Pierce v. Kittredge*, 374.
2. It is no defence to a suit against the acceptor of a draft which has been discounted, and upon which money has been advanced by the bank, that the draft was accepted for the accommodation of the drawer. *Randall*, 547.

See BANK, 3.

BILL OF LADING.

1. If a bill of lading of goods is indorsed in blank and delivered to a person of the owner for a special purpose, who is not authorized to sell the goods, a person who gets possession of it without the assent of the owner, although with the assent of the agent, acquires no title in the goods as against the principal. *Stollenwerck v. Thacher*, 224.
2. A bill of lading, even when running to order or assigns, is not a negotiable instrument, like a bill of exchange, but a symbol or representation of the goods to which it relates. *Ib.*
3. The delivery by an owner of goods of a common carrier's receipt for them, not negotiable in its nature, as security for an advance of money, with intention to transfer the property in the goods, is a symbolical delivery of them, and vests in the person making the advance a special property in the goods sufficient to maintain replevin against an officer who afterwards

upon a writ against the general owner. *National Bank of Green
earborn*, 219.

A draft is drawn by the shipper of goods on the consignee, and a bill of lading by which the goods are deliverable to the order of the shipper, is indorsed to the consignee, is attached to the draft and deposited with the bank discounting the draft, as collateral security for the advance. Such delivery transfers a special property in the goods to the bank, and gives it a right of immediate possession sufficient to enable it to replevin against the shipper and any one attaching the goods as property; and the consignee has no right of property in the goods, nor possession of them, except upon payment of the draft. *National Bank of Chicago v. Bayley*, 228.

Goods are shipped by railroad from another state to this, taking therefor a bill of lading in which he was named as consignor and consignee; indorsed the bill of lading in order to deliver to C.; drew a draft on C. for the price; attached the draft to the receipt and sent both to a bank in this state for collection; the bank forwarded an invoice of the goods to C., who went to the bank, accepted the draft, and afterwards sold the goods to D. A., at the request of C., entered into an agreement with him that A. should sell the goods, and, after delivering the draft and his commission, account to C. for the balance, paid up the draft with the receipt attached; and C. indorsed on the bill of lading in order to deliver the goods to A. Held, that A. had a special property in the goods; that C., until he paid the draft, had no title in the goods, and could pass none to D.; and that the carrier, on delivering them, was liable to an action by A. *Newcomb v. Boston & Lowell Railroad*, 233.

Goods are consigned deliverable to the order of the consignor, and a bill of lading, with a draft for the price, drawn on the purchaser of the goods. The bill of lading, if attached, is forwarded for collection, the purchaser has no title to the goods until the draft is paid and the bill of lading is indorsed to him; and the sale of the goods, to arrive, is void as against a person advancing money to pay the draft, to whom the bill of lading was indorsed by the consignor as soon as he obtained possession; and a second carrier who receives the goods from the first carrier to transport to their destination, with knowledge of the consignment, whose account they are carried, though without knowledge of the draft, is liable to the holder of the bill of lading, if he delivers the goods to such a purchaser. *Alderman v. Eastern Railroad*, 233.

CONTRACT, 3; DAMAGES, 5; PRINCIPAL AND AGENT, 2, 3.

BOARDING-HOUSE.

Liability given by the Gen. Sts. c. 151, § 29, to boarding-house keepers, for baggage and effects brought to their houses, belonging to their boarders, except mariners, for all proper charges due for fare and board, attaches as and when the fare and board are furnished. *Smith v. Boarding-house*, 70.

2. If a guest of a boarding-house keeper pays board by the week, and contract nothing is due until the end of the week, the lien, given by Gen. Sta. c. 151, § 29, nevertheless, in the mean time attaches. *Id.*

BOND.

1. The substitution by a clerical error of the creditor's name in the recital of a bond to dissolve an attachment, in the place intended for the original debtor, as the person to pay the judgment, does not invalidate the bond, if the intent can be distinctly ascertained from the entire instrument. *Hewes v. Cooper*, 42.
2. An omission to state, in the recital of a bond to dissolve an attachment, whose goods and estate are attached, will not defeat the creditor's right on the bond, if the bond describes correctly the suit to which the attachment applies. *Id.*

See JUDGMENT, 2, 3.

BOOKS OF ACCOUNT.

See EVIDENCE, 25.

BOUNDARY.

See ARBITRAMENT AND AWARD; DEED, 3.

BOW WINDOW.

See EQUITY, 9; WAY, 2.

BROKER.

- A. employed a broker to sell a house, but afterwards sold it himself, although the broker had furnished information which induced him to purchase; and in settling with the broker did not tell him the name of the purchaser. *Held*, that the question whether the not mentioning the name of the purchaser was such a concealment of a material fact as to avoid the contract was one of fact for the jury. *Newhall v. Pierce*, 457.

See PRINCIPAL AND AGENT, 3.

BURDEN OF PROOF.

See EVIDENCE, 1, 2; INTOXICATING LIQUORS, 4, 5; MALICIOUS PROSECUTION, 1.

CAPITAL AND INCOME.

See CORPORATION, 1-4.

CARRIER.

1. A common carrier may by an express contract exempt himself from liability for loss happening without his fault. *Hoadley v. Northern Transp. Co.* 304.

common carrier who negligently delays to send forward goods delivered for transportation is not liable for an injury to the goods by a peril in the contract of carriage, happening without his fault, while the goods are in his custody at the place where they were delivered to him, although the goods would not have been exposed to the peril but for such delay.

That wool was delivered at the station of a common carrier, in packages marked with the name and address of the owners, whose place of business was in Boston, and with the initial of the agent who had purchased it; that the weights and numbers were upon all the sacks; that previous shipments had been made by the same agent at the same place to the same principals during the same season; and that when said agent delivered this wool it in one part of the building, pointed it out to the defendants' agent, and said, "That pile of wool is for Boston," is evidence of a delivery to the principals or shipment to the principals at Boston. *Nichols v. Smith*, 332.

OF LADING, 3, 5, 6; CONFLICT OF LAWS; WAREHOUSEMAN.

CITY.

See SALE, 2, 4; WAY.

CLOUD UPON TITLE.

See EQUITY, 11, 12.

COLLATERAL SECURITY.

See PROMISSORY NOTE.

COMMON CARRIER.

See CARRIER.

COMPLAINT.

A defendant who pleads guilty to a complaint in the Municipal Court and appears in the Superior Court, is not entitled to a trial by jury, and unless the complaint is withdrawn by special leave of court, or a motion is interposed in arrest of judgment for legal defects apparent on the record, the government is entitled to have sentence passed. *Commonwealth v. Mahoney*, 151.

See INTOXICATING LIQUORS, 1, 2, 5, 6; RECORD, 2, 3.

COMPOSITION.

See EQUITY, 10.

CONDITION.

See SALE, 8-11.

CONFLICT OF LAWS.

A contract made at the place where a contract, signed only by the carrier, is made for the carriage of goods, requires evidence other than the mere receipt by

the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and determined by the law of the place where the suit is brought. *H. Northern Transportation Co.* 304.

See DIVORCE.

CONSIDERATION.

See MARRIED WOMAN, 1.

CONSIGNOR AND CONSIGNEE.

See BILL OF LADING, 4-6.

CONSTITUTIONAL LAW.

1. It is within the constitutional power of Congress to fix the rate of interest which a national bank may take upon a loan of money and to determine the penalty to be imposed for taking a greater rate, and such power exercised by Congress is exclusive of state legislation. *Central National Bank v. Pratt*, 539.
2. The provisions of the U. S. St. of 1864, c. 106, § 30, imposing a penalty upon national banks for taking usury, supercede the state laws on this subject. *Davis v. Randall*, 547.
3. The St. of 1869, c. 415, relating to the manufacturing for sale and distribution of intoxicating liquors, including malt liquors, is in the nature of a regulation of a particular kind of property, and applies to the property of corporations as well as to the property of individuals; and does not violate the obligation of the contract contained in the charter of a corporation although the corporation was created before the passage of said statute under a charter which authorized it to manufacture malt liquors, and the legislature had no power to alter, modify or repeal said charter. *Commonwealth v. Intoxicating Liquors*, 158.

See ADOPTION, 1; SCHOOL COMMITTEE, 1, 2.

CONTRACT.

I. Making.

1. Where an employer has printed rules and regulations hung up in his shop, requiring workmen to give notice a certain number of days before quitting, and to work out the time, or else to forfeit the wages due; if a workman does not know of such rules when he begins work, the fact that he afterwards informed of them and continues to work without objection, as a matter of law shows that he assented to the rules as a part of his contract. *Collins v. New England Iron Co.* 23.
2. If a person accepts a policy of insurance without dissent, the law presumes that he knows and assents to its contents. *Monitor Ins. Co. v. Buffalo*.
3. The acceptance by a consignor of goods of a bill of lading, without

to an assent to its contents. *Hoadley v. Northern Transportation*
 Co., STATUTE OF, 1-3; PRINCIPAL AND AGENT, 4; RAILROAD, 2.

II. Consideration.

See MARRIED WOMAN, 1.

III. Validity.

Agreement not to bid or to influence any one else to bid for the service
 of the inmates of a house of correction, is against public policy and
 no action will lie upon it, even if the party letting the services has
 no injury by reason of the making of the agreement. *Gibbs v*
1892.

See EVIDENCE, 15; RAILROAD, 11.

IV. Construction.

Contract to manufacture and deliver to B. a quantity of lumber at a cer-
 tain time, and B. agreed to buy of A. the lumber at said time; each side of
 the contract was contained in a separate instrument, written at
 the same time, but each complete in itself and neither making any reference
 to the other. *Held*, that the two instruments were to be construed together
 as one contract containing mutual and dependent promises. *Collins v. De-*
1859.

Contract to sell a farm to B., and afterwards B. agreed in writing to quit the prem-
 ises before a certain date, and to leave all tools, implements, &c., which
 were received with said place, thereon in as good a condition save wear and
 tear as when found. *Held*, that this agreement included only those tools, im-
 plements, &c., which once belonged to A., and to which B. had no other title
 than having received them with the place from A., and not such as had
 been B.'s by subsequent dealings with A. *Goodnow v. Davenport, 568.*

Contract in writing sold a building to B. and agreed to remove
 the building from the land. In consideration thereof B. sold a building to A. to be re-
 placed by A. and agreed to pay A. \$200. To the performance of the agree-
 ment A. bound himself in the penal sum of \$100. A.'s building, in re-
 place, fell down in the highway, and A. thereupon abandoned his efforts to
 replace it, and used the fragments as his own. B. did not pay the sum of
 money though it was demanded. B. then sued A. for breach of contract and
 asked as damages the amount of the penal sum. *Held*, in a suit by A.
 against B., that the stipulations of the parties were not independent, that
 the failure of A. to perform his part of the agreement released B. and that
 B. would not lie. *Gates v. Ryan, 596.*

See CONTRACT AND USAGE, 3; EVIDENCE, 6; PARTY WALL; RAILROAD, 12.

V. Performance and Breach.

Contract as part of the consideration for the purchase of a house conveyed by
 A. to B. was the agreement of B. & Co. to deliver a quantity of lumber to
 A. A. agreed to discharge a mortgage on the house before a certain

day, a refusal by B. & Co. before said day to perform their agreement is no excuse for a failure on the part of A. to perform his, although B. & Co. were the parties beneficially interested in the house. *Somers v. Wright*, 292.

9. Where A. has agreed to deliver a certain quantity of lumber to B. at a time certain, and at said time tenders a less quantity than that agreed upon, and B. refuses absolutely to receive the lumber, not because the tender is not sufficient, but for other reasons, such tender is not equivalent to performance on the part of A., and the refusal will not excuse further performance of his contract on the part of A. so as to enable him to recover against B. on his contract to buy said lumber. *Collins v. Delaporte*, 159.

See ACCOUNT ANNEXED, 2; DAMAGES, 1, 4; ORDER, 1, 2.

CONVERSION.

The defendant rightfully took building materials from a building and carried them from the premises although there was room for them to remain there. On one article being demanded of him he told the plaintiff's attorney that he might have it by going to the defendant's locker, and refused to return it to the premises; and on a further demand being made, some months afterwards, he refused to return it. *Held*, that the evidence warranted a finding that the second refusal, like the first, was merely a refusal to take it back to the plaintiff's house, and that the defendant did not claim any right to retain it as his own, and did no act amounting to a conversion. *O'Connell v. Jacobs*, 21.

See DAMAGES, 5; EVIDENCE, 16.

CORPORATION.

1. Whether the distribution, by a corporation, of its earnings among its stockholders is an apportionment of stock, or a division of profits, depends upon the substance and intent of the action of the corporation, as shown by its votes. *Rand v. Hubbell*, 461.
2. A corporation voted to increase the number of shares of its capital stock, so as to allow each stockholder to increase the number of shares held by him by one half, and commanded the directors to do whatever was required by law for that purpose. A vote of the directors, passed on the same day, declared that a dividend in cash should be payable to each stockholder at the time within which he was allowed by the vote of the corporation to take his new shares, and should be applied by him in payment for those shares; and directed the treasurer to issue such shares to old stockholders only. Each stockholder received a check for the amount of his dividend, and immediately exchanged the check for a certificate of the shares apportioned to the stock held by him. The checks were then destroyed, and were not presented at the bank. *Held*, that the stock issued in compliance with the above votes constituted a stock dividend; and that in the case of shares of old stock held by a trustee, the new shares must be considered an addition to the capital of the trust fund. *Id.*
3. When the directors of a corporation vote a cash dividend for the purpose of paying for new stock to be issued to its stockholders, the whole transaction

ing in fact a stock dividend, if the issue of the stock is void because compliance with the provisions of the St. of 1870, c. 179, the cash will fall also, and cannot be claimed by a person entitled to the interest of certain shares of said stock. *Ib.*

A fund was invested in the stock of a corporation, which having sold its real estate and property, and being about to wind up its affairs and devoted to pay a dividend in cash to its shareholders upon the surrender of its stock certificates. Its assets at the time of said distribution consisted in undivided earnings. *Held*, that the entire amount received by the corporation was capital and not income. *Gifford v. Thompson*, 478.

A bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers or stockholders of a corporation for its debts, the corporation was made a party defendant. *Pope v. Leonard*, 286.

A bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers or stockholders of a corporation must be in behalf of the plaintiff and not of the other creditors of the corporation, and the non-joinder of the other creditors is not excused by an allegation in the bill that there are no other creditors known to the plaintiff. *Ib.*

A bill against the officers of a corporation under the St. of 1862, c. 218, on the ground that they did not file the certificate required by the St. of 1862, c. 218, and also upon the ground that they signed the certificate required by the Gen. Sts. c. 61, § 8, knowing it to be false, cannot be joined in one bill with a claim against the stockholders, upon the ground that the stock was never fully paid in. *Ib.*

A bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, an allegation that the corporation was organized as a manufacturing corporation under the Gen. Sts. c. 61, and that at a meeting the said corporation was established in Boston, is a sufficient allegation on that the corporation was organized and established in Boston, without showing in detail that all the preliminary steps were taken. *Pope v. Leonard Oil Co.* 286.

An allegation in a bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, that the debts of the corporation exceeded its capital in a certain amount, follows the words of the statute, and is sufficient. *Ib.*

A bill in equity brought under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, alleged a judgment recovered against the corporation July 14, 1868, and that the execution was returned unsatisfied September 12, 1868. The bill was filed June 6, 1873. *Held*, on demurrer, that the bill did not disclose such unreasonable delay or laches as to deprive the plaintiff of his right to the relief given by the statute.

An allegation in a bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, that the certificates required by the Gen. Sts. c. 61, § 10, had not been filed after the annual meetings of 1865, 1866 and 1867, sufficiently alleges that annual meetings were held in 1865, 1866 and 1867. *Ib.*

12. In a suit in equity under the St. of 1862, c. 218, to enforce the liability of the officers of a manufacturing corporation, proof that the certificate required by § 8 of the Gen. Sts. c. 61, was signed, sworn to and filed in the office of the Secretary of the Commonwealth, by the defendants as officers of the corporation, that the association engaged in business in its corporate name, contracted debts and filed other certificates required by law, also signed by the defendants, declaring the corporate character of the organization, is conclusive, as against the defendants, of the corporate character of the association. *Priest v. Essex Hat Manufacturing Company*, 380.
13. The proceedings under the St. of 1862, c. 218, to enforce the liability of the officers of corporations must be in strict accordance with the statute, and a return of the execution unsatisfied on the same day on which the demand thereon was made, does not make the officers liable; and it is of no avail to show that the corporation neglected to pay the debt, made no attempt to exhibit property, and had none to exhibit. *Id.*
- See CONSTITUTIONAL LAW, 1-3; EQUITY, 7, 21, 22; RAILROAD; STATUTE; TRUSTEE PROCESS, 1.

COVENANT.

See CONTRACT, 7; PLEADING, 1.

CUSTOM AND USAGE.

1. Evidence of a custom in a trade to have printed rules and regulations requiring workmen to give notice a certain number of days before leaving, and to work out the time, or else to forfeit the wages due, is inadmissible, unless the party seeking to avail himself of the custom offers to show that the other party knew of it. *Collins v. New England Iron Co.* 23.
2. Usage of trade is a matter of fact, not of opinion; it may be proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practised by themselves and others in the trade to which it relates; but their conclusions or inferences as to its effect, either upon the contract or the legal title or rights of parties, are not competent to show the character or force of the usage. *Hawkins v. Warren*, 514.
3. Usage is not allowed to control the express intention of parties to an agreement; nor the interpretation and effect which result from an established rule of law applicable to it; nor to engraft on a contract of sale a stipulation or obligation different from or inconsistent with the rule of the common law on the same subject. *Id.*
4. On the issue whether a usage exists in a city to inspect a certain kind of provisions, evidence that the rules of a chamber of commerce, having the power given to it by its act of incorporation to appoint an inspector of provisions, and one of the purposes of which was declared to be "to establish and maintain uniformity in the commercial usages of the city," said nothing about the kind of provisions in question, while they provided for the inspection of many other kinds, is admissible to show the non-existence of the alleged usage. *Kershaw v. Wright*, 361.

the issue whether an alleged commercial usage exists, a witness may be called to describe how, under the usages in force, a transaction like the one in question would be conducted by all the parties thereto, from its inception to its conclusion. *Ib.*

See SALE, 9-11.

DAMAGES.

A. agreed in writing under seal to sell by warranty deed a lot of land to B. for a certain sum payable in lumber "at current retail prices." The land was subsequently conveyed, a mortgage upon it still existing, and an agreement in writing under seal was made between A. and B. reciting the conveyance of the land subject to a mortgage, "which mortgage was according to previous agreement to have been discharged prior to said conveyance." A. also covenanted to discharge the mortgage before a certain day, and it was agreed that B. should not pay the lumber agreed upon as the price, until the amount of the mortgage, computed at the current retail price of the lumber delivered. A. did not discharge the mortgage, and B. paid it to prevent foreclosure. *Held*, that B. in an action for breach of the second agreement was entitled to recover the loss of profits which would have accrued from the delivery of the lumber, and that the measure of damages was the difference between the wholesale and the retail price of the lumber. *Somers v. Wright*, 292.

Where the measure of damages is the plaintiff's loss of profits in having to cash when he is entitled to pay in a particular kind of goods at retail price, evidence of the profits of any particular dealer in such goods is incompetent. *Ib.*

A vendor of land agreed to pay off a mortgage at a time certain, the vendee retaining by agreement a part of the consideration until the mortgage was discharged; the vendor failed to discharge the mortgage at the time agreed upon, and the vendee paid the amount due with interest thereon for several months subsequent to the time at which the vendor agreed to discharge it. *Held*, that the vendee was not entitled to recover the interest which accrued after the date at which the vendor agreed to discharge the mortgage. *Ib.*

In a suit for breach of contract to buy lumber, admitting that the plaintiff was not entitled to recover some damages, evidence that the lumber tendered was not of the quality agreed upon, is material and competent in reduction of damages. *Collins v. Delaporte*, 159.

The owner of cotton, agreed to sell it to B., and sent it to his special agent with a bill of lading running to A. and indorsed by him in blank, with instructions to hold the bill of lading until a draft drawn on B. for the price of the cotton was paid. The agent delivered the bill of lading to B. on his presenting the draft, but before he paid it. B. obtained the cotton of a commission-carrier, and paid the freight, and then pledged the cotton to C. for advances on the cotton. *Held*, in an action by A. against C. for the conversion of the cotton, that the measure of damages was the market value of the

cotton at the time of the conversion, less the freight paid, but that commissions which would have been due B. had he paid for the cotton were not to be deducted. *Stollenwerck v. Thacher*, 224.

See CONTRACT, 7; EMINENT DOMAIN; RAILROAD, 3.

DECEIT.

In an action for deceit the declaration alleged that the plaintiff was induced by false and fraudulent representations of the defendant to purchase the stock, fixtures and good-will of his business. To prove the purchase the plaintiff put in evidence a written instrument in the form of a lease, whereby the defendant leased to him his interest in the business, fixtures and furniture for six months, the plaintiff agreeing to pay in instalments during this period, and by which the defendant agreed "that provided the said lessee completes the term of this indenture, to redeem and annul this indenture at the expiration of six months, or the said lessee at the expiration of six months repossess the same as his own property with any further cost from said lessor." *Held*, that there was no variance. *Packard v. Pratt*, 405.

See EVIDENCE, 16, 17.

DECREE.

See EQUITY, 18-20.

DEED.

1. Where a deed is signed by the mark of the grantor, and the attesting witness testifies that he drafted and witnessed the execution thereof in the usual course of business, that his recollection of the transaction is general, and that he cannot say whether or not the defendant asked him to attest the deed, or knew that he signed his name as attesting witness, there is sufficient evidence of execution to be submitted to the jury. *Robinson v. Brennan*, 582.
2. Where a mortgage deed describes the property conveyed as "the tract of land this day conveyed by A. to B., and by B. to me by deed of this date," and does not name the town, county or state in which the land is situated, the deeds from A. to B. and from B. to the mortgagor, which contain descriptions of the land, may be admitted in evidence, on the trial of a writ of entry to foreclose the mortgage, although said deeds were not on record when the mortgage was executed. *Ib.*
3. In a writ of entry, where the description in the deed, under which the demandant claims, after beginning at an ascertained point, is, "thence northerly bounded easterly by land of this grantor to the highway, thence northwesterly by said highway to land of B.," and it is shown that a due north line from the ascertained point will reach the land of B. before it reaches the highway; the tenant is not entitled to a ruling that as a matter of law the deed does not give the grantee more than one foot on the highway. *Garcia v. Dean*, 577.

See EQUITY 18-15; ESTOPPEL, 1, 2; MARRIED WOMAN, 2.

DEFAULT.

See BAIL, 1.

DEMURRER.

See ACTION, 2; EQUITY, 18, 22, 23.

DEPOSITION.

tion to the admission of part of a deposition, that the form of an in-
tory does not give notice of the substance of the answer thereto, so
permit cross-examination thereon, cannot be taken on argument in this
when the entire deposition is not before the court. *Kershaw v. Wright*,

DESERTION.

tional absence from military service without leave, does not of itself
tute the crime of wilful desertion; there must be in addition the inten-
ot to return to the service. *Hanson v. South Scituate*, 336.

"wilful desertion" referred to in the St. of 1865, c. 230, § 2, is the
rtion" defined by the Articles of War, U. S. St. 1806, c. 20, art.
b.

DEVISE AND LEGACY.

rix bequeathed the residue of her estate "to be equally divided among
persons who shall be my legal heirs at the time of my decease." The
paragraph in the will was: "And in the distribution of the said residue
g my heirs, I desire and direct that the children of my sisters" A. and
shall share the same equally; that is, that it be divided among them
ically or *per capita*, and not *per stirpes*, and that the offspring of any
sed child of theirs only take by right of representation, or the share
be parent of such offspring would take if living." The legal heirs of
atrix were her sister B. and two children of her sister A. There
also then living seven children of B. *Held*, that B. took one half of
idue and the two children of A. the other half. *Rand v. Sanger*, 124.

DIVORCE.

a husband, whose wife is living apart from him without justifiable cause,
es from this Commonwealth to another state and acquires a domicile
without the purpose of obtaining a divorce, and afterwards obtains a
e of divorce in that state, according to the laws thereof, and after
to her by leaving a summons at her abode in this Commonwealth and
ublication in a newspaper in that state, the courts of that state have
iction of the cause and of both the parties, and the decree of divorce
the Gen. Sts. c. 107, § 55, valid and effectual in this Commonwealth
all persons; although the wife was never in that state, had no settle-
there derived from her parents or ancestors, never appeared in the
ere, had no knowledge or information that he contemplated going to
tate, or that he had left this Commonwealth, till after he had filed his
or divorce, and was never provided by him with a home or support in

that state, or requested or furnished with means by him to go to that state, and was without such means. *Burlen v. Shannon*, 438.

See EXCEPTIONS, 5.

DOMICIL.

Evidence that a police officer of the town of N. sometimes while on duty slept in the police station there; that he had a room in N. where he sometimes slept, and also another room there at the house of his brother where he kept his clothes, and that he claimed to be an inhabitant of N., is sufficient to warrant the jury in finding that he was an inhabitant of that town, although he worked and boarded in the town of W. and was a police officer of that town. *Commonwealth v. Kelleher*, 103.

See DIVORCE.

DOWER.

See EVIDENCE, 2.

DURESS.

See PAYMENT.

EASEMENT.

If the eaves of a house belonging to one person have projected over the land of another for more than twenty years, the owner of the house has no title in the land of such other person under the eaves, and cannot prevent him from building on that land, if he can do so without interfering with the eaves. *Eaton v. Evans*, 204.

See LIGHT AND AIR.

EMINENT DOMAIN.

1. The value of land taken for a post-office in Boston, pursuant to the St. of 1873, c. 189, and the U. S. St. of 1873, c. 227, is to be estimated as of the time of filing the petition, and not as of the time of the trial and verdict. *Burt v. Merchants' Ins. Co.* 1.
2. In estimating the value of land taken under the Gen. Sts. c. 43, § 55, and under the St. of 1873, c. 189, the situation of the estate and the manner of its occupation are to be taken into consideration; but no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole. *Id.*

EQUITY.

I. Jurisdiction and General Principles.

1. In this Commonwealth jurisdiction in equity can only be exercised when the parties have not a plain, adequate and complete remedy at law. *Jones v. Newhall*, 244.

only relief to which the plaintiff would be entitled in equity is the measure and kind as that which he might obtain in a suit at law, the court has not jurisdiction in equity, unless the remedy at law is doubtful, or complicated by multiplicity of parties having different interests. *Ib.*

Equity will not decree specific performance of a written contract of sale at the instance of the vendor when all that is to be done by the vendee is the payment of money, for which the vendor may maintain an action at law, or a tender of performance on his part. *Ib.*

The Commonwealth in equity has no concurrent jurisdiction in a case of this kind where there is a plain and adequate remedy at law. *Suter v. Mat- 258.*

A bill in equity brought by S. against M. alleged that M. by false and fraudulent representations obtained from S. certain sums of money, a negotiable note, and a number of shares of railroad stock as collateral security therefor, and prayed for the repayment of the money, the surrender and cancellation of the note, and the return of the stock to the plaintiff. It appeared in evidence that M. indorsed the note before it was due to a bank, deposited the shares with it as collateral; that S. knew this before the maturity of the note; and that the note not being paid when due, the shares were sold, and the amount received credited on the note. The stock was released by S. at the sale. M. then sued S. on the note, and this action was pending when the bill in equity was brought. *Held*, that the bill could not be maintained, as the plaintiff had a plain and adequate remedy at law.

No allegation in a bill in equity that land is held subject to a restriction against building, and that adjoining land is believed to be held under a like restriction, without showing such a relation between the owners of the two parcels as would enable the one to enforce such restriction against the other, affords no ground for relief. *Seabury v. Metropolitan Railroad, 53.*

A manufacturing corporation owning the land on both sides of, and the fee in, a highway, laid railroad tracks across the highway; the surveyors of the highway having decided that such use of the highway was an obstruction to travel, the attorney general, at the relation of the surveyors, filed an injunction for an injunction to prevent the continuance of such use. *Held*, that the injury to the right of the public was not of such a nature as to require the extraordinary process of injunction. *Attorney General v. Bay Brick Co. 431.*

An injunction will not be granted to restrain a judgment in a suit at law, or a verdict, if the party seeking it could by proper diligence have protected his rights in that suit. *McBride v. Little, 308.*

The absence of any grant or agreement, the interference with the proceeds from an estate, or the general diminution of its value, by the building of an adjoining estate of a bow-window, affords no ground for the interposition of a court of equity for the relief of the person so injured, unless the complained of amounts to a nuisance. *Jenks v. Williams, 217.*

10. A creditor, who has advanced the money for the composition of an insolvent with his creditors, is not entitled to an injunction restraining the prosecution of an action at law, brought by another creditor against the insolvent, for the balance of his debt after the payment of the composition, in the absence of fraud or collusion between said creditor and the insolvent. *McBride v. Little*, 308.
11. To induce a court of chancery to order a writing to be cancelled or surrendered, as constituting a cloud upon title, it must at least be an instrument which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to that of the party claiming relief. *Nickerson v. Loud*, 94.
12. A paper signed by A. and recorded in the registry of deeds, giving notice that certain real estate held by B. is claimed to be subject to a trust in favor of A. and others, and that A. will dispute any title that B. may attempt to make, does not constitute a cloud upon title. *Ib.*
13. A deed absolute in form may in equity be shown by oral evidence to have been intended as security for a debt. *Hassam v. Barrett*, 256.
14. The relief afforded by equity in declaring a conveyance of real estate, absolute in form, to be a mortgage, where it is shown by oral evidence that it was given as security for the payment of a debt, is given on purely equitable grounds, and in the absence of such equitable consideration, the relief will be refused. *Ib.*
15. A voluntary conveyance of land absolute in form made by a debtor to one creditor in order to defraud his other creditors will not be deemed an equitable mortgage by proof of a subsequent oral agreement between the grantor and the grantee, whereby the latter agreed to reconvey on payment of the amount due him. *Ib.*

See INFANT ; MORTGAGE, 3 ; RECEIVER, 1.

II. Equity Pleading and Practice.

16. An objection to a bill in equity that the plaintiff has a plain, adequate and complete remedy at law will be deemed to be waived if taken for the first time in an answer filed by a defendant after he has appeared without objection to the jurisdiction, at a hearing appointing a receiver and ordering the sale of property, and also at a hearing before a master. *Jones v. Keen*, 170
17. A husband need not be made a party to a bill in equity brought by his wife under the Gen. Sts. c. 108, § 3, concerning her separate property. *Forbes v. Tuckerman*, 115.
18. Where an appeal is taken to this court from a decree overruling a demurrer, it is in the discretion of the justice making the decree to order the defendant to answer pending such appeal. *Ib.*
19. If the final decree of a single justice of this court, sitting in equity, is appealed from, without a report of the evidence or facts found upon which the decree was made, the only question raised by the appeal is whether the decree followed the frame of the bill and is justified by the record. *Stanley v. Stark*, 259.

bill in equity alleged that the plaintiff and one of the defendants had been members of a firm; that the firm had received a sum of money from the treasurer of a relief fund, upon the express trust that it should be used by the firm in reëstablishing its business; that the money was placed in the hands of the defendant partner for this purpose, who delivered it to the plaintiff and defendant, both parties having knowledge of the trust; that the defendant partner retired from the firm, agreeing that the plaintiff should continue the business and have the money for this purpose; that the plaintiff made arrangements to continue said business, but the defendants refused to give it up, contending that the defendant in possession had the right to apply it to the payment of an old debt due him from the firm; that when money was received from the treasurer, the firm gave its promissory note, without interest, with the agreement that if the money was used for the purpose named, the note should not be called for; and that when the defendant partner left, it was agreed that the plaintiff should take up this note, and give his own note in the place of it, and that this was done. The plaintiff prayed that the defendants should be required to deliver the money to the plaintiff, and for general relief. *Held*, that a decree that the defendants should pay the sum of money to the plaintiff followed the frame of the bill and was justified by the record. *Ib.*

A bill in equity under the St. of 1862, c. 218, § 4, to enforce the liability of the officers of a corporation, is not multifarious because it contains three distinct grounds of liability, if all the defendants are under the same liability and have a common interest. *Pope v. Salamanca Oil Co.* 286.

A bill which contains three distinct causes of action a demurrer for want of equity cannot be sustained by matter which is a defence to only one of the causes of action. *Ib.*

Where a demurrer was filed to a bill in equity for the specific performance of an agreement to purchase real estate, and the defect in the plaintiff's title was afterwards cured, *held*, that whether the bill could be maintained must be determined on all the equities of the case after answer filed. *National Western Bank v. Eldridge*, 424.

A creditor of one member of a partnership brought a bill in equity under Gen. Sts. c. 113, § 2, cl. 11, against all the members of the partnership, to reach and apply to the payment of the debt the amount that would be due to the debtor on liquidation of the partnership. He afterwards sought to make the other debtors of the firm parties defendant. *Held*, that they had no interest in the suit, and could not be joined as defendants. *Tobey v. Farlin*, 98.

A bill of interpleader not filed by the nominal plaintiff but by his attorney in record, at the expense and for the benefit of one of two persons claiming the money and in the hands of the plaintiff, after the other person had recovered judgment against the plaintiff in an action at law, in which the same attorney had pleaded the right of the first, cannot be maintained. *Provident Institution for Savings v. White*, 112.

26. Under the twenty-seventh rule in chancery, in bills of interpleader, or in the nature of interpleader, no solicitor or counsel for the plaintiff shall appear or be heard or act for or in behalf of any or either of the defendants. *Provident Institution for Savings v. White*, 112.
27. An exception to the finding of a master upon the facts before him is to be regarded only so far as it is supported by the statements of the master, or the evidence reported by him. *Jones v. Keen*, 170.
28. A master appointed "to hear the evidence and to report the same and all facts" bearing upon the questions at issue, has authority to decide upon controverted facts. *Ib.*
29. The findings of a master upon questions of fact are not to be set aside without clear proof of error or mistake on his part. *Ib.*
30. A bill in equity was signed "A. B. by his solicitor C. D.," and contained no allegation that C. D. was authorized to sign it. *Held*, a sufficient signing. *Pope v. Salamanca Oil Co.* 286.

See APPEAL ; CORPORATION, 5-13 ; MORTGAGE, 7 ; STATUTE.

ESTATES OF DECEASED PERSONS.

See EXECUTOR AND ADMINISTRATOR.

ESTOPPEL.

1. A deed of assignment of a mortgage, without covenants of warranty, does not estop the assignor, or those claiming under him, to set up an after-acquired title. *Weed Sewing Machine Co. v. Emerson*, 554.
2. A recital in a conveyance, that the property is subject to a mortgage, and the excepting of the mortgage from the covenant of warranty therein does not estop the grantee to dispute the validity of the mortgage as against the holder thereof. *Ib.*

EVIDENCE.

1. If goods have been obtained from their owner by fraud, the burden of proof is upon one who claims under the fraudulent purchaser to show that he is a *bonâ fide* purchaser for value. *Haskins v. Warren*, 514.
2. The burden of proof is on the demandant in dower to show that she is the lawful widow of the deceased, and it is not shifted by the establishment of a *primâ facie* case. *Nichols v. Munsel*, 567.
3. If the defendant is called as a witness for the plaintiff and testifies to facts which if true are conclusive against the plaintiff's case, and the plaintiff puts in evidence contradicting the defendant's testimony, the question at issue must be submitted to the jury. *Warren v. Chapman*, 584.
4. Where the judge presiding at a trial admits as evidence a family record of births, the first part of which, including the name of the person whose age is sought to be established, is a copy of a former record ; it must be presumed that the judge found as a fact that the original record was lost, and the copy, properly substantiated, is admissible as secondary evidence. *Whitcher v. McLaughlin*, 167.

entry contained in a church record of baptisms of the birth of a child, though of itself it be not competent evidence to prove the date of the birth, is inadmissible to prove the date of the baptism, and this, if connected with other evidence tending to show the age at baptism, is admissible to show the date of the birth. *Ib.*

Plaintiff offered oral evidence of an executory contract, also two letters, the one written by himself, which he offered to show by oral evidence was intended to execute said contract; the other a reply written by the defendant to the first letter; the legal construction of the two letters taken together, taken from the oral evidence, made the plaintiff the defendant's agent, and not execute the executory contract. *Held*, that the legal effect of the two letters could not be varied by oral evidence. *McFarland v. Boston & Lowell Railroad*, 68.

Evidence of a contemporaneous oral agreement varying the terms of a written order for the delivery of goods is inadmissible. *Russell v. Barry*,

in an action on a written agreement signed by the defendant, whereby money became due to the plaintiff on the completion of a house, then building for the defendant by a third person, evidence is admissible that after the making of the agreement and before the money became due the plaintiff borrowed a sum of money of the defendant, and in consideration of the loan agreed to finish the house within a certain time if the third person did not, and if the house was not finished that he would return the agreement, if there is evidence that neither the plaintiff nor the third person finished the house within the time specified. *Ib.*

The presumption that an estate is situated in a certain place, arising from the fact that a written contract to convey it is dated at that place, is one of fact and may be rebutted by oral evidence. *Mead v. Parker*, 418.

The town record kept pursuant to the Stats. of 1863, cc. 65, 229, of the names of the soldiers who composed the town's quota of the troops furnished by the Commonwealth to the United States, is competent evidence of the enlistment of such soldiers and of his acquiring thereby a settlement under the Stats. of 1865, c. 230. *Hanson v. South Scituate*, 386.

A general order of the governor of the State is competent evidence of a quota for troops under an act of Congress, and of the assignment of quotas to towns under the call. *Ib.*

A certificate of discharge from the military service of the United States is admissible in evidence to show that a soldier was honorably discharged, and statements on the certificate, stating that the soldier had deserted, which statements were made without the consent of the soldier and after the certificate was delivered to him, will not affect its admissibility. *Ib.*

An entry on the muster roll of a company that a member thereof has deserted is not conclusive evidence of the truth of the charge. *Ib.*

A certificate from a public officer that certain facts appear from the records of his office, but which does not profess to be a transcript of the record, is competent evidence of such facts. *Ib.*

15. In an action against a married woman for breach of a written agreement for the purchase of land sold to her by auction, parol evidence that the plaintiff requested her to bid on the property as an under-bidder and told her that she would not be bound to take the property, but might if her husband desired, and that she did not read the agreement or know its contents when she signed it, does not show any fraud practised on third persons, or any illegal contract between the plaintiff and defendant, and is inadmissible. *Faucett v. Currier*, 20.
16. In an action of tort for the conversion of coal which the plaintiffs alleged they were induced to sell through the fraud and deceit of one of the defendants in representing to their agent that the coal was for C. F. C. & Co., who were responsible parties, which fraud was participated in by the other defendants, the plaintiffs must prove that they relied on and were in fact misled by the representations. For this purpose, and because they formed inseparable parts of the transaction, the orders from the agent to his principals to forward the coal, the bills of lading accompanying it when forwarded, the invoices sent in the usual course of business, and the transcripts thereof delivered by the agent to the defendant making the representations are competent and admissible in evidence. The bills of lading and transcripts of invoices containing the name of C. F. C. & Co., and delivered to the defendants, are also competent to show knowledge on the part of the defendants that the plaintiffs supposed they were selling to C. F. C. & Co. *Packer v. Lockman*, 72.
17. In an action by a seller to recover damages sustained by means of a sale induced by the fraud of the purchaser's agent, evidence that the purchaser afterwards sold the coal for less than the price at which the seller sold is admissible as tending to show knowledge on the purchaser's part of the fraud and participation in it. *Ib.*
18. Before a writing can be used as a standard of comparison of handwriting, it must be proved that the specimen offered as a standard is the genuine handwriting of the party sought to be charged, and this question of its admissibility is to be determined by the judge presiding at the trial. So far as his decision is of a question of fact merely, it is final, if there is proper evidence to support it; and exceptions to its admission as a standard will not be sustained unless it clearly appears that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof of the qualifications requisite for its competency. *Commonwealth v. Coe*, 481.
19. In an action of replevin against B. to obtain goods sold by the plaintiff to A., and by him to B., if the plaintiff seeks to rescind the sale on the ground of fraud on the part of A., evidence that A. filed a voluntary petition in bankruptcy after the sale to B., and that he was adjudicated a bankrupt thereon, is inadmissible. *Haskins v. Warren*, 514.
20. In an action by the seller of goods to rescind the sale on the ground of fraud, if the party charged with the fraud soon after the sale went into bankruptcy, the amount of his liabilities at the time of his failure is a fact com-

to be proved in the case; and testimony of the assignees of the
 pt on this point, and on the amount realized from the assets of the
 pt estate, is admissible. *Ib.*

action by a boy ten years old for a personal injury, a physician called
 inness for the plaintiff testified to the extent of the injury. The de-
 offered to show that the physician and the plaintiff's mother three
 before the injury drove together to an apothecary's shop and there re-
 until one o'clock at night, under circumstances showing great inti-
Held, that this evidence might properly be rejected by the presiding
 is immaterial. *Elkins v. Boston & Albany Railroad*, 190.

action for an injury caused by the alleged unskilful driving of a per-
 son of similar negligent acts on his part at other times is not admis-
Maguire v. Middlesex Railroad, 239.

the issue whether a broker buying a certain kind of provisions was in-
 not having the provisions inspected, the answer of a witness, asked
 the usages in such a case, that "the responsibility of putting up
 provisions right, rests with the packer," is not an opinion on a matter of
 fact is a mode of stating, as a matter of fact, that the broker in such a
 depends upon the packer, and the answer is admissible. *Kershaw v.*
 361.

business who is engaged in the business of packing and forwarding hams
 properly be asked as an expert if in his opinion there was danger that
 in lot of hams, shipped in a specified condition, would not arrive at
 destination in as good condition as when shipped; and may answer
 they could not, in consequence of the condition of the weather when
 are shipped. *Ib.*

action on a promissory note given with others in settlement of a part-
 account, the sum due from the defendant in settlement was in dis-
 A witness for the plaintiff testified as to the amount, that it was made
 in the books of the firm, which were referred to at the settlement, but
 could not recollect the items, or how it was made up, and that the
 were in his possession. He was then requested by the defendant's
 to produce the books the next day, but failed to do so. *Held*, that the
 ant's counsel had a right to argue to the jury upon the absence of the
 and that an instruction at the plaintiff's request, "that inasmuch as
 books are not in the custody of the plaintiff, no inference is to be drawn
 from the non-production of the books, it being in the power of either party
 to produce them," was erroneous. *Eldridge v. Haw-*
 0.

action against a husband for board furnished his wife, evidence of
 cruelty by the defendant towards her of such a nature as to justify
 leaving him, committed prior to the cause of a like action between
 the parties, in which the jury returned a verdict for the defendant,
 and specially that the wife "lived separate from her husband without
 consent, and without any justifiable cause," and judgment was rendered
 accordingly, is inadmissible, although the witness offered was not a compe-

tant witness at the trial of the former action, and is competent in this. *Bur-
len v. Shannon*, 438.

27. In an action against a husband for board furnished his wife who lived apart from him, a letter of the wife to the husband was put in evidence, tending to show that the separation was not caused by her fault, and that she was willing to return. The defence then introduced testimony to the effect that the plaintiff told the witness that the wife sent the letter to evade the law, and that she did not intend to live with her husband. *Held*, that this testimony was competent only to affect the credibility of the plaintiff as a witness, and the good faith of her claim; and that evidence offered in rebuttal, that the wife did the acts in question with a different intention from that stated by the plaintiff, was rightly rejected. *Ib.*
28. An officer made a return of service on a notice that a debtor arrested on a mesne process desired to take the oath that he did not intend to leave the state. The return did not state where the service was made, except that it was headed with the name of the county for which the officer was appointed. The service was actually made outside of his precinct, but this objection was waived. Evidence was admitted that the service was made at a certain distance from the place of the hearing, and that there were places within the county equally distant. *Held*, that the evidence did not contradict the officer's return, and was rightly admitted. *Francis v. Howard*, 286.

See ACCOUNT ANNEXED, 2; APPEAL, 3; AUDITOR; BANK, 3; CARRIER, 3; CONVERSION; CORPORATION, 12; CUSTOM AND USAGE, 1, 2, 4, 5; DAMAGES, 2; DEED, 1, 2; DEPOSITION; EQUITY, 13-15; EXCEPTIONS, 3; 4, 7, 9, 14-20; FALSE PRETENCES, 9-12; INTOXICATING LIQUORS, 6, 7; JUDGMENT, 1, 2; LIMITATIONS, STATUTE OF, 1, 2; MALICIOUS PROSECUTION, 3; NEGLIGENCE, 1-3; PARTNERSHIP, 3, 5; PROMISSORY NOTE; RAILROAD, 9, 10; SALE, 4, 7, 9, 10, 12, 13; WAREHOUSEMAN.

EXCEPTIONS.

1. A bill of exceptions should not set forth the whole charge to the jury, but only the points of law raised at the trial and the rulings thereon. *Burt v Merchants' Ins. Co.* 1.
2. When a case is tried by a judge without a jury, his findings on questions of fact are final. *O'Connell v. Jacobs*, 21.
3. The objection that evidence is not properly admissible under the pleadings must be made at the trial, and it is too late to raise it for the first time in this court. *Russell v. Barry*, 300.
4. The admission of material, incompetent evidence under objection is ground for a new trial, although neither counsel nor court alludes to it afterwards in the course of the trial. *Maguire v. Middlesex Railroad*, 239.
5. Where the validity of a divorce is involved in the issue tried before a jury, objections to the sufficiency of the notice to the libellee, and to the form of the proceedings, which do not appear to have been made at the trial, are not open to an excepting party at the argument in this court. *Bur-
len v. Shannon*, 438.

omission of a question of legal construction to the jury affords no exception, if they decide it aright. *Goodnow v. Davenport*, 568.
 ception to a refusal to rule cannot be maintained which does not show re was evidence in the case from which the jury might find the facts h the request was based. *Wilcox v. Conway*, 561.

the plaintiff has put in an auditor's report in his favor and rested his is within the discretion of the presiding judge, and not a subject of n, to allow the plaintiff to put in additional testimony in support of e close of the defendant's evidence. *Lowe v. Pimental*, 44.

thin the discretion of a judge presiding at a trial to recall the jury y have retired, and to restate the law and evidence to them, although , when asked if they desired any instructions on the law, said that not. *Nichols v. Munsel*, 567.

within the discretion of the judge presiding at a trial to order several ounded on the same subject matter, brought by the same plaintiff several defendants, to be tried together, although the defendants distinct counsel, and the evidence in the several cases is different. *Eld v. Sleeper*, 587.

within the power of the presiding judge at a jury trial to withdraw se, without the consent of the parties to the suit, an instruction or ven in the course of the trial. *Eldridge v. Hawley*, 410.

judge presiding at a trial withdraws an instruction which has been the jury, he should do so in so distinct a manner as to leave no their minds as to the law applicable to the question before them.

udge presiding at a jury trial gave, at the request of the plaintiff, an s instruction, and the defendant excepted. The plaintiff then the instruction; and the judge said: "If the party declines to re- I will leave that matter as it stands before the jury." *Held*, that were not sufficiently instructed to disregard the instruction given, t, as the matter about which the instruction was given was one of them to consider, the jury should have been so instructed. *Id.*

within the discretion of the judge presiding at a trial to exclude evi- ferred in rebuttal, which might have been introduced, by the party it, in putting in his case. *Strong v. Connell*, 575.

vidence which is admissible for any purpose is admitted, and it is in- upon a particular branch of the case, and no specific exception is e ruling asked for, the general exception to its admission will be d. *Packer v. Lockman*, 72.

exception to a refusal to rule that upon all the evidence the plaintiff established his case, the weight of the evidence will not be consid- t only whether there was any evidence to warrant a verdict. *Smith*, s, 388.

ception to the exclusion of testimony cannot be sustained unless the ceptions shows that the excepting party was necessar'y injured by elusion. *Id.*

18. An exception to a question to a witness will not be considered, which does not show how the question was answered, nor that the answer was in some way unfavorable to the party excepting. *Kershaw v. Wright*, 361.
 19. Where evidence is admitted which is competent when connected with other evidence, an exception to such admission cannot be sustained, unless the bill of exceptions shows affirmatively that such other evidence was not introduced, or that the evidence admitted was improperly used for a purpose for which it was not competent. *Whitcher v. McLaughlin*, 187.
 20. It is the province of a judge who presides at a trial to pass upon all preliminary matters which are necessary to be shown in order that a record entry may be properly admissible as evidence; and if he admit such record entry, it is presumed that he found as facts all such preliminary matters; and such finding is conclusive, unless he saves the question on report, or it is brought up on a bill of exceptions which contains a statement of the evidence. *Id.*
 21. At the trial of an indictment for obtaining money by false pretences, the presiding judge in charging the jury suggested the inquiry whether the person defrauded would have lent the money if he had known that the security offered, a certificate of stock, was forged and worthless; and then instructed them that, if he would not, and was in fact induced to make the loan by the delivery of the certificate, and his belief in its genuineness, and the jury find the other facts constituting the offence, it would be sufficient; and added: "And the fact, if it was a fact, that the defendant then entertained the purpose of repaying the loan at some future time, would not divest the act of its criminality." The defendant excepted to "this part of the instructions relating to the obtaining of money or property upon a loan, by means of false pretences." *Held*, that this exception could not be sustained. *Commonwealth v. Coe*, 481.
 22. By the 28th rule of this court a petition to prove exceptions under the Gen. Sts. c. 115, § 11, must be filed in this court within twenty days after the party seeking to establish the truth of his exceptions has had notice of the refusal of the judge to allow them. *Brown v. Gilman*, 56.
 23. Where a verdict was rendered for the plaintiff at September term, 1872, exceptions filed by defendant in due season at that term, time extended for filing amended exceptions, judgment on the verdict September term, 1873, of which the defendant had notice, and the court adjourned without day October 10, 1873, without any further order being made in the case, the exceptions disallowed February 14, 1874, and the petition to prove the exceptions filed in this court February 25, 1874. *Held*, that the twenty days began to run at least from October 10, 1873, and that the petition was filed too late. *Id.*
- See DEPOSITION; EQUITY, 27-29; EVIDENCE, 18; INTOXICATING LIQUORS, 8; NEGLIGENCE, 5; TRESPASS, 2; VERDICT; WITNESS, 2.**

EXECUTOR AND ADMINISTRATOR.

title of an executor's sale of a parcel of land running through from one street, described the estate as late the residence of T. E., and incorrectly the owners of the estates bounding it on either side, and set out on which it abutted on either end, but transposed the numbers on opposite streets, so that the estate was an impossible one if determined by the numbers. *Held*, that the misdescription by the numbers did not render the notice invalid. *New England Hospital v. Sohler*, 50.

Administrator who, by verbal agreements with the creditors of an estate, induced them not to commence actions against the estate within the two years allowed by the Gen. Sts. c. 97, § 5, cannot be required to set up the defence of the statute of frauds in personal actions against himself upon his claims, for the benefit of the next of kin of the intestate. *Ames v. Jackson*, 1.

Actions made by an administrator after the expiration of two years from the date of his appointment, in pursuance of promises, made upon valid considerations, within said two years, should be allowed him, and may be set against personal assets in his hands, at any time before the settlement of his final account. *Ib.*

EXPERT.

See CUSTOM AND USAGE, 2, 5; EVIDENCE, 24.

EXPRESSMAN.

See RAILROAD, 4, 6.

FACTOR.

See PRINCIPAL AND AGENT, 3.

FALSE PRETENCES.

Indictment for cheating by false pretences charged that the defendant obtained money as a loan from a person by falsely pretending that a forged certificate of stock was a good, valid and genuine certificate of stock, and produced the certificate at length. *Held*, that the fact that the certificate was made out in the name of the lender was no reason for quashing the indictment. *Commonwealth v. Coe*, 481.

Indictment for cheating by false pretences, setting forth a certificate of stock as the false token with which the fraud was committed, need not set forth in what manner the certificate could be used to deceive. *Ib.*

Indictment for cheating by false pretences, the description of the money obtained as a "check and order for the payment of money" is sufficient, and the check need not be set forth at length. *Ib.*

Allegation, in an indictment for cheating by false pretences, that the defendant "obtained money as a loan with the intent to cheat and defraud" is sufficient. *Ib.*

Representation, that a certificate of stock is good, valid and genuine, is not a representation as to the ability of the person making it to repay

- money obtained thereby, within the Gen. Sta. c. 161, § 54, requiring that the representation should be in writing. *Ib.*
6. An allegation in an indictment for cheating by false pretences, that a certificate of stock, which was the false token used, "was of the tenor following," is to be referred to the time when the false pretence was made; and it need not set forth indorsements on the back of the certificate. *Ib.*
 7. In an indictment for cheating by false pretences, it is not necessary to set forth the fact, that the defendant gave his promissory note for the money at the time when it was obtained by the false pretences; and evidence at the trial that such a note was given does not constitute a variance. *Ib.*
 8. An allegation, in an indictment for cheating by false pretences, that a certificate of stock "was not a good, valid and genuine writing and certificate of stock, but was false, forged and counterfeit, and of no value," is not a descriptive allegation; and proof that a certificate purporting to be for one hundred shares of stock is in fact a certificate issued for one share and subsequently altered, does not constitute a variance. *Ib.*
 9. On the trial of an indictment for cheating by falsely pretending that a forged certificate of stock was genuine, evidence of the possession and use by the defendant of other forged certificates of stock about the same time, whether before or afterwards, is admissible on the question of guilty knowledge. *Ib.*
 10. The fact that a forged certificate of stock was offered and received as security for a loan of money, is evidence upon which it is competent for a jury to find that the lender was thereby induced to part with his money; although the lender in reply to the question, if he did not rather trust the defendant than any security, testifies that he "had every confidence in him." *Ib.*
 11. It is no defence to an indictment alleging the obtaining of money by false pretences, that the person so obtaining the money intended to repay it, and evidence of ability to make the repayment is immaterial. *Ib.*
 12. Where the property obtained by false pretences is a check for \$7000, evidence that the check, which was given as for a loan of money, was drawn on a bank, that the drawer at the time made deposits in two banks and was in the habit of drawing on one of them, is sufficient to warrant the jury in finding that the check was of value. *Ib.*

See EXCEPTIONS, 21.

FENCE.

See ANIMALS; RAILROAD, 8.

FIXTURE.

A counting-room put into a store by a tenant, which is made of a framework of three sides fastened to the floor by nails and to the brick wall of the building in which it stands. is a trade fixture. *Brown v. Wallis*, 156.

See REPLEVIN.

FRAUD.

ON, 2, 4; BROKER; DECEIT; EQUITY, 4, 5; EVIDENCE, 1, 16, 17,
FRAUDULENT CONVEYANCE; LORD'S DAY, 2; PLEADING, 2;
1, 5.

FRAUDS, STATUTE OF.

Written contract to convey real estate, the words "a house on Church
are a sufficient description of the estate to satisfy the requirements
statute of frauds; and the house may be identified by parol evidence.

Parker, 413.

Executory agreement for the manufacture and sale of a specific chattel,
manufactured in accordance with the terms of the agreement, is not a
of sale, within the statute of frauds, Gen. Sts. c. 105, § 5. *Goddard*
ey, 450.

ed to build a buggy for B., and to deliver it at a time certain. B.
rections as to the style and finish of the buggy, and it was built in
nce with his directions, and marked with his monogram. Before the
was finished B. called to see it, and in response to an inquiry of A.,
f he might sell the buggy, replied that he would keep it; when the
was finished, A. notified B., and sent him a bill for it. B. retained
and promised "to see" A. "about it." The buggy was afterwards
ed by fire while in A.'s possession. *Held*, in a suit by A. for the
that the agreement was not a contract of sale within the Gen. Sts. c.
; and that the property in the buggy had passed to B., and he was
Ib.

See EVIDENCE, 9; EXECUTOR AND ADMINISTRATOR, 2.

FRAUDULENT CONVEYANCE.

ance made by an insolvent debtor of all his property to one creditor,
sole purpose of securing that creditor's debt, is not a fraud at com-
y, although both the debtor and the creditor knew at the time of
the preference that the effect of it would be to deprive other cred-
the power of reaching the debtor's property by legal process. *Gid-*
Sears, 505.

See EQUITY, 15.

GRANT.

See LIGHT AND AIR.

GUARDIAN.

See ADOPTION, 2; TRUST AND TRUSTEE, 1.

HANDWRITING.

See EVIDENCE, 18.

HEIR.

See DEVISE AND LEGACY; TRUST AND TRUSTEE, 2.

HIGHWAY.

See WAY.

HORSE RAILROAD.

See RAILROAD, 11-13.

HUSBAND AND WIFE.

Whether a sewing machine is a necessary for a wife in such a sense that the husband can be sued for it, is a question of fact for the jury. *Willey v. Beach*, 559.

See EQUITY, 17; EVIDENCE, 26, 27; INTOXICATING LIQUORS, 3, 9; LIMITATIONS, STATUTE OF, 1, 2, 4; MARRIED WOMAN, 1, 2.

INCOME.

See CORPORATION, 1-4.

INDICTMENT.

1. An order that an indictment be laid on file is not equivalent to a final judgment, or to a *nolle prosequi*, or discontinuance. *Commonwealth v. Dowdican's Bail*, 133.
2. An order laying an indictment on file, on the payment of costs, does not entitle the defendant to be finally discharged. *Ib.*
3. When an indictment is laid on file, and the judge making the order indorses thereon that a certain statute has been repealed, and it appears that the case is not brought under said statute, the indictment may be brought forward and proceedings had upon it. *Ib.*
4. On an indictment for an assault and battery, an acknowledgment of satisfaction by the party injured does not entitle the defendant to be discharged under the Gen. Sts. c. 171, § 28. *Ib.*
5. When a defendant is called and does not appear, the court is not required to decide in his absence a motion in arrest of judgment. *Ib.*

See BAIL, 2; FALSE PRETENCES; INTOXICATING LIQUORS, 3, 4; NURSANCE; SENTENCE.

INFANT.

Loches are not imputable to an infant plaintiff. *Burns v. Thayer*, 89.

See NEGLIGENCE, 2; RAILROAD, 9.

INFORMATION.

See EQUITY, 7.

INJUNCTION.

See EQUITY, 7, 8, 10.

INSOLVENT DEBTOR.

See FRAUDULENT CONVEYANCE.

INSURANCE.

I. *Life*.

See PLEADING, 1.

II. *Fire*.

Where a policy of insurance issued by an insurance company in the name of A. has been sent to the agent of A., and shortly afterwards is returned by the agent to the company with a request to have it made payable to B., and the company cancels the first policy, and makes a new one to B.; and there is evidence that what was done after the delivery of the first policy to A., by the agent, was done without the knowledge or authority of A.; the keeping of the new policy by B. for seven months does not as a matter of law constitute an acceptance, on the part of A., of the new policy, although it is admitted by A. that the possession of the policy by B. was not fraudulent. *Bennett v. City Ins. Co.* 241.

CONTRACT, 2; MORTGAGE, 2, 3; PRINCIPAL AND AGENT, 4; TRUSTEE PROCESS, 1.

INTEREST.

See BANK, 1, 2; CONSTITUTIONAL LAW, 1, 2; DAMAGES, 2.

INTERPLEADER.

See EQUITY, 25.

INTOXICATING LIQUORS.

A proceeding under the St. of 1869, c. 415, for the forfeiture of intoxicating liquors illegally kept and intended for sale, is of a criminal nature, and the allegations of the complaint must be proved beyond a reasonable doubt. *Commonwealth v. Intoxicating Liquors*, 142.

A complaint on the St. of 1869, c. 415, § 44, averred that intoxicating liquor was kept in a certain three-story brick building with basement, situate, &c., and prayed for a warrant to search "said three-story brick building with basement and all sheds and outbuildings belonging to said building." The warrant issued on this complaint directed the entry and search of the three-story brick building and all outhouses and sheds belonging to said building. *Held*, that the warrant was void. *Commonwealth v. Intoxicating Liquors*, 145.

An indictment on the Gen. Sts. c. 87, §§ 6, 7, for keeping a tenement used for the illegal sale of intoxicating liquors, without having any license, appointment or authority, need not further set forth that said liquors were not such as it was lawful to keep and sell. *Commonwealth v. Shea*, 102.

4. On the trial of an indictment for the keeping of a tenement for the illegal sale of intoxicating liquors, the burden of proof is on the defendant to show that he acted under a license or appointment. *Ib.*
5. On a complaint charging that the defendant was a common seller of spirituous and intoxicating liquors without having any license, appointment or authority therefor, the burden of proof is on the defendant under the St. of 1864, c. 121, to show that he had such license, appointment or authority, although he is not the proprietor of the tenement described in the complaint. *Commonwealth v. Belou*, 139.
6. A plea of guilty to a complaint for keeping a certain tenement open on the Lord's day, within the time covered by an indictment for keeping the same tenement for the illegal sale and illegal keeping of intoxicating liquors, is, on the trial of such indictment, competent evidence to show that the defendant kept the tenement within the time charged. *Commonwealth v. Ayers*, 137.
7. On the issue whether the defendant had reasonable cause to believe that certain intoxicating liquor conveyed by him to a house was intended to be sold in violation of law, evidence is admissible, in the absence of any evidence of a change in the use of the building, that four months before the act of the defendant the house was used as a place for the sale of intoxicating liquors; and that at the time when the defendant conveyed said liquors he had in his wagon another jug of liquor marked with the name of a person shown to be a seller of intoxicating liquors. *Commonwealth v. Kenney*, 149.
8. Where a bill of exceptions to a ruling under which the defendant was convicted of keeping intoxicating liquors with intent to sell the same states that the liquors were kept by the defendant's wife, who did business on her own account, having filed a proper certificate and taken out a United States license as a retail liquor dealer, and that he lived in the house with her, and does not state that she kept said liquors in a tenement separate and apart from her husband's house, it will be assumed that she kept them in such house. *Commonwealth v. Barry*, 146.
9. If a married woman, in the presence of her husband, keep intoxicating liquors with intent to sell the same in violation of law, the husband will be liable for such illegal keeping, if he have knowledge of the fact and of her intent, and does not use reasonable means to prevent her carrying out such intent, notwithstanding she is doing business on her own account, having filed a certificate under the St. of 1862, c. 198, and has a United States license as a retail liquor dealer. *Ib.*

See CONSTITUTIONAL LAW, 3; NUISANCE.

ISSUE.

See TRUST AND TRUSTEE, 2.

JUDGE.

See EXCEPTIONS, 2, 8-12.

JUDGMENT.

the absence of fraud and collusion, a judgment rendered against a principal is conclusive evidence of the debt thereby ascertained both against him and his surety on a recognizance subsequently taken on his arrest on execution. *Way v. Lewis*, 26.

The absence of fraud or collusion, a judgment against the defendant in an action is conclusive evidence of the debt both against him and a surety and to dissolve an attachment. *Cutter v. Evans*, 27.

To avoid such a judgment it is not sufficient to show that in the original action the defendant was, while it was pending, adjudicated a bankrupt under the laws of the United States, that the plaintiff proved his claim against his estate in bankruptcy, that the defendant's bankruptcy was suggested on the docket of the court in which the original action was pending, that one of plaintiff's counsel was chosen assignee in the bankruptcy proceedings. The fact of bankruptcy and the proving of the plaintiff's claim have been pleaded in bar, or a stay of proceedings obtained. *Id.*

See CONTRACT, 7; EVIDENCE, 26.

JURISDICTION.

See ARREST; EQUITY, 1; REMOVAL OF ACTIONS.

JURY.

DEMOORER; COMPLAINT; EXCEPTIONS, 6, 9; HUSBAND AND WIFE; NEGLIGENCE, 1; RAILROAD, 3.

JUSTICE OF THE PEACE.

See REMOVAL OF ACTIONS; TRESPASS, 2.

LACHES.

See CORPORATION, 10; EQUITY, 8; INFANT.

LANDLORD AND TENANT.

When after the expiration of his lease continues in possession under a new agreement, express or implied, for a lease, he becomes a tenant at will if the lease is executed; and evidence that the tenant underlet part of the building which was not let to him by the former lease but was included in the new agreement, and that he received rent therefor, and paid at the rate stipulated under the new agreement, is evidence of an entry under the new agreement, even though the rent was paid under the old agreement and the fact that the landlord agreed to repair the building and failed to do so would not, after an entry by the tenant, justify him in changing the character of the tenancy from a tenancy at will to one at sufferance. *Wells v. Scudder*, 267.

See ACTION, 1; FIXTURE; LEASE, 1-4; PAYMENT; REFPLEVIN.

LAW AND FACT.

See **BROKER; HUSBAND AND WIFE; MALICIOUS PROSECUTION, 2;**
NEGLIGENCE, 1; RAILROAD, 3.

LEASE.

1. Under a lease in which the lessee covenants to pay "all taxes assessed during the term" upon a portion of the demised premises, the lessee is not entitled to a proportionate return of taxes paid by him to the lessor, although the building is, after such payment, destroyed by fire during the year for which the taxes are assessed, and the lease is thereby terminated. *Wood v. Bogle, 30.*
2. Where a lease of a part of a building provides that "all merchandise, furniture and property of any kind which may be on the premises during the continuance of this lease is to be at the sole risk and hazard of the lessee, and that if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, or by the use or abuse of the Cochituate water, or by the leakage or bursting of water pipes, or in any other way or manner, no part of said loss or damage is to be charged to, or be borne by, the lessors, in any case whatever," the lessor is not liable for damage done to the lessee's goods by the bursting of a water pipe in a part of the building not let to him. *Fera v. Child, 32.*
3. An assessment upon an estate under the St. of 1866, c. 174, which has been paid by a lessor, is a tax which may be recovered by him of a lessee, who by a lease made before the passage of that statute has covenanted to pay "such sum or sums of money as shall be equal to the amount of the rates, taxes and duties of every kind that shall be levied or assessed on the demised premises, or on the lessors of the same; as well those assessed or levied by the authority of the United States, or those assessed or levied by the authority of the State of Massachusetts, or of the city of Boston, for each year and part of a year," if the lease was made and the assessment laid before the passage of the St. of 1871, c. 382. *Curtis v. Pierce, 186.*
4. In a lease for three years of land made after the passage of the St. of 1866, c. 174, the covenant by a lessee to pay "all taxes and duties levied or to be levied thereon during the term," binds him to pay to the lessor an assessment upon the estate, for the laying out of a street, in pursuance of the said statute, and of the St. of 1868, c. 276, made during the term of the lease, and which the lessor has paid. *Blake v. Baker, 188.*

See **ACTION, 1; DECEIT; LANDLORD AND TENANT; RAILROAD, 12;**
RECEIVER, 2, 3.

LEGACY.

See **DEVISE AND LEGACY.**

LIBEL.

See **ACTION, 5; BANKRUPT**

LIEN.

See BOARDING-HOUSE, 1, 2 ; MECHANIC'S LIEN ; SHIP.

LIGHT AND AIR.

Grant of an easement of light and air is not implied from the grant of a house having windows overlooking land retained by the grantor. *Keats v. Keats*, 204.

See EQUITY, 9.

LIMITATIONS, STATUTE OF.

Partial payment made by a woman on her husband's promissory note will take it out of the statute of limitations, in the absence of evidence that she was authorized her to make the payment. *Buller v. Price*, 578.

Evidence that the holder of a promissory note wrote to the maker demanding payment, and that in reply the wife of the maker wrote a letter inclosing the note in part payment of the note, is not sufficient evidence that the maker authorized the payment, to take the case out of the statute of limitations, that he authorized the writing of the letter, so as to make its contents admissible against him. *Ib.*

An attesting witness, within the statute of limitations, Gen. Sts. c. 155, § 4, must be one who at the time of the attestation would be competent to testify as to the matter which he attested. *Jenkins v. Dawes*, 599.

A negotiable promissory note was attested by the wife of the payee of the note.

At the time of the attestation a wife was not a competent witness in an action to which her husband was a party. In an action on the note by the payee, *held*, that the note was not properly attested, although at the time of the attestation the wife was a competent witness. *Ib.*

When the maker of a note four years after the time at which he signed it, in pursuance of an agreement made at that time, acknowledges, to a person who did not see him sign the note, that the signature to it is his, and releases such person to sign it as a witness in order to prevent the operation of the statute of limitations, the question whether the note is "signed in the presence of an attesting witness" within the Gen. Sts. c. 155, § 4, is for the jury. *Swazey v. Allen*, 594.

See WITNESS, 1.

LIVERY STABLE.

See BAILMENT.

LORD'S DAY.

It is not a violation of the Gen. Sts. c. 84, relating to the observance of the Lord's day, for a husband and wife to hire a horse and wagon to attend the funeral of the husband's brother-in-law. *Horne v. Meakin*, 326.

Goods are sold and delivered to A. and B. on the Lord's day, the sale being induced by the false representations of A. on a previous day, and subsequently, not on the Lord's day, the seller demands the price of A. and he

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promises to pay it, this amounts to a sale to him, and he is liable for the price. *Winshell v. Carey*, 560.

See INTOXICATING LIQUORS, 6.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, the burden of proof is on the plaintiff to show that the defendant acted without probable cause. *Good v. French*, 201.
2. In an action for a malicious prosecution, whether there was a want of probable cause is a question of law upon the facts proved. *Id.*
3. If a person obtains flour by falsely representing himself to be the agent of another, evidence that he is in good credit, that he has money in the hands of another person sufficient to pay for the flour, and that there is a practice amongst flour dealers, not shown to be one of the established usages of the trade, to buy flour in the name of other persons, has no tendency to show that a prosecution for obtaining the flour by false pretences was instituted without probable cause. *Id.*

See BANKRUPT.

MANDAMUS.

See SCHOOL COMMITTEE, 2.

MANUFACTURING CORPORATION.

See CORPORATION, 12.

MARRIED WOMAN.

1. A contract to build a house on the land of a married woman, although signed by her husband as well as herself, is a contract in reference to her separate property within the Gen. Sts. c. 108, § 3; and her liability under the contract is a good consideration for her acceptance of an order drawn by the contractor for building the house, upon her jointly with her husband, in favor of a third person, to whom the contractor was indebted. *Pierce v. Kittredge*, 374.
2. Where property is conveyed to a married woman, and by her, on the same day, mortgaged back to the grantor, the mortgage is void under the Gen. Sts. c. 108, § 3, unless her husband joins in the conveyance or assents to it. *Weed Sewing Machine Company v. Emerson*, 554. [See St. of 1874, c. 184.]

See EVIDENCE, 15; HUSBAND AND WIFE.

MASTER AND SERVANT.

See CONTRACT, 1; CUSTOM AND USAGE, 1; SHIP, 7.

MASTER IN CHANCERY.

See EQUITY, 28-30.

MECHANIC'S LIEN.

When labor is performed, or furnished, under an entire contract, in the erec-

repair of several buildings, owned by the same person and situated on the same lot, a lien attaches upon the whole estate for the whole value of the work performed, although the contract specifies separate amounts for the work to be done on each house. *Wall v. Robinson*, 429.

See SHIP, 4, 5.

MISTAKE.

See ARBITRAMENT AND AWARD.

MORTGAGE.

I. *Of Real Estate.*

A mortgage to H. as security for a loan and future advances agreed to be made on the performance of certain conditions. B. then conveyed the equity of redemption to A. "subject to my mortgage to H. to be repaid and paid by the grantee:" afterwards he assigned the agreement to C. who notified H. to hold the mortgage and note undischarged as security for him. After that A. assigned the equity of redemption "subject to my mortgage:" the plaintiff claiming under A.'s assignee asked to redeem the mortgage on payment of the loan secured by the mortgage, without requiring that H. was discharged from all liability under the agreement to make future advances. At the time when the bill was filed no advances had been made, and the condition on which they were payable had not been performed.

Held, that the plaintiff must pay the full amount of the note in order to redeem, and that the mortgagee would hold the balance over and above the amount advanced by him in trust for the assignee of the agreement. *Cox v. Hoxie*, 120.

A mortgage paid to a mortgagee by an insurance company, in pursuance of its agreement with the mortgagor, cannot be applied by him to the payment of a debt secured by the mortgage, if it be not due, without the consent of the mortgagee. *Gordon v. Ware Savings Bank*, 588.

If mortgaged premises are injured by fire and the amount of the loss is paid by an insurance company, in pursuance of its agreement with the mortgagor, to the first mortgagee, who pays the amount to the mortgagor to enable him to be employed in repairing the premises so as to make them as valuable as before the fire, and he so applies it, the holder of a second mortgage on the premises has no equity to have the amount so received applied in reduction of the debt secured by the first mortgage. *Id.*

A condition of a mortgage was that if the grantor should pay to the mortgagee \$2500 in one year with interest, or otherwise pay such notes as the mortgagee should sign for his accommodation during said term, the deed, as well as the promissory collateral note whereby the grantor promised to pay to the mortgagee \$2500 with interest at ten per cent. should be void. The mortgage was delivered, signed one note for \$2500 for the accommodation of the grantor, and paid it at maturity. *Held*, on a writ of *scire facias* to foreclose the mortgage, that the conditional judgment should be for the amount of the note paid by the mortgagee, with legal interest from the date of payment. *Athol Savings Bank v. Pomroy*, 578.

5. The title of a purchaser from a mortgagee under a mortgage containing a power of sale is not defeated by the neglect of the mortgagee to make and file the affidavit required by the Gen. Sts. c. 140, § 42. *Burns v. Thayer*, 89.
6. If the mortgagee is indirectly a purchaser at a sale made under a power contained in a mortgage, which does not give the mortgagee the right to purchase, the sale is not void, but only voidable, and if before proceedings are taken to set aside the sale, the nominal purchaser sells the land to a *bonâ fide* purchaser without notice, for an adequate consideration, such purchaser takes a good title. *Ib.*
7. B. made a mortgage of real estate to P. which contained a power of sale, but did not give P. the right to purchase at such sale. P. sold for breach of condition to D. for \$1200, the mortgage debt then being over \$1400. D. who was by an arrangement with P. a nominal purchaser sold to T. *Semble*, that if B. was entitled to redeem on the ground that T. was not a *bonâ fide* purchaser without notice, P. should have been joined as a defendant, as he apparently retained the original debt. *Ib.*
8. Although an advertisement, under a power of sale in a mortgage, does not state the terms of sale, or that the terms would be stated at the time of the sale, the fact that at the sale a deposit was required, and that this prevented a person then present from bidding, does not invalidate the sale, if the mortgagee acted in good faith, and the requiring a deposit was usual and reasonable. *Pope v. Burrage*, 282.
9. The finding as a fact that the holder of a mortgage in selling the mortgaged premises did all that was required by the terms of the power of sale contained in the mortgage, and by the good faith required of a mortgagee selling under a power, is equivalent to a finding that the terms of the sale were usual and reasonable, and calculated for the protection of all parties interested. *Ib.*
10. A. executed a mortgage of real estate with a power of sale to B., and subsequently conveyed the equity of redemption to C. The mortgage note was deposited in a bank, and on two occasions, as the interest came due, notices were sent to A., who collected the amount of C. and paid it to the bank. When the next instalment of interest was due, A. received the money of C., but did not pay it to the bank or to the mortgagee. When C. was informed that A. had not paid the interest, he sent word to the mortgagee's attorney that if A. did not pay the interest, he would. After this, and without giving notice to C., B. sold the estate, in good faith and in exact conformity to the provisions of the mortgage, to D., who acted in good faith and was the highest bidder at the sale. After D. had signed an agreement of purchase, but before the deed was executed to D., a bill in equity to redeem was brought by C. against B. and D. *Held*, that although A. was not the agent of B., and had not any authority to represent or act for him, when after a reasonable time it became evident that A. would not pay, notice should have been given to C., and that the bill could be maintained. *Drinan v. Nichols*, 353.

See DEED, 2; EQUITY, 13-15; ESTOPPEL, 1, 2; MARRIED WOMAN, 2.

II. *Of Personal Property.*

See PROMISSORY NOTE; SHIP, 1.

NATIONAL BANK.

See BANK.

NECESSARIES.

See HUSBAND AND WIFE.

NEGLIGENCE.

In an action of tort to recover damages for injuries sustained by the plaintiff being run over by a wagon, the evidence for the plaintiff tended to show that before crossing the street, he looked both ways and had time to cross; that a wagon going with unusual speed knocked him down; that the street was paved and he did not hear the wagon; that he was a few minutes crossing, and was in the middle of the street when struck; that he was not standing still at the time and was looking straight ahead; that the driver of the wagon admitted seeing the plaintiff six feet off. The evidence for the defendant as to the noise the wagon made was conflicting. The defendant put in evidence tending to show that the street was paved; that the wagon was a heavy one and had a heavy load; that the distance, from the place where the wagon turned into the street to the place of the accident, was six hundred and forty-four feet; that the street was a straight one, and there was no other carriage on the street. At the close of all the evidence the defendant requested the judge to rule that the plaintiff had not shown that he was using due care, and had not shown negligence on the part of the defendant. The judge declined so to rule, and submitted the case to the jury, who found for the plaintiff. *Held*, that the questions were properly submitted to the jury upon the evidence. *Schienfeldt v. Norris*, 17.

In an action to recover damages for injuries sustained through the negligence of the defendant, the age of the plaintiff is admissible in evidence to show that he exercised such care as was reasonably to be expected of him. *Wells v. Boston & Albany Railroad*, 190.

Standing on the front platform of a horse-car when there is room inside, is not of itself conclusive evidence that a person injured by the negligence of the driver of the car was not in the exercise of due care. *Maguire v. Midland Railroad*, 239.

The fact that a person injured by the negligence of the driver of a horse-car was intoxicated at the time of the accident will not prevent his maintaining an action for damages unless his intoxication contributed to the injury.

In an action to recover for an injury sustained by a horse through the negligence of the defendant in taking the horse on slippery ground, the presiding judge gave general instructions not excepted to as to what constituted due care. The plaintiff then requested the court to rule, "that the ground was slippery, or the horse's shoes so smooth that they slipped

with no load, common prudence required of the defendant greater care in the use of the horse than if its shoes had been sharp, or the ground not slippery." This instruction the court declined to give, saying that the jury were to consider all the circumstances, and these among others. *Held*, that the plaintiff had no ground of exception. *Strong v. Connell*, 575.

See EVIDENCE, 22; RAILROAD, 7-10; WAREHOUSEMAN.

NEW TRIAL.

1. Upon a motion for a new trial a verdict which, upon the issue submitted to the jury, is against the weight of evidence introduced at the trial, cannot be sustained by the opinion of the court upon a distinct ground of liability, which has not been alleged or tried. *Elkins v. Boston & Albany Railroad*, 190.
2. In an action against a railroad corporation to recover damages for injuries sustained by a train of cars striking the wagon in which the plaintiff was riding at a highway crossing, the declaration charged the defendant with not ringing a bell before crossing the highway, but did not allege that there was no sign-board at the crossing, or that the absence of a sign-board there had any connection with the accident. At the trial, evidence of the absence of the sign-board was admitted only on the issue of due care on the part of the plaintiff, and the jury were instructed that the defendant could be held liable only upon the ground alleged in the declaration. The jury found a verdict for the plaintiff, and a motion for a new trial having been argued, the judge reported that he was of opinion that the evidence did not warrant the jury in finding that the defendant was in fault in respect of ringing the bell or sounding the whistle, or negligent in any manner in the running of the train, and that the verdict ought to be set aside for that reason; unless the failure to maintain a sign-board at the crossing might properly be considered as evidence of such negligence, or as a ground of liability, either under the present or under an amended declaration. *Held*, that even though the want of a sign-board would be a ground of liability under an amended declaration, the defendant was entitled to a new trial. *Id.*

NOTICE.

See EXECUTOR AND ADMINISTRATOR, 1.

NUISANCE.

An indictment under the Gen. Sts. c. 87, §§ 6, 7, charging the maintaining of a common nuisance on a day certain, and for six months next preceding said day, is supported by proof that the defendant maintained the nuisance during any part of the time covered by the indictment. *Commonwealth v. Mitchell*, 141.

See EQUITY, 9; SURVEYORS OF HIGHWAYS.

OFFICER.

See EVIDENCE, 24.

ORDER.

the acceptance of an order for the payment of money on the completion of house building by the drawer for the acceptor, and directing the same to be charged to the drawer "on account of contract," which contract it is admitted is a contract by the drawer to build and complete a house for the acceptor, is not absolute but conditional on the completion of the house according to the contract. *Somers v. Thayer*, 163.

A written order for the delivery of lumber to be used in building the house for the drawer, and which he promises to pay for "when the house is completed," becomes due when the house is substantially finished by any one, though the drawee knew that the person, to whom the order requested him to deliver the lumber, was building the house under a contract, and it is not completed according to the terms of the contract. *Russell v. Barry*, 300.

ORDINANCE.

See **WAY**, 2.

PARTIES.

SAILEMENT, 2; **CORPORATION**, 5, 6; **EQUITY**, 17, 24; **PARTY WALL**; **PLEADING**, 1, 2.

PARTNERSHIP.

Whether money lent to a member of a firm is advanced upon his credit or on that of the firm of which he is a member, and whether the individual stock of such person given for the loan is so far payment thereof as to leave the creditor no recourse to the firm, are questions of fact depending upon the intent, understanding and agreement of the parties. *Smith v. Collins*,

a suit by A. against alleged copartners, where the issues, whether the alleged partnership in which the individual partners were authorized to borrow money on the credit of the firm existed in fact, and whether the alleged partners represented to A. that it did, are presented together, the separate admissions of the alleged partners, made to third persons, are competent to charge them respectively upon the first, but not upon the second issue; but admissions made to A. are competent upon both issues to charge the person making them. *Ib.*

For the purpose of showing the nature and scope of an alleged partnership, evidence of the common and usual dealings of persons engaged in the same business in the same locality, is competent. *Ib.*

A partnership in the business of buying and selling cattle is a trading partnership, one of the incidents of which is the right to borrow money for the purposes of the business. *Ib.*

Statements made by an alleged partner at the time that a loan is obtained, avowing that the money is for the use of the alleged firm, are part of the res gestæ, and are competent to charge the other partners in a suit to recover money lent, if the fact that the several individuals are partners, or that

they have so held themselves out to the person making the loan, is established. *Ib.*

See EQUITY, 24.

PARTY WALL.

If A. by virtue of a contract, not under seal, with B. builds a division wall, one half on the land of each, and B. agrees to pay one half the expense, A. acquires no interest in the land of B., and none passes to the grantee of A., which he can enforce against B. by a suit at law. *Joy v. Boston Penny Savings Bank*, 60.

PAUPER.

See DESERTION; EVIDENCE, 10.

PAYMENT.

A threat by a lessor to eject a tenant unless he will pay a sum demanded as rent is not such duress as will enable the tenant to recover back the rent, although a greater sum is demanded than is due, and the tenant pays it under protest. *Emmons v. Scudder*, 86?

See LIMITATIONS, STATUTE OF, 2; SHIP, 2.

PLEADING.

1. An action on a policy of life insurance, under seal, whereby the insurer covenants with A., his heirs, executors, administrators and assigns, to pay the sum insured to B. on the death of A., cannot be maintained by B. *Flynn v. North American Life Ins. Co.* 449.
2. A. bought cotton and shipped it to B., drawing on him for the amount of the purchase under an agreement by which B. was to sell the cotton, and, after deducting all expenses, pay one half the profit to A. B. sold the cotton to C., who sold it to D. Held, that A. was interested only in the profits, and was not a necessary party to a suit by B. against D. in which B. sought to recover the cotton on the ground that it was obtained from him by fraud. *Haskins v. Warren*, 514.

See AMENDMENT, 2; CORPORATION, 7-9, 11; EQUITY, II; EXCEPTIONS, 3; PARTIES.

POLICE COURT.

See RECORD, 1-4; REMOVAL OF ACTIONS.

POOR DEBTOR.

1. If an insufficient notice has been given to a plaintiff to appear at the examination of a debtor arrested on mesne process, the appearance of the plaintiff's attorney at the time and place mentioned to examine the notice and return is not a waiver of the objection to the notice. *Francis v. Howard*, 236.
2. Under the Gen. Sts. c. 124, § 13, one who is arrested on an execution in favor of a plaintiff who resides in the county where the arrest is made, and

an attorney who lives in that county, may give notice of his intention to the poor debtor's oath, to the attorney who made the writ upon which he was arrested, although such attorney does not reside in that county. *See v. Wiley*, 358.

See ARREST.

POST OFFICE.

See EMINENT DOMAIN.

POWER.

See MORTGAGE, I. 5-10.

PRACTICE.

APPEAL, 1, 2; EXCEPTIONS, 3, 8-14; NEW TRIAL; REMOVAL OF ACTIONS; REPORT, 1-3; TRIAL.

PRESUMPTION.

See EVIDENCE, 4, 9; TRESPASS, 3.

PRINCIPAL AND AGENT.

A special agent cannot enlarge his authority by his own statements so as to bind the principal. *Stollenwerck v. Thacher*, 224.

A special agent, authorized to deliver a bill of lading only upon payment of a bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal by a delivery made without such payment.

A broker solicited orders for a firm of cotton buyers, receiving a deposit of a fixed sum per bale from them, and looked to them and not to the cotton for its payment; each party paid its own expenses; in pursuance of an order procured by the broker, the firm obtained cotton, and sent bills of lading thereof to the purchaser, and the bills of lading with drafts attached to the broker, with instructions not to deliver the bills of lading until the drafts were paid. *Held*, that the broker was not the partner, nor the agent or factor of the firm, intrusted with the goods for sale, within the meaning of the statute. *See* Sts. c. 54. *Ib.*

The agent of an insurance company to solicit risks, obtained for B. a policy of insurance from said company, paying for it a cash premium and depositing and depositing a premium note, in the name of B. The policy provided that B. had paid a cash premium and given a deposit note of like amount; B. received the policy without reading it, and had no knowledge of its execution or of the note by the agent. *Held*, that the acceptance of the policy by B. was a ratification of the act of the agent in executing the note; and that the fact, known to B., that the agent was the agent of the company, did not prevent his acting for B. in executing the premium note. *Monitor Ins. Co. v. Buffum*, 343.

BILL OF LADING, 1; DAMAGES, 5; EVIDENCE, 6; INSURANCE, II.; MORTGAGE, 10; SALE, 5, 7.

PROBATE COURT.

See **ADOPTION, 2; APPEAL, 1-3; TRUST AND TRUSTEE, 4.**

PROMISSORY NOTE.

In an action on a promissory note by an indorsee, who took it after maturity, parol evidence is admissible in defence to show that after the giving of the note the parties thereto orally agreed that a bill of sale, under seal, and purporting to be an absolute conveyance of personal property made to the payee by the maker contemporaneously with the note, should be considered as a mortgage and stand as a security for the note, and that the payee of the note sold the property and indorsed only a part of the proceeds upon the note, although the sale and indorsement were before the plaintiff took the note. *Cresch v. Byron*, 324.

See **LIMITATIONS, STATUTE OF, 1-5; SHIP, 2; WITNESS, 1, 2.**

PROXIMATE CAUSE.

See **CARRIER, 2.**

RAILROAD.

1. The Sts. of 1872, c. 53, § 12, and c. 180, § 3, relating to railroads thereafter "constructed," crossing at grade, do not apply to a railroad corporation which prior to the passage of these statutes has located the line of its road, exercised its right of taking land for the use of its road, incurred liability for land damages and expense in laying the road bed, in rock excavation, in the construction of abutments for a bridge, and in the building of a long bridge at grade in the immediate vicinity of the point where it intended to cross another railroad at grade, although the railroad and the crossing at grade were not completed. *Attorney General v. Ware River Railroad*, 400.
2. Under the St. of 1873, c. 353, § 1, a person, to whom a debt is due for labor performed in constructing a railroad, by virtue of an agreement with a contractor whose contract with the owner of the railroad was made before the passage of the statute, has not a right of action against such owner, although the labor was performed after the statute took effect. *Parker v. Massachusetts Railroad*, 580.
3. An application for a jury to assess damages for land taken in Boston under the St. of 1869, c. 291, § 5, cannot be made to the Superior Court at a term later than that next after the estimate of the commissioners named in that statute is made known to the parties. *Roberts v. Boston & Lowell Railroad*, 57.
4. A railroad corporation is not bound to furnish an expressman, who seeks to carry on his business over its road, with facilities and accommodations different in kind from those furnished to the general public; and the fact that it has furnished him with such facilities for many years, and that he has thereby acquired a valuable business, is immaterial. *Sargent v. Boston & Lowell Railroad*, 416.
5. The St. of 1867, c. 339, obliging each railroad within the Commonwealth to give to all persons or companies reasonable and equal terms, facilities and

accommodations for the transportation of merchandise, does not render it lawful for such a railroad to carry on the express business itself and to refuse to allow similar privileges to another person. *Ib.*

When a railroad corporation may lawfully refuse to furnish a person desiring to carry on an express business over its road with greater facilities than are furnished to the public generally, the fact that the corporation carries on such business itself, and that this is *ultra vires*, is immaterial. *Ib.*

A horse, while trespassing upon the track of a railroad corporation, is killed by a locomotive engine, the corporation is not liable unless the injury was caused by the wanton and reckless misconduct of its agents; and it is not enough to show that they carelessly ran over the horse, and did not take reasonable care to avoid him. *Maynard v. Boston & Maine Railroad*, 188.

A railroad corporation is not liable for killing animals which being unlawfully upon a lot of land go thence upon its track, and are there killed by a passing train, although it was the duty of the corporation to maintain a fence between its track and said lot, and it did not do so, unless the killing was wanton or malicious. *McDonnell v. Pittsfield & North Adams Railroad*, 564.

In an action against a railroad corporation to recover for injuries sustained in the wagon, in which the plaintiff was driving on a highway crossing the railroad track, being struck by a train of cars, evidence tending to show that the wagon was being driven slowly along the highway; that the plaintiff, and another person who was driving, did not know that they had arrived at the railroad crossing, nor see or hear the engine or cars; that there was no sign-board at the crossing; that the train was going at the rate of thirty miles an hour, and that the whistle of the engine was not sounded or the bell rung before reaching the crossing, and not showing that the approaching train was in sight from the highway, is sufficient, if uncontrolled, to justify the inference that the plaintiff was in the exercise of ordinary care. And the facts that the plaintiff, a boy ten years old, in a cold afternoon in winter, had the lappets of his cap tied over his ears; that he had previous knowledge that the railroad crossed the highway at the place of the accident, and did not tell his companion of it; and that he did not look or listen for the train, are not conclusive against the plaintiff upon the issue of ordinary care on his part, if there is evidence that the plaintiff and his companion did not know that they were at the crossing, and that the defendant did nothing to warn them of it or of the approach of the train, until it was too late. *Ellis v. Boston & Albany Railroad*, 190.

In an action against a railroad corporation for injuries sustained by being run into at a place where a highway crosses the railroad, evidence that there is no sign-board at the crossing at the time of the accident is admissible on the issue of due care on the part of the plaintiff. *Ib.*

A contract by which a horse-railroad corporation transfers the entire control of its road with all its franchises, receiving in return only a fixed rent paid in the form of a dividend to its stockholders, is *ultra vires*, and void. *Widdlax v. Boston & Chelsea Railroad*, 847.

12. The lessee of a horse-railroad cannot recover of the lessor for the expense of renewing the road, except in a suit upon the contract of lease, and if this contract is *ultra vires*, no action can be maintained in any form. *Ib.*
13. B., a corporation owning a horse-railroad, made a contract with A., by which the latter was to construct and run the road, paying a rent to B. of \$5600 a year, which was equal to eight per cent. on one half of its shares of stock, the other shares being deferred stock and receiving no dividend therefrom. All the net earnings above \$11,200 a year were to be divided between A. and B. It was also agreed that if any of the materials used in the construction of the road should be worn out or become unfit for use, and the track should require to be renewed, and the cost of renewal in any one year should exceed \$2000, the expense should be paid from a sinking fund, to be set apart, one half by each of the parties, from the surplus income after a dividend of eight per cent. should be paid upon all the stock of A., "or if said fund shall not be sufficient, then the same shall be provided in such a way as may be found equitable." B. assigned the contract to C., and by a contract between A. and C., A. assented to the assignment and relinquished all claim under the contract to any participation in the profits or earnings of the demised road, and also agreed to cancel six hundred shares of its stock, and to reduce its capital to the sum of one hundred and ten thousand dollars. C. agreed to pay A. \$8800 a year instead of \$5600. To secure this arrangement the shareholders of the deferred stock of A. paid to C. \$20,000, and C. guaranteed a dividend of eight per cent. to the stockholders of A. In an action by C. against A., to recover the expense of renewals of the road, *held*, that no action would lie. *Ib.*

See NEGLIGENCE, 3, 4 ; NEW TRIAL, 1, 2 ; SURVEYORS OF HIGHWAYS, 3 ;
WAREHOUSEMAN.

RAILROAD RECEIPT.

See BILL OF LADING, 3, 5.

RECEIVER.

1. The compensation of a receiver appointed to complete, launch and sell a vessel and pay the proceeds into court, is not to be determined by a fixed commission on the amount of money passing through his hands; but should be such an amount as would be reasonable for the services rendered by a person competent to perform the duty. *Jones v. Keen*, 170.
2. Receivers, appointed in pursuance of the Gen. Sta. c. 58, § 6, of an insolvent insurance company, are not responsible merely by accepting the trust and receiving the assets of the company, on the covenants of a lease previously made by the company. To bind them there must be an election on their part, or some act equivalent in law to an election. *Commonwealth v. Franklin Ins. Co.* 278.
3. A. made a lease of a building to an insurance company for \$1250 a quarter; the company removed from the building and allowed B. to occupy it, and hired another building from B., for which they agreed to pay the same rent.

It was due from them to A. under the first lease. By a verbal agreement between the company and B., the company continued to pay A. the rent due under the first lease and paid no other rent. The company afterwards re-let to a third building and underlet the second to C. The company then became insolvent and receivers were appointed. Before the January rent was due B. threatened to eject C. unless the rent was paid. C. notified the company and the receivers. A proposition was made to the receivers for B. to take \$1250 on January 1, and a dividend as the rent due April 1, when all the leases terminated. The receivers took no formal action on this, but on January 1, one of them gave B. a check for \$1250, and collected \$100 of C. This check was indorsed and paid to A. as the rent of the first building. *Held*, that this was an election on the part of the receivers to pay to B. a dividend on the rent of the second building due April 1, but that it was not an election on their part to pay rent of the first building to A. *Id.*

See TRUSTEE PROCESS, 1; WAREHOUSEMAN.

RECOGNIZANCE.

See BAIL; JUDGMENT, 1.

RECORD.

Where the contents of several writings taken together form the record sent on appeal from a police court to the Superior Court, a certificate affixed to the end of such record is a sufficient certificate of each of the writings contained therein. *Commonwealth v. Barry*, 146.

The signature of the clerk of a police court, followed by the word "clerk," is a sufficient attestation of a record sent up on appeal to the Superior Court.

Commonwealth v. Belou, 139.

Copies of the record of a Municipal Court furnished on appeal to the Superior Court need not be under seal. *Commonwealth v. Bellows*, 139.

The docket of a Municipal Court is the record of proceedings in that court, and the more full record is made up, and is sufficient proof of those proceedings. *Good v. French*, 201.

See EVIDENCE, 4, 5, 14.

REMOVAL OF ACTIONS.

A motion was commenced in a police court in which the pleadings showed that the title to real estate was brought in question. The defendant claimed that the court had no jurisdiction, but neither party requested that the case be removed to the Superior Court under the Gen. Sts. c. 120, § 13. The presiding judge thereupon ordered the defendant to remove the case to the Superior Court, and to recognize with a surety to enter the case in that court. The defendant protested, but complied with the order, and in the Superior Court moved to dismiss the case for want of jurisdiction in that court, on the ground that the proceedings in the court below were void. *Held*, that this motion was rightly overruled. *Leary v. Reagan*, 558.

REPLEVIN.

Replevin will not lie by the assignee of a tenant against the landlord for an unremoved trade fixture. *Brown v. Wallis*, 756.

See BILL OF LADING, 3, 4; EVIDENCE, 19.

REPORT.

1. The Superior Court has no authority to report to this court any case which is heard by that court without a jury. *Bearce v. Bowker*, 129. *Commonwealth v. Dowdican's Bail*, 183.
2. The authority given by the Gen. Sts. c. 115, § 6, to the Superior Court to report a case after verdict for determination by this court, extends only to questions of law. The report should be so framed as to state the nature of the case, and the questions of law intended to be reserved, and so much only of the facts or the evidence as may be necessary to present those questions. *Churchill v. Palmer*, 810.
3. A report from the Superior Court stated none of the rulings upon the admission and rejection of evidence, and upon the question reserved whether there was any evidence to be submitted to the jury, referred to the stenographer's report annexed, and this report as printed covered nearly two hundred pages, and consisted in greater part of irrelevant and unimportant details of testimony, long cross-examinations affecting only the bias and credibility of witnesses, and interlocutory discussions between the judge and the counsel, through which the rulings of the judge and the portions of the evidence bearing upon the questions of law to be determined, were scattered. *Held*, that the report was so irregular that it must be dismissed. *Id.*

RETURN.

See EVIDENCE, 28.

SALE.

I. *Of Real Estate.*

1. A stipulation in the advertisement of an auction, that a building to be sold for cash down should be removed within five days from day of sale, is a condition, and although the price be paid by the purchaser, if the building be not removed before the expiration of the time limited, the sale is voidable at the option of the seller. *Woodward v. Boston*, 81.
2. No stipulation can be implied from a sale by a city of its private property, that the public officers who by law have charge of the streets will grant a license to obstruct them. *Id.*
3. A statement by an auctioneer, made as an inducement to purchase, that a building is suited for tenement purposes and could be removed for that purpose, but not shown to be made or understood to vary the terms of a printed advertisement, is a statement of opinion only, and cannot be construed as an implied guaranty that the proper authorities would grant a permit to remove the building through the public streets. *Id.*
4. Evidence that when buildings are sold by the city of Boston, they are sometimes removed as a whole, by a license from the proper authorities; that the

dear employed by the city to sell a building represented that it was for tenement purposes and could be removed for that purpose; that the size of the building and the width of the streets it could be removed alone, does not by implication annex to the contract of sale a stipulation that the purchaser will be permitted so to remove it. *Ib.*

See FRAUDS, STATUTE OF, 1.

II. Of Personal Property.

agreed to furnish B. with lumber, and without any authority from B. to sell the lumber of C., representing himself as B.'s agent. C. sent the lumber to B. with a bill in which C. was named as seller, and B. as buyer. B. received the lumber and did not notify C. that he was buying the lumber from C. *Held*, in an action by C. against B. for the price of the lumber, with damages in tort for the conversion, that B. was liable. *Bearce v. Bowker*,

where the vendor has done everything he was to do under an executory contract for the manufacture and sale of a specific chattel, which was manufactured in accordance with the terms of the agreement, and has given notice thereof to the purchaser, the general property in the chattel passes to the purchaser, and the chattel is at his risk. *Goddard v. Binney*,

in an action against A. for a breach of warranty in the sale of goods, the plaintiff introduced evidence tending to show that they made an agreement with A. to purchase for a fixed price with a person representing himself to be an agent of A.; that by the terms of the agreement the goods were to be sold by sample; that before closing the contract they saw A., who told them that they were buying directly of him and would get their bill direct from him; that no price or other terms were agreed on or mentioned between them and A., who received the price agreed upon by the agent and delivered the goods, but instead of giving a bill direct to the plaintiffs, gave them a bill from a firm of which A. had been a member, but which had ceased to exist, and a former clerk of this firm made out a bill of the goods from this firm to the plaintiffs, A. representing that this would make no difference. *Held*, that the court was competent for the jury to find that A. adopted the contract of sale made by the agent, and that if so, A. could not repudiate the warranty, and that was an essential part of the contract. *Held*, also, that the manner in which the bills were made out was open to explanation, and did not conclusively show that the plaintiffs bought of the agent. *Churchill v. Palmer*, 310. The delivery of goods sold for cash is a release or waiver of the title of the seller to the goods, whether this right is in the nature of a contract affecting the title, or only a lien for the price. *Haskins v. Warren*, 514. Goods sold are delivered to the purchaser, and there is evidence that the goods were for the purpose of examination or other special and limited use, and not for the purpose of giving absolute possession to the purchaser, evidence is admissible that it was in the usual course of dealing to give an opportunity for examination in that mode. *Ib.*

10. If goods sold are delivered for the purpose of completing the sale of a usage that the sale is not completed is inadmissible. *Ib.*
11. A usage that no title passes upon an ordinary sale and delivery, actual payment of the consideration within a certain number of days, is unreasonable and invalid. *Ib.*
12. In an action by the seller of goods to rescind the sale on the ground of fraud, evidence of other purchases made by the person charged with the fraud, at or about the same time, is competent, if the purchases are connected as to show a general purpose in the transactions, or that he was conducting business in some unusual manner, indicating an intention of failure; and evidence is inadmissible in defence to show that from whom the other purchases were made brought suits to rescind made by them, and afterwards abandoned them. *Ib.*
13. In an action by a seller of goods to rescind a sale on the ground of fraud, evidence that the party charged with the fraud overdrawed his bank daily at and before the time of the purchase, is competent as to show that he must have been aware of his condition. *Ib.*

See BILL OF LADING, 3; CONTRACT, 7; CUSTOM AND USAGE, 16, 17, 19, 20; FRAUDS, STATUTE OF, 2, 3; LORD'S PLEADING, 2.

SCHOOL COMMITTEE.

1. Under the Constitution of the Commonwealth, a woman may be elected to a school committee. *Opinion of the Justices*, 602.
2. Under the provision of the revised charter of the city of Boston (c. 448, § 24,) that "the board of aldermen, the common council and the school committee, shall have authority to decide upon all questions relating to the qualifications, elections and returns of their respective members," a decision of the school committee, declaring a seat in the board of aldermen for want of legal election and qualification, is conclusive, and is not reversed by this court upon petition for a writ of mandamus, although the school committee states in its record, as the sole reason for its decision, that the petitioner is a woman. *Peabody v. School Committee of Boston*.

SEAL.

See PLEADING, 1; RECORD, 3.

SELECTMEN.

See SURVEYORS OF HIGHWAYS, 2.

SENTENCE.

On an indictment for a felonious assault on A. with the malicious intent to maim and disfigure A. by putting out and destroying the eye of the defendant is found guilty of an assault without the intent as alleged in the indictment, he may be adjudged guilty of a simple assault under *Sta. c. 172, § 14. Commonwealth v. McGrath*, 150.

SETTLEMENT.

See DESERTION; EVIDENCE, 10; TRUST AND TRUSTEE, 2.

SHIP.

Mortgage on a vessel is postponed to the lien given to material-men by the Gen. Sts. c. 151, § 12. *Jones v. Keen*, 170.

Payments given by the builder of a ship to a person who has furnished materials in her construction, merely for the accommodation of such person, not credited on the bill, are not payment for the materials, and the fact that the notes have not been surrendered does not prevent the material-man from enforcing his lien. *Ib.*

Failure including in a claim of a lien on a vessel materials furnished another vessel, through ignorance and not wilfully or knowingly, does not prevent the material-man from enforcing his lien against the first vessel for the materials actually used in her construction. *Ib.*

A person who performs labor on two vessels under an entire contract for a round sum, cannot maintain a lien under the Gen. Sts. c. 151, § 12, on one of the vessels for the work done on that vessel, whether he has performed the contract or has been prevented from finishing his work by the failure of the owner of the vessel to complete the vessel sufficiently for him to perform it. *Ib.*

A material-man, who has performed labor and furnished materials to two vessels under an entire contract for a round sum, and who after the work is done destroys, with the assent of the owner of the vessel, the original contract and makes and antedates a new contract applicable to one vessel only, cannot set up this contract in his claim for a lien as the one under which the work was done and materials furnished, cannot maintain a lien. *Ib.*

Under the Gen. Sts. c. 151, § 12, a lien exists for labor and materials furnished, as well as for labor performed and materials used in the construction of a vessel; and a person contracting with the owner of a vessel may enforce his lien for labor performed and materials furnished by persons with whom he has made a sub-contract. *Ib.*

A person employed at day's wages by the owner of a vessel to work as a blacksmith in making spikes and bolts from the owner's iron for use in the construction of the vessel, and who does this work and also some jobs on other vessels and some outside work by the owner's direction, has a lien on the vessel under the Gen. Sts. c. 151, § 12, for the labor performed on the spikes and bolts used in her construction. *Ib.*

A material-man, who, in his statement of a lien filed in the town clerk's office, wilfully and knowingly claims more than is due him, cannot enforce it. *Ib.*

See MECHANIC'S LIEN; RECEIVER, 1.

SLANDER.

See LIBEL.

SOLDIER.

See DESERTION, 1, 2 ; EVIDENCE, 10-18.

SPECIFIC PERFORMANCE.

See EQUITY, 3 ; EXECUTOR AND ADMINISTRATOR, 1.

STATUTE.

The right to maintain a bill in equity to enforce the liability of the of a corporation, under the St. of 1862, c. 218, which had vested before passage of the St. of 1870, c. 224, is not taken away by the latter act, the bill is not filed until after its passage. *Pope v. Salamanca Oil*

See CORPORATION, 3 ; RAILROAD, 1, 2.

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STENOGRAPHER.

See SUPERIOR COURT.

STOCK DIVIDEND.

See CORPORATION, 2, 4.

STREET RAILWAY.

See RAILROAD, 11-13.

SUPERIOR COURT.

The purpose of the St. of 1870, c. 812, providing for the appointment of a stenographer to the Superior Court in the county of Suffolk, of stenographers, is to afford assistance to the court and the counsel in conducting the trial, and

ports and bills of exceptions, not that a complete record of all that
 place in the court below, whether material or immaterial to the ques-
 of law reserved, should be transmitted to this court. *Churchill v.*
 , 310.

See REMOVAL OF ACTIONS; REPORT.

SUPREME JUDICIAL COURT.

See APPEAL, 1-3; EQUITY, I; EXCEPTIONS; REPORT.

SURETY.

See JUDGMENT, 1-3.

SURVEYORS OF HIGHWAYS.

decision of surveyors of highways, acting within the scope of their
 city, under the Gen. Sts. c. 44, § 8, that a structure in the highway is
 struction to public travel, is conclusive; and evidence is not admissible
 y that the structure is not in fact an obstruction, or that the removal
 obstruction will seriously incommode and damage the person who
 it there; or that the surveyors did not act in good faith, in deciding
 was an obstruction to public travel. *Bay State Brick Co. v. Foster,*

act that the persons chosen to be surveyors of highways are selectmen
 town, does not prevent their acting as surveyors, nor invalidate their
 that capacity. *Id.*

act that the rails of a private railroad were placed on a highway by
 mission of the town authorities, who permitted them to remain there
 eries of years, does not prevent the surveyors of highways from re-
 them if they deem them an obstruction to public travel. *Id.*

SURVIVORSHIP.

See ACTION, 2-5.

TAX.

See LEASE, 1, 3, 4.

TOWN.

See WAY, 1.

TRADE FIXTURE.

See FIXTURE; REPLEVIN.

TRESPASS.

ction of tort for breaking and entering the plaintiff's close may be
 ined, if the plaintiff is in possession, and neither party proves title
 close. *Sweetland v. Statson*, 49.

action of tort for breaking and entering the plaintiff's close, it should
 ged that the defendant "forcibly broke and entered" the plaintiff's

close; but the omission of the word "forcibly" may be cured by amendment; and the defendant, if he wishes to avail himself of such defence, should specifically point out the defect at the trial, even if it is before the trial of the peace, and if this is not done the defect cannot be taken into consideration in this court on a bill of exceptions which states that the defendant asked the court to rule that the declaration did not set forth a legal defence. *Wilcox v. Conway*, 561.

3. The fact that a portion of the time described in one of the declarations in two actions, by the same plaintiff against the same defendant, for the same cause, committed on the same close, is also included in the other, does not create a presumption of law that the trespasses charged in the two declarations are the same. *Ib.*

See ANIMALS; REMOVAL OF ACTIONS.

TRIAL.

If trial by jury is waived pursuant to the Gen. Sts. c. 129, § 66, the jury should render a judgment and not a verdict. *Bearce v. Bowker*, 561.

See EXCEPTIONS; REPORT.

TROVER.

See CONVERSION.

TRUST AND TRUSTEE.

1. A. reciting that his wife B. was under guardianship as an infant, and that he was minded to set apart certain property, "the income of which is to be paid to the guardian" of B. during the lifetime of A., so that in the event of her death a comfortable support and maintenance will be secured for her during the lifetime of A., conveyed certain property to C. in trust for the use and benefit of B. for the time being a certain sum, during the lifetime of A.; "the receipt of the said guardian to be a full acquittance to the trustee for any payments." The indenture then provided for the termination of the trust in case of the death of B. living A., and in case of the death of A. living B., and that if B., "her guardian for the time being, or any person authorized by her, or acting in her behalf," should commence proceedings against A. in relation to certain property, the income of which was withheld, and if the proceedings continued for two years the trust should cease. B. was afterwards discharged from guardianship and decedent A. and C. conveyed the trust property to A. Held, that the trust was not notwithstanding the discharge from guardianship. *Scott v. Randall*, 562.
2. A voluntary settlement fully executed cannot be revoked or annulled by a second settlement of the same property, in the absence of any reservation in the deed of settlement reserving such power to the settler. *Sewall v. Sewall*, 562.
3. A. in 1825 made a voluntary conveyance, without reserving any power of revocation, of personal property to an annuity company in trust for the payment of an annuity to him for life, and upon his death to transfer the principal to his heirs.

executor or administrator, in trust for the special use and benefit of any children of A.; if one only, in trust for his or her use and benefit; if more than one, for their use and benefit equally, the legal representatives take their parent's share; in case of A.'s death without leaving any issue, to pay the principal to the mother of A. for her own use; in case A. survived his mother and died without leaving any lawful issue, then to pay the principal sum to his executor or administrator in trust for the use of his mother at law and the heirs at law of his mother equally to be divided between them. A. subsequently undertook to change the terms of the settlement. In 1865 he adopted a child in pursuance of the provisions of the Gen. Sts. c. 100, and died in 1872, leaving no other child. *Held*, that A. had an estate in fee simple, and no power to change the terms of the settlement. *Also*, that the adopted child took the remainder of the property as a child "under the settlement, as one of the legal consequences and incidents of the natural relation of parents and children," by virtue of the provisions of the Gen. Sts. c. 110, § 7. *Ib.*

Where a testator directs that the judge of probate shall approve of the appointment of a trustee, to be made by persons designated by his will, the person occupying the office of judge of probate acts under the authority conferred upon him by the will, and not as a court or judicial officer, and no assent to the parties in interest is not required. *National Webster Bank v. Judge*, 424.

The provisions of the Gen. Sts. c. 100, § 9, do not operate to vest the title in real estates in trustees not appointed under the provisions of that statute.

An appointment by deed under the provisions of a will, which devises an estate to trustees, with power to appoint others to supply vacancies as they occur, and which declares "that the new trustees so appointed shall have the same power, right and interest touching the trust premises, as if appointed trustees," does not operate as a good appointment of the estate by which the title will vest in the trustees by force of the devise itself, but will remain in the survivors of the original trustees as a naked trust, and the execution of a power of sale conferred upon the trustees by the will will pass to the purchasers by force of the terms of the devise, and not by their deed under the power. *Ib.*

See CORPORATION, 2, 4.

TRUSTEE PROCESS.

Where receivers of an insurance company, established by the laws of this Commonwealth, have been appointed and an injunction issued, under the provisions of the Gen. Sts. c. 58, § 6, neither the corporation nor the receivers can be charged in a trustee process. *Columbian Book Company v. De Golyer*, 67.

A contract to become due for labor and materials furnished under an entire contract for building a house, is "future earnings" within the meaning of the Act of 1865, c. 43, § 2, which declares an unrecorded assignment of future earnings invalid against a trustee process. *Somers v. Keliher*, 165.

3. If a person makes a contract to furnish labor and materials in the house, and by the terms of the contract he is to be paid when the work is completed, an assignment by him of the money payable under the contract, if made before he is entitled to receive the money, is an assignment of his earnings. *Id.*

See EQUITY, 24.

ULTRA VIRES.

See RAILROAD, 6, 11, 12.

USAGE.

See CUSTOM AND USAGE.

USURY.

See BANK, 1, 2; CONSTITUTIONAL LAW, 1, 2.

VARIANCE.

See DECEIT; FALSE PRETENCES, 7, 8.

VENDOR AND PURCHASER.

See SALE, 1.

VERDICT.

A misrecital of a verdict in a motion contained in a bill of exceptions will not affect the verdict as shown by the record. *Commonwealth v. McGowan*.

See ASSAULT.

WAIVER.

See POOR DEBTOR, 1; SALE, 8.

WAREHOUSEMAN.

In an action against the receivers of a railroad for the loss of goods, while in the defendants' freight house, evidence that the freight house was filled with wool in sacks, and paper stock in a ragged condition lying loosely upon the floor; that some kind of oil was stored there, a can of which had leaked out upon the floor; that much of the glass was broken out of the windows at one end of the building; that the most inflammable materials were stored in that end; that a locomotive engine passed close to the track, twenty-five or thirty feet from said windows, about fifteen minutes before the fire was discovered, and that the fire caught at that end of the building, is evidence to be submitted to the jury of a want of ordinary care on the part of the defendants as warehousemen. *Nichols v. Smith*.

WARRANTY.

See SALE, 7.

WAY.

ject in a highway, with which a traveller does not come in contact or on, and which is not an incumbrance or obstruction in the way of is not to be deemed a defect, for the reason that its bright appearance causes a horse to take fright, in consequence of which he momentarily loses the control of his driver, and causes damage. *Cook v. Mon-* 571.

St. of 1799, c. 31, § 5, and the ordinance of the city of Boston of 1850, imposing penalties for making and maintaining bow-windows or other projections into the streets of Boston, are intended for the benefit of the public, and do not confer distinct rights on individual citizens or owners of property. *v. Williams*, 217.

WARRANTS; BAILMENT, 8; BETTERMENT, 1-4; SALE, 2-4; SURVEYORS OF HIGHWAYS.

WILL.

See DEVISE AND LEGACY; TRUST AND TRUSTEE, 4, 6.

WINDOW.

See EQUITY, 9; LIGHT AND AIR; WAY, 2.

WITNESS.

Signature of an attesting witness placed below the body of a note and the date thereof may apply to the whole note if shown to have been so placed for that purpose after the note was completed. *Warren v. Chapman*,

question, "When did you get the title to that note?" is within the scope of cross-examination, and is not open to exception. *Moore v. Boston & Lowell Railroad*, 63.

DEED, 1; EVIDENCE, 23, 24; LIMITATIONS, STATUTE OF, 3-5.

WOMAN.

See SCHOOL COMMITTEE, 1, 2.

WORDS.

"without leave." See *Hanson v. South Scituate*, 336.

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See *MECHANICS' LIEN*; *RAILROAD*, 2; *SHIP*, 4-7.

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MASSACHUSETTS REPORTS

116

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

SEPTEMBER 1874 — JANUARY 1875

JOHN LATHROP

REPORTER

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. HORACE GRAY, CHIEF JUSTICE.

HON. JOHN WELLS.

HON. JAMES D. COLT.

HON. SETH AMES.

HON. MARCUS MORTON.

HON. WILLIAM C. ENDICOTT.

HON. CHARLES DEVENS, JR.

ATTORNEY GENERAL.

HON. CHARLES R. TRAIN.

FOR the sake of securing greater promptness of publication the Reporter has printed the cases in the order of decision without reference to terms of court; and has indicated, in a line at the head of each case, the county in which it arose, the date of argument and judgment, and the judges present. When only one date is so given, the case was argued and determined on the same day.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

COMMONWEALTH vs. JOSEPH T. BARRY.

Suffolk. September 8. — 12, 1874. MORTON & ENDICOTT, JJ.,
absent.

U. S. St. of 1864, c. 106, § 55, making the embezzlement of the funds of a national bank by one of its officers a misdemeanor, does not interfere with the jurisdiction of state courts over larcenies committed upon the property of a national bank by one of its officers.

fact that a person who has stolen property belonging to a national bank is an officer of the bank and subject to punishment for embezzlement under the U. S. St. of 1864, c. 106, § 55, does not relieve him from his liability to punishment for the same act as a larceny at common law or under the statutes of a state.

Money belonging to a bank is intrusted to the care of the teller during the day, but at night is placed in a safe, which he cannot rightfully open, if he abstracts money from the safe at night and converts it to his own use, his offence is larceny and not embezzlement.

Offence of receiving stolen property is a substantive crime in itself, and not merely accessory to the principal offence of larceny.

INDICTMENT on the Gen. Sts. c. 161, § 43, charging the defendant on October 21, 1871, with feloniously buying and receiving and aiding in the concealment of certain legal tender notes and bank bills of the goods, chattels and moneys of the National Bank, knowing the same to have been feloniously stolen, the said legal tender notes and bank bills having been

before then feloniously stolen, taken and carried away by William S. Hine.

At the trial in the Superior Court, before *Rockwell, J.*, the defendant pleaded in bar to the jurisdiction that the offence set forth in the indictment was only cognizable by the Circuit Court of the United States for the District of Massachusetts; but the presiding judge disallowed and overruled the plea.

William S. Hine was called as a witness, and testified as follows: "I was the book-keeper and teller of the National Bank of Great Barrington, Massachusetts, from February 1, 1871, to October 21, 1871, inclusive; as such teller I had the combination of the combination locks of three of the four doors of the vault and safe, (there being two doors on the vault and two on the safe,) the cashier had the other combination; without a knowledge of the combinations of these four locks, access could not be obtained to the inner safe, in which the money of the bank was kept; the cashier did not have the combinations of the vault locks which I had, nor I of the one which he had, which was the outside door of the inner safe, being the third door of the vault. At noon, October 21, 1871, the cashier left the bank to go to dinner, putting the money into the vault, and locking the outside door of the vault, leaving the outside door of the inner safe standing open; I opened the outer door of the vault, with the combination of which lock I had, and finding the outside door of the inner safe open, I took a screw driver and removed the box which held the number of the combination on that door, and in that way obtained a knowledge of the combination of the vault lock, which enabled me to unlock that door when locked, and that combination was in use. There being an error in the books of the bank, the cashier and I remained in the bank that evening till half-past eight o'clock, at which time I placed the money in the safe and fastened the doors; the cashier and I then left the bank together, he going towards his home, and I then returned to the bank, unlocked the door, entered the bank, lit a candle, and unlocked the doors of the safe and vault, using the same combinations which existed at noon-time, and removed the funds and money of the bank, wrapped them up in a bundle, and left the bank, locking all the doors, and proceeded with the money to my boarding-house. On Friday, October 20, 1871,

ived notice from the cashier that I would be discharged from employ of the bank on account of my irregular habits; on the morning of that day, at about nine o'clock, having made up my mind to take the funds of the bank, I met the defendant Barry in the streets of Great Barrington, and asked him to drive me to Pittsfield the next afternoon, as I wanted to take the nine o'clock train from Pittsfield to Albany, and agreed to give him \$1000 if he would get me there in time to do so; he seemed astonished at the offer; I told him if I chose I could take the funds of the bank, and I thought of doing so the next day; he asked me what business, and I said yes; we then proceeded down the road track some distance, and I then disclosed to him my purpose; this was the commencement of the defendant's knowing and aiding anything to do in the transaction; after I had taken the funds of the bank to my boarding-house, and placed them in my satchel, I proceeded with the money from my boarding-house to Humphrey's Bridge, the place agreed upon for meeting Barry; and Barry there without a conveyance of any kind, and we then concluded to walk to Van Deusenville, where I was to take my horse and carriage, and did so; I took from the satchel three packages of money, amounting in all to about \$1700, and delivered them to the defendant Barry, and took the train for Pittsfield; that was the last I saw of Barry."

It was proved that Hine at January term, 1872, of the Superior Court in Berkshire, had pleaded guilty to an indictment for embezzling of \$24,894 of the moneys of the said National Mahawie Bank from the building of said bank, and been sentenced thereon to the house of correction for two years.

The government proved the organization of the National Mahawie Bank, under the laws of the United States, and in accordance with the provisions of the acts of Congress in relation to the organization of national banks contained in the U. S. Statutes, c. 106.

The defendant asked the judge to rule that upon this evidence the offence was not within the jurisdiction of the court. The judge declined so to rule; the jury returned a verdict of guilty against the defendant alleged exceptions.

M. Barker, (*E. M. Wood* with him,) for the defendant. The offence of the defendant was only cognizable by the courts

of the United States. It appeared in evidence that Hine was the teller of the National Mahawie Bank, which was organized under the U. S. St. of 1864, c. 106, and that while such teller, he abstracted, and took from the vault of the bank a large sum of money belonging to the bank, and converted it to his own use. This was an offence under § 55 of that act, and was punishable as a misdemeanor. There was evidence tending to show that the defendant aided and abetted Hine in taking said money and converting it to his own use, advising with him in regard to taking the money, and assisting him in carrying the same to Van Deusenville, and receiving and concealing a portion of the same. By so doing he committed an offence under the U. S. St. of 1869, c. 145. The offence was only cognizable by the courts of the United States. The U. S. St. of 1789, c. 20, § 11, provides that the Circuit Courts of the United States "shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." No law of the United States gives to the state courts cognizance of offences under the U. S. St. of 1864, c. 106, or the U. S. St. of 1869, c. 145. It therefore follows that the state courts have no jurisdiction of the offence committed by the defendant. *Commonwealth v. Felton*, 101 Mass. 204. *Prigg's Case*, 16 Pet. 539, 617. *Houston v. Moore*, 5 Wheat. 1, 27. 1 Kent Com. (12th ed.) 399. *Commonwealth v. Fuller*, 8 Met. 813, 819. *Commonwealth v. Tenney*, 97 Mass. 50.

2. The offence of Hine, as stated in his own testimony, was embezzlement, and not larceny. He was the teller of the bank; that is, the officer who receives and pays out its money; and, as he testifies, that upon that evening at half past eight o'clock, he himself placed the moneys of the bank in the safe, inside the vault, and fastened the doors; as teller of the bank he could lawfully take its moneys from the safe and pay them to third persons, and his office of teller continued in the night time as well as during the day. This case is distinguishable from *Commonwealth v. Davis*, 104 Mass. 548, by the fact that in the latter case the defendant had no right to remove the goods, or to sell them, or had even the bare custody of them, being simply a clerk and packer in the employ of the owner of the goods.

It is entirely immaterial whether the crime of Hine was embezzlement or larceny. Whichever it was, all the acts which he committed from the time when he took the money out of the vault, until he and the defendant parted at Van Deusenville, constituted an offence under the U. S. St. of 1864, c. 106, § 55, and in doing all those acts he was, according to the testimony, aided and abetted by the defendant, who, in doing all that he did, committed an offence under the U. S. St. of 1869, c. 145, which offence was punishable by the courts of the United States and only there.

R. Train, Attorney General, for the Commonwealth.

WELLS, J. The only question argued before us by the defendant is that of jurisdiction. It is contended that when an offence is punishable both by the laws of a state and by those of the United States, the jurisdiction of the courts of the latter excludes that of the state courts, unless otherwise provided by the laws of the United States.

We assume that position to be correct, it does not meet this case. The offence charged in the indictment, upon which the defendant was found guilty, is that of receiving and aiding in the concealment of stolen property, under the Gen. Sts. c. 161, § 43. The indictment recites the previous larceny of the property, consisting of money, from the National Mahawie Bank, by William S. Hine. This and the principal offence of Hine, as set forth, are independent of any trust, and of any relation of either to the bank as clerk, agent or agent. But such relation and breach of trust are essential elements in the offence punishable under the laws of the United States. The U. S. St. of 1864, c. 106, § 55, provides: "That every president, director, cashier, teller, clerk, or agent of an association, who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association" shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five nor more than ten years. The two offences are essentially different. The Constitution of the United States does not purport to punish larceny or embezzlement. The obvious inference is that Congress did not intend to interfere with the jurisdiction of state laws and state courts in the punishment of offences of that class against the property of national banks.

The defendant contends that, as it appeared in evidence that Hine was in fact teller of the bank, and was enabled through that position to secure the means by which to "abstract" the funds from its vault, his offence comes within the terms of the statute of the United States, and is punishable exclusively under it; and therefore that the accessorial offence of Barry cannot be punished at all. *Commonwealth v. Felton*, 101 Mass. 204.

In our opinion, neither branch of this proposition can be maintained. In the first place, if the fact that Hine was teller of the bank subjects him to the punishment imposed for his breach of trust in that capacity, under the statute of the United States, it does not relieve him from his liability to punishment for the larceny at common law or under statutes of the state. There is no identity in the character of the two offences, although the same evidence may be relied upon to sustain the proof of each. An acquittal or conviction of either would be no bar to a prosecution for the other. *Commonwealth v. Tenney*, 97 Mass. 50. *Commonwealth v. Hogan*, 97 Mass. 122. *Commonwealth v. Harrison*, 11 Gray, 308. *Commonwealth v. Shea*, 14 Gray, 386. *Commonwealth v. Carpenter*, 100 Mass. 204. *Morey v. Commonwealth*, 108 Mass. 438. Exclusive jurisdiction of the one does not exclude jurisdiction of the other.

Upon the facts stated it is clear that the offence of Hine was larceny and not embezzlement. Although as teller he was intrusted with funds of the bank while engaged in transacting its business, at night they were withdrawn from his possession and placed in such custody that he could not lawfully resume possession until the return of business hours and the concurrence of the cashier authorized him to do so. That custody was possession by the bank; and his wrongful violation of it made the taking of the funds larceny. *Commonwealth v. Berry*, 99 Mass. 428. *Commonwealth v. Davis*, 104 Mass. 548.

In the second place the offence of receiving stolen property is a substantive crime in itself, and not merely accessorial to the principal offence of larceny. In this respect the case is clearly distinguishable from that of *Commonwealth v. Felton*, *supra*.

Exceptions overruled.

COMMONWEALTH vs. JOHN CHAPPEL.

Franklin. September 14. — 18, 1874. WELLS & MORTON, JJ., absent.

sale of cider at a public bar and to be drunk on the premises is not an offence under the St. of 1869, c. 415, without proof that the cider is intoxicating.

COMPLAINT under the St. of 1869, c. 415, §§ 31, 36, for the illegal keeping of intoxicating liquors. At the trial in the Superior Court, before *Brigham*, C. J., the evidence tended to show that the defendant occupied the lower story of a three story building as an eating-house, and therein kept a bar, and sold hop beer and cider by the glass. Evidence was also introduced to show that he kept and sold whiskey, which need not be stated in detail.

The jury, after receiving instructions which were not excepted to and retiring, came into court and asked for instructions as to whether selling a glass of cider was an offence. The presiding judge instructed them that sales of cider at a public bar, by the glass, to be drunk on the premises, was a violation of the statute, and would warrant a conviction. The jury returned a verdict guilty, and the defendant alleged exceptions.

T. B. O'Donnell, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The St. of 1869, c. 415, §§ 31, 36, on which the complaint is founded, prohibits the keeping with intent to sell of "any spirituous or intoxicating liquor." Section 30 of the same statute declares that "ale, porter, strong beer, lager bier, and wines, shall be considered intoxicating liquors within the meaning of this act, as well as distilled spirits; but this enumeration shall not prevent any other pure or mixed liquors from being regarded as intoxicating." This enumeration omits cider, which had been expressly specified in the former statutes, under which sales of cider, though not proved to be intoxicating, were held to be unlawful. St. 1855, c. 215, § 1. Gen. Sts. c. 86, § 28. St. 1868, c. 141, § 21. *Commonwealth v. Dean*, 14 Gray, 99. *Commonwealth v. Shea*, 14 Gray, 386. Cider is not named in the St. of 1869, except in § 26, which provides that "all intoxicating liquors, other than cider, malt liquors, and wines," containing less than a certain proportion of alcohol, shall be considered

adulterated ; and in § 29, which provides that “any person may manufacture cider, or may sell or keep for sale cider, where the same is not sold, or kept with intent to be sold, at a public bar or to be drunk on the premises.” It is impossible, consistently with any known or just rule of interpretation of penal statutes, to infer from the provisions of this act, what is certainly not expressed therein, that a sale of cider at a public bar or to be drunk on the premises is an offence, without regard to the question whether it is or is not intoxicating. The effect of all these provisions, viewed together and in relation to one another, is, that cider is not one of the liquors expressly declared to be intoxicating ; that it may, like any other liquor not enumerated, be proved to be intoxicating ; that all cider, whether intoxicating or not, may be sold or kept for sale except at a public bar or to be drunk on the premises ; and that a sale of cider within this exception is unlawful if the cider is proved to be intoxicating, and not otherwise. As the instructions given to the jury would lead them to infer that a sale of any cider whatever at a public bar and to be drunk on the premises was unlawful, the

Exceptions must be sustained.

COMMONWEALTH *vs.* CHARLES G. SHAW.

SAME *vs.* ARTHUR R. KANE.

SAME *vs.* ROBERT SHEEHY.

Hampshire. September 14, 1874. WELLS & MORTON, JJ., absent.

On a complaint on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law, evidence that the defendant was at a bar room on the day mentioned in the complaint ; that he had been there for more than a year previously ; that in the bar room were found small tumblers on a drainer which smelt of liquor ; that intoxicating liquors were found in a cellar communicating with the bar room ; that there was a sign over the bar room on which was the surname of the defendant with that of another person ; and that the defendant said to the witness when the liquors were found that if he, the witness, was as good to search other places as he was that, he would find more liquors, is sufficient to be submitted to the jury, although the liquors found were returned on a search-warrant as the property of the other person whose name was on the sign, and were forfeited, no one claiming them.

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On a complaint on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law, evidence that the defendant had on the day named in the complaint a tunnel and measure in his hand ; that there were several measures over the sink in the kitchen ; that there were intoxicating liquors found buried in the ground in the cellar, which had not been used for some time ; that near the day of the complaint drunken persons, strangers, had been found on the defendant's premises ; that access to the cellar where the liquors were found was from the outside, and that there was a path to it leading from the defendant's back door, and footmarks in the cellar from the outside door ; and that although there was a door leading into this cellar from another to which tenants had access, this door was not used, the floor was covered with dust and showed no footmarks, is sufficient to be submitted to the jury.

On a complaint on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law, evidence that, on the approach of state constables, the doors of the defendant's house were locked ; that a crash was heard at the back of the house, and on going there a stone jar was found broken, with some whiskey in it, a broken tumbler, and liquor spilled upon the ground ; that in the kitchen were found a sugar bowl with a spoon in it, and a tumbler which had recently been used for liquor ; that there was a bar room where were kept candies, cigars, tobacco, soda, small beer, and small whiskey tumblers, is sufficient to be submitted to the jury.

THREE COMPLAINTS on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law.

THE FIRST COMPLAINT charged the offence to have been committed on July 3, 1873, at Northampton.

At the trial in the Superior Court, on appeal, before *Dewey, J.*, *Elijah N. Sampson*, a state constable, testified as follows : " On July 3, 1873, I took a search-warrant to search the premises of *Michael Connor*, opposite the *Fitch Hotel* ; passed in through the front door into the bar room, and found the defendant and another man. On looking the bar over, found four small tumblers on a drainer, which smelt of liquor, and some sugar there in a drawer and a spoon in it, and all the implements for carrying on the trade." The witness being directed to state what he found, said he found a pail for rinsing ; " searched the cellar, and found on the cellar wall on the back stairs six bottles ; four contained whiskey and two of them gin ; that was all the liquor found. A door opened from the bar room into the cellar. There was a regular bar there, and beer tumblers ; no other business in that room, unless a few cigars on the shelf. There are two front rooms ; front room used for sale of tobacco, cigars, nuts ; never knew of any oysters sold there. Two rooms in front,

two doors, doors out of both rooms into the bar room. Joseph Kneeland was there with the defendant when I first went in. Have known the defendant at that place ever since I was appointed on the force, which was a year ago last June ; Kneeland does not belong there. The defendant made this remark, that if I was as good to search other places as I was here I should find more liquor." On cross-examination, the witness testified that he returned these six bottles found on July 3, on the search-warrant, as the liquors of Michael Connor, and they were forfeited, no one claiming the same. On reëxamination, the witness testified that the sign over the door was Shaw & Connor.

The defendant asked the presiding judge to rule that there was no evidence that the defendant owned or kept the liquor found there on July 3, or that he knew it was there. The presiding judge refused so to rule, but submitted the case to the jury under proper instructions. The jury returned a verdict of guilty, and the defendant alleged exceptions.

THE SECOND COMPLAINT charged the commission of the offence at Ware on September 3, 1873.

At the trial in the Superior Court, on appeal, before *Dewey, J.*, William E. Lewis testified for the government as follows : " I know the defendant. He lived in Ware, in a house in the rear of Main Street, a house known as the ' Old Barn.' I went on September 3, 1873, into his place with a search-warrant ; part of his place is used for a tailor's shop. I had a search-warrant ; I went in and found him upstairs ; he came down as I went in. I told him what I had ; he said, ' All right, look around.' As he came down he had a tunnel and measure in his hand. I looked around, and found over the sink in the kitchen several measures, some two or three measures, two tunnels. On that I went down into his cellar. I found in the cellar underneath his kitchen, buried in the ground, three jugs, buried, close by them, another three gallon jug, very nearly full ; the jugs contained gin and whiskey. The way to get into this cellar was from the outside on the west side of the tenement occupied by the defendant as a dwelling-house. This cellar had been in disuse for quite a while, on a former occasion I tried to get in. I did not have any words with the defendant at that time ; afterwards he said it must be some that Webb left when he got through. This was a man whe

lived on the premises a year or two before. He said he thought he could tell me who it was that told me. The path leading into this cellar was from his back door ; it had the appearance of being used. There were footmarks on the cellar bottom leading from this outer door leading from these premises. The defendant's cellar is not used in common by any one ; not gone over by any other parties except by himself. I have been to his place so many times that I know his premises pretty well. Not far from this time I found strangers there, drunken people there ; have arrested them." On cross-examination he testified : " There are other tenants in the house ; don't know but one other tenant. I think the house is divided into two tenements ; there are only two front doors ; I cannot say whether there are three tenants in the house or not. There are three cellars under the house ; there is a cellar under the whole house, divided into three parts ; there may be three rooms in the front part, and a long cellar back of these two or three. There is a door leading out of the middle front cellar into the back cellar, through the partition. There is a door at the east end of this long cellar. There are two outside doors to this long cellar, and one door from the middle room. The cellars under the front part are used by the tenants. The northwesterly cellar is the defendant's." Reëxamination : " The door at the east end has been fastened for a long time. The door in the cellar is not used, the floor is covered with dust, and no footmarks leading to this." This was all the evidence introduced by the government.

The defendant contended and asked the court to rule that there was no evidence that the defendant kept this liquor, or that he intended to sell the same ; but the court declined so to rule, but submitted the case to the jury with proper instructions. The jury returned a verdict of guilty, and the defendant alleged exceptions.

THE THIRD COMPLAINT charged the defendant with the same offence at Northampton on January 3, 1874.

At the trial in the Superior Court, on appeal, before *Wilkinson, J.*, Aaron R. Barton testified for the government as follows : ' I know the defendant. He lives on the road running from Florence to Lonetown ; what is called Rum Row, three quarters of a mile from the brush shop in Florence. I don't know how

long he has lived there ; some three or four years. I have been to his house several times ; went on the 3d of January. Elijah N. Sampson was with me. I left Sampson, who hitched his horse. When I got to the house, they locked the doors ; made considerable noise in shutting windows. I called for admittance to the house ; very soon they let me in. Sampson ran around to the rear of the house. As I got in, there were two tumblers and a sugar bowl. Sampson brought around a piece of a jar and a tumbler ; had perhaps half a glass of whiskey. Tumblers had been used. A tumbler and sugar bowl was on the table in this room, a room occupied, I should judge, for a kitchen. There were three rooms on the lower floor, aside from the buttery ; they run along in a row. The kitchen is the first room ; the further room is the bar room, where they kept candies, cigars, tobacco, soda, small beer, small whiskey tumblers. The defendant, his wife, and a person called Jack Purcell were present. One tumbler had been recently used for liquor ; the other had not. The sugar bowl had a spoon in it. Sampson found what was found outside of the house. The doors opened from all the rooms into the others, and were open at this time."

Elijah N. Sampson testified : "I went with Barton on January 3. Barton went to the house ; I stopped to hitch the horse. Heard a noise on the back side of the house, as if something had broken ; there was a crash ; I ran around. There was a stone jar broken, and small quantity of whiskey in the jar. The board was wet, where it had just been wet with this liquor, to all appearances. There was a broken tumbler there. I brought it around into the house. Saw a tumbler setting on the table. On some parts of the board, smelt the liquor very distinctly ; I called it whiskey." This was all the evidence of the government.

The defendant asked the judge to rule that there was not sufficient evidence upon which to convict the defendant. The judge declined so to rule, and submitted the case to the jury under proper instructions. The jury returned a verdict of guilty, and the defendant alleged exceptions.

D. W. Bond, for the defendants.

C. R. Train, Attorney General, for the Commonwealth, was not called upon.

BY THE COURT. In each of these three cases, the sufficiency of the evidence to be submitted to the jury is so clear that a recapitulation or discussion of it could serve no useful purpose.

Exceptions overruled.

COMMONWEALTH vs. PATRICK DOHERTY.

Hampden. September 22, 1874. **MORTON & ENDICOTT, JJ.,** absent.

A complaint on the St. of 1869, c. 415, § 39, to a police court alleged that the defendant, at a place within this Commonwealth, unlawfully did convey certain intoxicating liquors in a wagon to another person who intended to sell them in violation of law, the defendant having reasonable cause to believe that they were so intended for illegal sale. On appeal in the Superior Court the defendant objected that the complaint set forth no offence, because it omitted the words "from place to place within this Commonwealth." *Held*, that the defect was merely formal and the objection was taken too late.

COMPLAINT on the St. of 1869, c. 415, § 39, to the Police Court of Holyoke, averring that Patrick Doherty on July 20, 1873, "at said Holyoke, unlawfully did convey certain intoxicating liquors in a certain vehicle, to wit, a certain wagon, he, the said Doherty, having received said liquors from some person or persons to said complainant unknown, for the purpose of conveying the same unlawfully in said Commonwealth, said liquors being deposited and being conveyed in said vehicle by said Doherty as aforesaid to a certain person other than the said Doherty whose name to said complainants is now unknown; and said unknown person intending to sell said liquors in violation of the four hundred and fifteenth chapter of the statutes of the year of our Lord eighteen hundred and sixty-nine of said Commonwealth; and said liquors have been sold in said Commonwealth in violation of said chapter; and the said Doherty then and there having reasonable cause to believe that the said liquors have been so illegally sold and are so intended for illegal sale as aforesaid in this Commonwealth, whereby said liquors have become liable to be forfeited, against the peace of said Commonwealth, and the form of the statutes in such cases made and provided."

At the trial in the Superior Court, on appeal, before *Dewey, J.*, the defendant, after the evidence was all in, asked the judge to

rule that no offence was alleged in said complaint, but the judge declined so to rule, and the defendant alleged exceptions.

E. H. Lathrop, for the defendant. There is no allegation in the complaint of the illegal conveyance of liquor from place to place within the Commonwealth. It is not every possible conveyance of spirituous liquor that will make either the owner or his servant guilty of a criminal offence. *Commonwealth v. Waters*, 11 Gray, 81. In all the cases where it has been held that the objection comes too late, the objection was merely formal. Here it is to a matter of substance. The complaint sets forth no offence under the statute.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The complaint alleges that the defendant at Holyoke in this county unlawfully did convey certain intoxicating liquors in a wagon to another person who intended to sell them in violation of the St. of 1869, c. 415, the defendant having reasonable cause to believe that they were so intended for illegal sale; and thus makes plain to common understanding a charge of an unlawful conveying from place to place in violation of § 39 of the statute. The imperfection in the technical description of the offence, by omitting the words "from place to place within the Commonwealth," and the superfluous allegation looking towards an offence under § 37, are mere formal defects which could not be availed of for the first time in the Superior Court on appeal. St. 1864, c. 250, § 2. *Commonwealth v. Waters*, 11 Gray, 81. *Commonwealth v. Emmons*, 98 Mass. 6. *Commonwealth v. Blanchard*, 105 Mass. 173. *Green v. Commonwealth*, 111 Mass. 417. *Commonwealth v. Legassy*, 113 Mass.

Exceptions overruled.

COMMONWEALTH vs. AUSTIN O'REILLY.

Hampden. September 22. — 25, 1874. MORTON & ENDICOTT, JJ.,
absent.

On a complaint under the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with an intent to sell them in violation of law, it is sufficient to authorize a verdict of guilty, if it is proved that the defendant was in possession and exercising control of the liquors with intent to sell the same in violation of law, although he was not the owner of the liquors.

COMPLAINT under the St. of 1869, c. 415, § 36, alleging that the defendant on September 12, 1873, at Springfield, did keep intoxicating liquors with intent to sell the same in violation of law.

At the trial in the Superior Court, on appeal, before *Dewey, J.*, one Randall, a deputy state constable, and one Maxfield a policeman, testified that on September 12, 1873, they went to a store in Lyman Street, in Springfield, when the defendant was present, and seized a quart of gin, two quarts of whiskey, and about twenty gallons of ale in a barrel; that there was a bar room in the building, with a bar in it; that there were glasses, sugar basin and other articles of bar room furniture in the room; that the liquors seized by them were behind the bar; and that two or three persons were present at the time, but were not drinking.

The defendant proved the following facts: The store in which the liquors were seized had been kept for several years by James A. O'Reilly, who died in June, 1873. At the time of his death he was doing an extensive business as a dealer in liquors. He left a will in which his wife, Joanna O'Reilly, was named executrix; and before his death, being sick, he had been unable to go to the store, and for a long time prior to his death, the defendant was his clerk in his store. The executrix testified that the defendant was employed by her to assist her in the settlement of her husband's estate; that she requested him to remain at the store to collect and pay bills and settle accounts; that the defendant never had any interest in her husband's business, or in the property in the store at his decease; that she did not recollect being in the store but three times since her husband's death, and that whether the liquors there at his decease had been sold or

whether the defendant had since bought other liquors and sold them there, she did not know; that no liquors had been sold in the store by the defendant to her knowledge, and she had never given him any authority to sell liquors. There was no evidence of any sales of liquor by the defendant. The will of James A. O'Reilly was duly proved on September 2, 1873.

The court gave instructions to the jury as to the evidence necessary to prove that liquors were kept with intent to sell, to which no objection was made. The defendant requested the court to instruct the jury that, in order to convict, the government must satisfy them that the defendant was the owner of the liquors alleged to have been kept by him. The court refused to give this instruction; and instructed the jury that it was sufficient to authorize a verdict against the defendant, if it was proved that he was in the possession of and exercising control of the liquors with intent to sell the same in violation of law.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

W. L. Smith, for the defendant. 1. The complaint alleges that the defendant did keep intoxicating liquors with intent, &c. "To keep," in its obvious sense, implies proprietorship.

2. The instruction of the court assumed and suggested that the defendant was or might have been in possession of the liquors, and had control of them. But there was no evidence that he was in possession or exercised control of the liquors. On the contrary, it was proved that the liquors at the time of the seizure and for ten days previous thereto were in the exclusive possession and control of the executrix of the will of James A. O'Reilly. The instruction of the court was not called for nor warranted by the evidence in the case, and was of a character to mislead the jury.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The evidence was conflicting and was rightly submitted to the jury. The instruction given followed, and the instruction requested disregarded, the plain words of the statute, — "own, possess or keep." St. 1869, c. 415, §§ 31, 36.

Exceptions overruled.

COMMONWEALTH vs. THEODORE L. GRANT.

Middlesex. June 15. — September 28, 1874. COLT & ENDICOTT, JJ.,
absent.

It is perjury to swear falsely as to any material circumstance which has a legitimate tendency to prove or disprove the fact in issue.

A complaint was made against a woman for larceny from a man. The defence was that the man was her husband. At the trial the man testified that he had not been married to the woman, that he had never represented himself as her husband, that they had never lived together as man and wife, that he had not gone with her to a minister and been married by him, and that he had not entered into an agreement of separation with the woman. On an indictment of the man for perjury, in which the above statements were alleged to have been knowingly falsely made by him, the jury were instructed that if the defendant swore wilfully, falsely and corruptly in relation to any matters set forth in the indictment which were material to the issue whether he was married to the woman, though such matters were only circumstantial, then the defendant was guilty, and that it was not necessary for the jury to find that the defendant was in fact married to the woman, or had gone through the form of a marriage with her. *Held*, that the instructions were correct.

INDICTMENT for perjury. The indictment set forth at length that at a session of the Police Court of Charlestown, on March 6, 1873, one Lydia L. Grant was in due form of law tried under the name of Lydia L. Linnell on a complaint charging her with larceny from one Theodore L. Grant, within the jurisdiction of said Police Court; that at the trial aforesaid said Theodore L. Grant did appear as a witness for the Commonwealth, and then and there was sworn to speak the truth, the whole truth, and nothing but the truth, as such witness; that at and upon said trial of the said Lydia, upon the complaint aforesaid, it then and there became and was a material question and subject of inquiry whether the said Theodore L. Grant was not then or had not been before then, married to the said Lydia; and whether the said Theodore L. Grant had not before then gone through the marriage ceremony with the said Lydia; and whether the said Theodore L. Grant had not represented himself as the husband of the said Lydia; and whether the said Theodore L. Grant and the said Lydia had not before then lived and cohabited together as man and wife; and whether the said Theodore L. Grant and the said Lydia had not before then gone to a minister to

gether and been married to each other by said minister ; and whether the said Theodore L. Grant had not before then entered into an agreement of separation with the said Lydia ; that the said Theodore L. Grant being so sworn as aforesaid, in the premises, then and there “as such witness as aforesaid, upon the trial as aforesaid, and whilst it was such material question and subject of inquiry as aforesaid, unlawfully, falsely, knowingly; wilfully and corruptly did depose, swear and give evidence among other things in substance and to the effect following, that is to say: that the said Theodore L. Grant was not then, nor had ever before then been married to the said Lydia ; that the said Theodore L. Grant had not before then gone through the marriage ceremony with the said Lydia ; that the said Theodore L. Grant had never represented himself as the husband of the said Lydia ; that the said Theodore L. Grant and the said Lydia had never before then lived and cohabited together as man and wife ; that the said Theodore L. Grant and the said Lydia had not before then gone together to a minister and been married to each other by said minister ; and that the said Theodore L. Grant had not before then entered into an agreement of separation with the said Lydia. Whereas in truth and in fact the said Theodore L. Grant, at the time he so deposed and swore as aforesaid, well knew that he was then and for some time before then had been married to the said Lydia ; whereas in truth and in fact the said Theodore L. Grant had before then gone through the marriage ceremony with the said Lydia ; and whereas in truth and in fact the said Theodore L. Grant had represented himself as the husband of the said Lydia ; and whereas in truth and in fact the said Theodore L. Grant and the said Lydia had before then lived and cohabited together as man and wife ; and whereas in truth and in fact the said Theodore L. Grant and the said Lydia had before then gone together to a minister and had been married by said minister to each other ; and whereas in truth and in fact the said Theodore L. Grant had before then entered into an agreement of separation with the said Lydia, as the said Theodore L. Grant then and there well knew, but the said allegations were so sworn to and given in evidence as aforesaid by the said Theodore L. Grant for the purpose of unlawfully, wickedly and maliciously causing the said Lydia falsely to be convicted on the said complaint charging her with

larceny from the said Theodore L. Grant, and for no other purpose whatever ;" that Grant accordingly committed perjury.

At the trial in the Superior Court, before *Pitman, J.*, it appeared that on February 28, 1873, the defendant procured a search-warrant to search for some articles of personal property alleged to be in a house occupied by Lydia L. Linnell in Charlestown, and that the officers made the search and found some small articles of personal property which the defendant claimed as his property, and that thereupon one of the officers made a complaint in the Police Court of said Charlestown charging Lydia with the larceny of said property ; that the case came on for trial before the justice of said court, and that the said Lydia L. Linnell set up in defence that she was the lawful wife of the defendant, and therefore could not be convicted of the larceny of his property ; that the defendant was called and sworn as a witness for the government at the trial, and was asked the questions set forth in the indictment, and made the answers set forth in said indictment.

The only direct evidence of a marriage between the defendant and said Lydia was a marriage certificate signed by one Henry Duncan, and the testimony of Lydia that she and said defendant went to Providence on July 26, 1871, and were there married at the house of the Rev. Henry Duncan, who gave her said certificate, and that the defendant caused their marriage to be inserted in a Providence daily paper the afternoon of the same day, which paper she produced ; that they returned to Boston where they lived together a few days and then removed to the house of the defendant, where they resided together until September 12, 1872, when they separated and did not live together thereafter. There was other evidence tending to show that the parties had been together, and that the defendant had introduced the said Lydia as his wife before the separation. Lydia swore that she was not married at any other time or place than at Providence as aforesaid, and that there never had been any other ceremony of marriage between them.

The defendant testified that he never went to Providence with Lydia as alleged, and that no ceremony of marriage was ever performed between him and Lydia, that he had lived with Lydia, but not as husband and wife ; and it was admitted by the district attorney that the certificate produced was not a genuine certificate

but was made by a man named Henry Duncan who resided in Chelsea or Charlestown. It appeared that the defendant could neither read nor write. It also appeared by his own testimony that he had a wife living in Boston to whom he was married more than twenty years ago.

The defendant asked the court to instruct the jury as follows : 1. Unless the jury find that the parties were actually married or went through the form of marriage before some person supposed to be authorized to perform the marriage ceremony, this indictment cannot be maintained.

2. If the defendant had a lawful wife living other than Lydia Linnell, this indictment cannot be maintained.

3. The other allegations of perjury contained in the indictment are not material to the issue before the Police Court, if in point of fact the defendant and Lydia Linnell were not married or had not gone through the form of marriage.

The court declined to give any of the instructions asked for, but instructed the jury as follows : " That it was admitted that in the trial upon which the alleged perjury was charged to have been committed it was a material question whether the defendant was married to Lydia Linnell ; that if the defendant then swore wilfully, falsely and corruptly as set forth in the indictment in relation to any matters therein assigned which were material to this issue, — that is, which tended to prove the marriage, though such matters were only circumstantial, — then he was guilty ; that it was not necessary for the jury to find that the defendant was in fact married to, or had gone through with the form of marriage with said Linnell, if he had sworn falsely as aforesaid in relation to matters material in the consideration of such question of marriage at said trial."

The jury returned a verdict of guilty, and the defendant alleged exceptions to the rulings and refusals of the court.

G. A. Morse, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

DEVENS, J. The request made by the defendant was properly declined by the presiding judge. A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove

such fact. He cannot in the latter case exonerate himself from the offence, because, while the circumstances to which he thus swore did not exist, the fact sought to be established by them did exist. Even if the defendant was not married to Linnell, if he corruptly and falsely swore that he had not so represented, that he had not lived with her as his wife and had not made an agreement of separation from her, this testimony was material in the decision of the issue as presented to the Police Court, and might therefore be properly included in the assignments of perjury contained in the indictment. The offence of the defendant consisted in making false statements intended to corrupt the administration of justice, by inducing the magistrate to render a decision based thereupon, and it is not the less an offence because the decision was in fact correct.

Exceptions overruled.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,

John B. Tozier & another, claimant.

Hampshire. September 14. — October 2, 1874. WELLS & MORTON, JJ.,
absent.

In a complaint under the St. of 1869, c. 415, § 44, an averment that intoxicating liquors were kept "by a person unknown" for sale in violation of law, is sufficient.

Evidence that liquors were seized in the freight depot of a railroad company, at N. in this Commonwealth; that they were marked T. D., with the name of a place in Vermont, and the words "to be held at N.;" that a person employed in a grocery drove by the officer who made the seizure, in a buggy, and made motions towards the freight depot; that when the officer arrived at the depot the man who drove by in the buggy and one of the employees of the railroad company were engaged in rolling the barrels of liquor out on the back side of the depot, is not sufficient to warrant a finding that the liquor was kept for sale in violation of law, under the St. of 1869, c. 415, § 44.

COMPLAINT under the St. of 1869, c. 415, § 44, alleging that certain intoxicating liquors seized on a warrant were kept, and deposited in the freight-house of the Connecticut River Railroad Company, by a person unknown, for sale in violation of law.

At the trial in the Superior Court, before *Wilkinson, J.*, before the empanelling of the jury, the claimants filed their claim to said liquors; and moved to quash and dismiss the complaint and

warrant, because they did not contain the name of the person by whom said liquors were kept and deposited. The presiding judge overruled this motion and the claimants excepted. The government put in the following evidence :

Elijah N. Sampson testified : "I seized the liquor on September 24. I went then to the Connecticut River Railroad freight depot in Northampton. As I was going down Strong Avenue, Patrick Garvey drove by me with a horse and buggy, making motions towards the depot as he went down. Barton was about half way betwixt me and the freight-house ; I motioned to him to go down as quick as he could. When I got down to the freight-house I found these two barrels of gin there, and Garvey standing near it and Barton. The two barrels of gin were marked 'T. D., South Vernon, Vermont, to be held at Northampton.' Gauge mark on the barrels. I seized it and brought it away. Garvey was at work for his brother at that time in a grocery store on Main Street. The liquors were in the freight-house of the Connecticut River Railroad. It was in among other freight."

A. R. Barton testified : "I was between Clark's livery stable and the freight-house, Sampson was up towards Main Street ; this young Garvey came down with a team making motions back, as I supposed, that Sampson was coming. As soon as he passed me, I ran along and got in immediately after he did. One of the men employed on the railroad had one of these barrels, and Garvey had the other, rolling them out on the back side of the depot. I stopped them, told them that it said 'to be held at Northampton,' and I guessed we would hold them. Sampson came in and seized the liquors."

The claimants offered no evidence, but asked the court to rule that the charges in the complaint and warrant were not sustained upon the evidence. The court declined so to rule, but submitted the case to the jury under proper instructions. The jury found that the liquors were kept as charged in said complaint and warrant, and the claimants alleged exceptions.

D. W. Bond, for the claimants.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The motion to quash for the reason that the complaint does not give the name of the person by whom the liquors were kept and intended for sale, cannot prevail. The prosecutor

is bound to give as good a description as he can, but his ignorance of the name does not defeat the process. In such a case, the averment that the name is unknown is sufficient. *Commonwealth v. Sherman*, 13 Allen, 248.

In this case, the barrels containing the liquors were found at a railroad station with other freight, and were rolled out of the building, apparently in order to be taken to some other place. The only ground for suspicion as to the disposition intended to be made of them arises from the nature of the merchandise, and the fact that the mark "T. D., South Vernon, Vermont," was accompanied with the words "to be held at Northampton." The motions which Garvey is said to have made are not so described as to furnish any intelligible indication of a purpose on his part. He was not in the act of putting the barrels into a wagon, nor was he at the depot with a carriage in which he could have taken them away. It does not appear for whom they were meant, or where they were to be carried from the depot. The evidence reported does not show that any person was privately trying to get possession of them, or that any concealment was practised in relation to them. All that is shown is that they had arrived at the station and were left there to be called for. The intent to sell necessary to be shown is a present intent to sell when opportunity should arise. Whether they had been ordered by some dealer who had made up his mind, on second thoughts, that the business was too unsafe to go on with; whether they were left there to be disposed of in some lawful way, or to be sent to Vermont, or elsewhere; is left to conjecture. They were not for sale while at the depot, and the evidence that anybody was intending, at the date of the complaint, to sell them unlawfully, falls far short of the precision and distinctness required by the safe and discreet administration of criminal law.

Exceptions sustained.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,
William McCandless, claimant.

Hampshire. September 14. — October 2. WELLS & MORTON, JJ.,
absent.

On the trial of a complaint under the St. of 1869, c. 415, §§ 44, 45, which alleged that intoxicating liquors were kept in a dwelling-house and intended for unlawful sale, it is not necessary to prove that sales were intended to be made in the dwelling-house; it is sufficient to show that it was in effect a magazine or warehouse where liquors were stored which were intended to be sold at a saloon in the immediate neighborhood.

Evidence of the seizure in a dwelling-house of a barrel of whiskey and a tunnel; that the government stamp on the barrel was about a month old; that the barrel was not full; that empty barrels were found in the cellar, some of which had government stamps on them of recent date; that the occupier of the dwelling-house kept, at a place about one half mile from it, a saloon where liquors had at various times about the time of the seizure been seized in small quantities in flasks; and that a bar, drainer, tumblers and other implements of the liquor traffic were found there, is sufficient to warrant a finding that the liquors were kept in the house to be sold in the saloon in violation of law.

COMPLAINT under the St. of 1869, c. 415, §§ 44, 45, against certain intoxicating liquors alleged to be kept and deposited by William McCandless in his dwelling-house, he intending to sell the same in violation of law.

At the trial in the Superior Court, before *Wilkinson, J.*, the evidence on the part of the government tended to show that the liquor seized was found in a barrel in the bed-room of the said McCandless, and with the barrel was a tunnel; that the government stamp on said barrel was about a month old, and that the barrel was not full by about twelve or sixteen gallons; and that empty barrels were found in the cellar, some of which had government stamps upon them, of a recent date. There was no evidence that any sales had ever been made at said house. The government, against the claimant's objection, put in evidence tending to show that McCandless kept a saloon, about one half mile from his dwelling-house, where liquors had at various times about the time of the seizure been seized in small quantities in flasks by the officers, and where fixtures, such as a bar, drainer, tumblers and other implements of the liquor traffic were found. There was no other evidence that the liquors kept in the dwelling-house were intended for sale in said saloon.

The claimant asked the court to rule that the allegations in the complaint were not sustained by the evidence. The court declined so to rule, and submitted the case to the jury under proper instructions. The jury found that the liquors were kept by said McCandless as alleged in said complaint and warrant, and the claimant alleged exceptions.

D. W. Bond, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The evidence reported in this bill of exceptions had a strong tendency to show that the claimant's dwelling-house was the magazine or storehouse in which liquors were privately kept for the supply of his saloon. The number of empty barrels in his cellar, the condition of the one in which the liquor was seized, the dates of the government stamps upon the barrels, the proximity of the house to his saloon, and the small flasks found at the saloon and containing liquors, all tend in the same direction. It was not necessary to prove that sales were made or intended to be made at the house. An intent to sell at the saloon would be sufficient. St. 1869, c. 415, § 45.

In *Commonwealth v. Intoxicating Liquors*, 105 Mass. 595, the liquors were found in a cellar back of the claimant's kitchen. The building contained no shop or public eating-room. There was no saloon in the neighborhood in which the claimant had any concern. There was nothing in the fixtures in the cellar, or in any room under his control, indicating that it was intended as a place for such sales, except the fact that one barrel was on tap, that two small tumblers such as are sometimes used at bar-rooms were found there, with some orange peel, a tub, and some empty bottles and demijohns that had contained liquor. All this abundantly proved the possession and use of the liquors; but the object of this mode of proceeding is not to punish a past offence, but to prevent one that is threatened or intended. In order to obtain a conviction therefore it was necessary to go one step farther, and prove that at the date of the complaint the person having the control of the liquors had a continued and existing intent to sell when opportunity should offer. The element wanting in that case is supplied in the case at bar, by evidence that the claimant kept a saloon at the date of the complaint, fitted up and furnished as a bar-room, at which liquors in small quantities in flasks had

been seized, about that time, at a short distance from his house. It certainly was not a violent stretch of credulity in the jury to believe that the liquors were kept at the house to be sold at the saloon.

Exceptions overruled.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,
William C. Corning, claimant.

Hampshire. September 14. — October 2, 1874. WELLS & MORTON, JJ.,
absent.

A complaint under the St. of 1869, c. 415, § 44, alleged that intoxicating liquors were kept and deposited by some person unknown in a certain building occupied by said unknown person as a store-room. The evidence was that the liquors were deposited in a freight depot belonging to a railroad corporation; that they arrived and were deposited there in regular course of business, like other freight, and were not otherwise kept or deposited there. *Held*, a fatal variance.

COMPLAINT on the St. of 1869, c. 415, § 44, against certain intoxicating liquors alleged to be kept and deposited by some person unknown, in a certain building known as the Greenwich depot, "occupied by said unknown person as a store-room, the said unknown person intending to sell the same in violation of law."

At the trial in the Superior Court, before *Wilkinson, J.*, William E. Lewis, a state constable, testified that he seized nine casks of liquor at the depot of the Athol and Enfield Railroad in Greenwich, in this Commonwealth; that he found it in the freight department of the depot, deposited there like other freight, as it was taken from the cars; that each barrel bore the trade-mark of "Corning & Co.," purporting that they were wholesale dealers in liquors somewhere in Kentucky or Ohio, and that they were also further marked as consigned to "C. & Co." Greenwich, Mass. Lewis also testified that there was no other store-room in the depot than the general apartment where freight was deposited from the cars, and that the liquors were no otherwise kept or deposited in the depot, nor was the depot in any other way occupied as a store-room than by the liquors being left there like other freight intended to be removed from the depot. There was no evidence than as above, as to who were intended by "C. & Co."

There was also evidence admitted under objection, tending to show that the liquors were intended to be sold in violation of law. A statement of this is now unnecessary.

The claimant asked the presiding judge to rule that the allegation that the building was occupied by the unknown keepers and depositors of the liquor as a store-room, kept therein, was not maintained on the evidence. The court declined so to rule, the jury found that the liquors were kept and deposited as alleged, and the claimant alleged exceptions.

C. Delano, for the claimant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. It is charged in the complaint that the liquors were kept and deposited by some person or persons not known by name to the complainants in a certain building, occupied by said unknown person or persons as a store-room. At the trial it appeared that the building belonged to a railroad corporation, and was used as a freight depot; that the casks of liquor arrived and were deposited there in regular course of business, like other freight, and were not otherwise kept or deposited there; nor was the depot otherwise occupied as a store-room for the casks, than by their being left there like other freight intended to be removed. The evidence reported in the bill of exceptions wholly fails to support the charge that the liquors were kept in a store-room occupied and kept by the unknown person or persons. It was not their store-room, nor was the property in their keeping. The variance between the allegations and the proof is so wide and so material, that the verdict cannot be sanctioned. Therefore, without considering the other objections urged by the claimant, we must order that the

Exceptions be sustained.

116 97
153 158
116 27
153 202

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,
John Dewey & another, claimants.

Hampshire. September 14. —October 2, 1874. WELLS & MORTON, JJ.,
absent.

A complaint under the St. of 1869, c. 415 § 45, averred that certain intoxicating liquors were kept and deposited by A. "in a certain dwelling-house building"

(the situation of which was described) "occupied by the said" A. "as a dwelling and premises." *Held*, a sufficient averment that the liquors were kept by A. in his dwelling-house.

A complaint under the St. of 1869, c. 415, §§ 44, 45, averring that certain intoxicating liquors are kept and deposited in a dwelling-house, a place of common resort being kept therein, and which charges that intoxicating liquor had been sold in said house by the occupant thereof within a month previous, is sufficient, without an averment that the occupant of the house is the keeper of the place of common resort.

A complaint under the St. of 1869, c. 415, § 45, described the building in which intoxicating liquors were alleged to be kept for sale in violation of law as "a certain dwelling-house building situate on Cherry Street, so called, in N., on the northerly side of said street, the same being the second house from Market Street, on said Cherry Street, and occupied by A. as a dwelling and premises." The warrant which issued on the complaint described the building to be searched as "a certain frame building situate on Cherry Street, so called, in N., on the northerly side of said street, and is the second house easterly from Market Street, in said Cherry Street, and occupied by A. as a dwelling and premises." *Held*, that there was no variance.

On a complaint under the St. of 1869, c. 415, §§ 44, 45, alleging that intoxicating liquors are kept in a dwelling-house and intended for unlawful sale, it is not necessary to prove that sales were intended to be made in the dwelling-house; it is sufficient to show that it was in effect a magazine or warehouse where liquors were stored which were intended to be sold at a saloon in the immediate neighborhood.

Evidence that three casks containing liquors were found in the cellar of a dwelling-house occupied by A.; that A. kept a saloon an eighth of a mile distant, in which there was a bar or counter; that he had a few weeks before pleaded guilty to a complaint dated and sworn to April 1, 1874, alleging a single sale of intoxicating liquors in the saloon May 4, 1874; that shortly before the seizure a boy brought liquors to the saloon, similar to those found in A.'s cellar; that the boy came to the saloon by a street which led from said dwelling-house to the saloon, and that A. admitted that he knew the boy; is competent evidence to warrant a jury in finding that the liquors in the cellar were intended for sale in violation of law, although the street on which the boy was first seen near the saloon was also the direct route from two other streets as well as that from the dwelling-house.

COMPLAINT on the St. of 1869, c. 415, §§ 44, 45, averring that certain intoxicating liquors were, on May 19, 1874, kept and deposited by John Dewey "in a certain dwelling-house building situate on Cherry Street, so called, in Northampton, on the northerly side of said street, the same being the second house from Market Street, on said Cherry Street, and occupied by the said Dewey as a dwelling and premises, and a place of common resort is kept therein, and which liquors are intended by said Dewey" for sale in violation of law. The warrant which issued upon this complaint described the premises where the liquors

were alleged to be kept as "a certain frame building situate on Cherry Street, so called, in Northampton, on the northerly side of said street, and is the second house easterly from Market Street, in said Cherry Street, and occupied by the said Dewey as a dwelling and premises, and a place of common resort is kept therein." The complaint also recited that the complainant had reason to believe, and did believe, that intoxicating liquors had been sold in said house, by the occupant of said house, and with the consent and permission of the occupant of said house, contrary to law, within one month next before the day on which the complaint was made.

John Dewey and Patrick H. Dewey appeared and claimed the liquors seized under said complaint.

In the Superior Court, before *Wilkinson, J.*, the claimants filed a motion to quash on the following grounds: 1. "That said warrant does not aver that the place where said liquors were kept and deposited was a dwelling-house. 2. That the complaint does not allege that the place of common resort was kept by said John Dewey. 3. That the complaint and warrant do not agree in describing the situation of the house on Cherry Street, where said liquors were alleged to be kept and deposited." The motion to quash was overruled.

At the trial *Elijah N. Sampson*, a state constable, was the only government witness; his evidence tended to show that a portion of the liquors seized were found in the cellar of the dwelling-house occupied by John Dewey on Cherry Street, in Northampton; that the liquors found in said cellar were in three casks, one forty gallon cask, containing thirty gallons of imported brandy; one forty gallon cask, containing twenty-eight gallons of whiskey; and one ten gallon keg containing two gallons of gin, the two latter casks bore stamps dated in March, 1874.

There was no evidence offered by the government tending to show that there was a place of common resort kept in the dwelling-house of John Dewey. And the claimants upon this evidence, it being all the evidence on this point, asked the court to rule that the seizure proceedings could not be maintained, if the liquors were merely found in the cellar of John Dewey's dwelling-house, and if there was no place of common resort kept therein; but the presiding judge refused so to rule, and the claimants excepted.

Sampson also testified that on the day of the seizure and before the seizure, he was standing on Main Street in Northampton, and saw a boy coming down Market Street with a small valise in his hand; that the boy, when he reached Main Street, took the sidewalk on the northerly side as far as the First National Bank, and then crossed over to a billiard saloon on the corner of Main and Pleasant streets, kept by the claimants, and was about to enter said saloon, but seeing Sampson he stopped, when Sampson said to him, "As you are going in you might as well go in," and that he accompanied him-in, and asked John Dewey if he knew him; that Dewey said he did; that said Sampson then overhauled his valise and found therein bottles of the same kinds of liquors as were in the casks found in the cellar on the premises searched. Sampson testified that the place where he first saw the boy on Market Street was on the direct route from John Dewey's dwelling-house to the billiard saloon above mentioned, but was an eighth of a mile from said dwelling-house, and that it was also on the direct route of a person coming from Union Street and North Street to said billiard saloon. The claimants objected that this evidence was irrelevant and inadmissible to establish any of the allegations of the complaint, but the court admitted it, and the claimants excepted. Sampson being further inquired of by the government testified, that some weeks prior to the date of the seizure in question, he was in the saloon of John and Patrick Dewey, and found in a room in the rear of the saloon a bar or counter, and found John Dewey in the act of selling liquor to one Pittsinger, and that Sampson then complained of Dewey for making said sale, and that he pleaded guilty to said charge before a magistrate. John Dewey objected that this could only be shown by the record, and that it was immaterial, irrelevant and inadmissible evidence if established by the record. The court then permitted the government to produce the record, and it showed a complaint dated and sworn to, April 1, 1874, in which it was alleged that the sale to said Pittsinger was May 4, 1874, and the claimants again objected to the admission of such record, but it was admitted, and the magistrate before whom the case was returned, testified against the claimants' objection, that John Dewey, when arraigned on said complaint said he was guilty, and that he paid a fine and costs for said offence. The claimants excepted to the admission of all the evidence.

The presiding judge, in charging the jury, told them that John Dewey might have been convicted on the complaint in question, notwithstanding the apparent discrepancy in dates between the complaint and jurat, and that they might consider this conviction as bearing on the question of his intent to sell the liquors seized in violation of law. There was no other evidence in the case.

The claimants asked the court to rule that upon the whole evidence the government had failed to maintain the material allegations of the complaint. The court declined so to rule, and left it to the jury to say whether the liquors found in the cellar of the dwelling-house were kept for the purpose of being sold, in the Commonwealth, in violation of the law. The jury returned a verdict that the liquors were kept and deposited and intended for sale as alleged in the complaint; and the claimants alleged exceptions.

C. Delano, for the claimants.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. We see no cause for sustaining the motion to quash. The complaint avers that the liquors were kept in a "dwelling-house building" (the situation of which is described) occupied by Dewey as a "dwelling-house and premises." Though somewhat inartificially expressed, the obvious meaning is that the liquors were kept by him in his dwelling-house. There was no occasion to allege that the place of common resort was kept by him. The charge that he had sold liquors at the house within a month previous was sufficient to justify the issuing of the warrant. *Commonwealth v. Intoxicating Liquors*, 110 Mass. 182. *Commonwealth v. Intoxicating Liquors*, 108 Mass. 19. There is no material variance between the complaint and warrant as to the situation of the house. The house is fully described and identified in the complaint, and although the warrant adds something unnecessarily to the description, it is not at all inconsistent with that contained in the complaint.

We have already had occasion to rule, that it is not necessary to prove that sales had been made or were intended to be made at the dwelling-house. *Commonwealth v. Intoxicating Liquors*, ante, 24. If the claimant's dwelling-house was in effect a magazine or warehouse where liquors were stored, which he intended to sell at a saloon in the immediate neighborhood, it would be sufficient

to maintain the complaint. It is impossible to say that the evidence reported (especially so much as relates to the boy with the valise and the bottles) had no tendency of that kind. The defendant's plea of guilty on a charge for a single sale some weeks previously, coupled with proof that the sale was at his saloon, and that he had continued to keep the same saloon ever since, and was at the time of the seizure found in the act of receiving a supply of liquors, was competent evidence against him. *Commonwealth v. Hazeltine*, 108 Mass. 479. *Commonwealth v. Callahan*, Ib. 421. *Commonwealth v. Ayers*, 115 Mass. 137. The discrepancy of date was immaterial. *Exceptions overruled.*

COMMONWEALTH vs. FRANK CAMPBELL.

Hampshire. September 14. — October 2, 1874. WELLS & MORTON, JJ.,
absent.

On an indictment under the Gen. Sts. c. 87, § 7, for keeping a tenement used for the illegal keeping and illegal sale of intoxicating liquors, if the government contends that liquors had been there sold and kept for sale in violation of law, it is not necessary to prove delivery of liquors, but the fact of a sale having been made may be shown by circumstantial evidence; and the manner in which the place is fitted up, the furniture and liquors found there, the number of persons about the premises, are all circumstances tending to show that the keeper of the tenement was engaged in the illegal sale of liquors.

The St. of 1869, c. 415, § 35, making the delivery of intoxicating liquors *prima facie* evidence of a sale, does not preclude the government from proving the fact of a sale by circumstantial evidence, where there is no evidence of a delivery.

INDICTMENT under the Gen. Sts. c. 87, § 7, charging the defendant with keeping a common nuisance, to wit, a tenement in Northampton used for the illegal keeping and illegal sale of intoxicating liquors, on March 1, 1874, and on other days between that day and May 21, 1874.

At the trial in the Superior Court, before *Wilkinson, J.*, *Elijah N. Sampson*, a state constable, testified that he visited the defendant's premises on April 7 and 9, and on May 17, that the defendant occupied three rooms of a tenement on Masonic Street, the front room having a high counter which the witness called a bar, and behind it were some tumblers; that there were shelves behind this counter where soda, small beer, cigars, &c., were kept; that

in the next room in the rear of this was a bed room, and in the rear of that a room with tables for card playing; that on his visits of April 7 and 9 he found no liquor, but the tumblers smelt of liquor; that on May 17, which was Sunday, and the day after the Mill River Reservoir disaster, and a day when there was a multitude of strangers in Northampton, seeing quite a crowd in the neighborhood of defendant's premises he went there and found the doors locked, but saw four men coming out of the side door; that he passed in and saw one man to all appearance drunk, and also saw a crowd of as many as ten others stand leaning against the so called bar, inside the bar-room, and found behind the bar a bottle partly filled with liquor and tumblers smelling of liquor and a keeler; that he saw no one drinking and no liquor being poured out or served. There was no other evidence offered by the government.

The defendant was a single man, and there was evidence tending to show that the rooms in the rear of the front room were his ordinary living and lodging apartments, and that he had no house elsewhere; that there was no cooking stove in any of said apartments; there was a front door and side door by which the several apartments might be reached, the side door being the door by which the bed room and rear room were most directly accessible from without.

The district attorney contended and argued to the jury that liquors had been sold and drunk and were kept for sale on the defendant's premises, in violation of law.

The defendant asked the court to instruct the jury as follows:

1. If the defendant was a single man and had his bed, took his meals, and had his lodgings on the premises, and habitually lived on the premises, it was as much his dwelling-house as though he had a family, and were living and lodging there with his family.

2. That there was no such evidence in the case of an actual delivery of liquor as to raise the statute presumption of a sale in violation of law.

The presiding judge gave the first instruction, but declined to give the second, and submitted the case to the jury on instructions otherwise applicable and not objected to, and the defendant ex-

cepted to the foregoing refusal to instruct. The jury returned a verdict of guilty and the defendant alleged exceptions.

C. Delano, for the defendant. The court should have instructed the jury that there was no such evidence of a delivery of liquors as to raise the statute presumption of a sale. St. 1869, c. 415, § 35. This prayer for instruction was made necessary by the district attorney having unnecessarily contended and argued "that liquors had been sold" on the premises. But there was no sufficient evidence to warrant this argument, and the jury were in danger of being misled by it. Sampson, the only witness for the government, saw no one drinking, and no liquor poured out or served. On the evidence reported, the defendant could not have been convicted of either being a common seller or of single sales.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The St. of 1869, c. 415, § 35, provides that the delivery of intoxicating liquors, under certain circumstances, shall be deemed *prima facie* evidence of a sale. It having been argued on behalf of the prosecution that such liquors had been sold and used, and were kept for sale on the defendant's premises, it became necessary for the court to instruct the jury, among other things, as to the legal and proper proof of sale. The only objection relied upon by the defendant to the judge's charge was his refusal to instruct the jury that there was no such evidence of delivery as to bring the case within the provision of the statute above referred to. But there is nothing in any statute that declares that such shall be the only evidence of a sale, or that attaches to it any special or peculiar importance. The fact that a person sells liquor at a given place may be proved by circumstantial evidence. The manner in which the place was fitted up, the furniture and liquors found there, the number of persons about the premises, the character and condition of the persons so found, are all of them circumstances having a tendency to show that on the occasion in question the defendant was engaged in the sale of liquors. *Commonwealth v. Van Stone*, 97 Mass. 548. *Commonwealth v. Berry*, 109 Mass. 366. *Commonwealth v. Dearborn*, Ib. 368. It does not appear from the bill of exceptions that the statute presumption arising from the act of delivery was relied upon by the prosecution. It was therefore unnecessary to give

the instruction requested by the defendant. As the instructions were in all other respects unobjectionable, the

Exceptions are overruled.

COMMONWEALTH vs. MICHAEL CONNORS.

SAME vs. SAME.

Hampshire. September 14. — October 22, 1874. WELLS & MORTON, JJ.,
absent.

At the trial of an indictment under the Gen. Sts. c. 87, § 7, for maintaining a liquor nuisance on a day certain and on divers other days between that day and another day certain, evidence of the character of the place on any day between the two days named is competent.

A conviction on an indictment under the Gen. Sts. c. 87, § 7, for maintaining a certain tenement as a liquor nuisance on a day certain, and on divers other days between that day and a day certain, is not a bar to an indictment found at the same session of the grand jury for maintaining the same tenement as a liquor nuisance on the day last named in the first indictment, and on divers other days between that day and another day certain.

THE FIRST CASE was an indictment found at the June session of the grand jury, 1878, under the Gen. Sts. c. 87, § 7, for keeping a common nuisance, to wit, a tenement for the illegal keeping and sale of intoxicating liquor, on July 1, 1872, and on divers other days between that day and May 1, 1873.

At the trial in the Superior Court, before *Dewey, J.*, after evidence had been introduced concerning the character of the defendant's place on July 2, 1872, the presiding judge allowed evidence to be introduced, against the defendant's objection, as to what was found at the defendant's place on other days between said July 2, and May 1, 1873.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

THE SECOND CASE was an indictment under the Gen. Sts. c. 87, § 7, for keeping a common nuisance, to wit, a tenement for the illegal keeping and sale of intoxicating liquor on May 1, 1873, and on divers other days between that day and June 12, 1873.

At the trial in the Superior Court, before *Dewey, J.*, the defendant filed a plea that he had been found guilty on an indict-

ment found against him at the same session of the grand jury, for keeping a common nuisance, to wit, a certain tenement for the illegal keeping and sale of intoxicating liquor from July 1, 1872, to May 1, 1873, and that the tenement was the same set out in this indictment.

A demurrer to this plea was sustained; the defendant was required to answer over, and pleaded not guilty. The jury returned a verdict of guilty, and the defendant alleged exceptions.

D. W. Bond, for the defendant. The grand jury, by returning the two indictments, find that the defendant had kept a tenement as a nuisance continuously from July 1, 1872, to the time of the finding of the two indictments. The defendant was not guilty of as many different offences as there were days during this interval, but of one offence, more or less aggravated according to the length of time the tenement was so maintained. In *Wells v. Commonwealth*, 12 Gray, 326, the court say: "A nuisance is an offence that may have continuance, and may therefore be laid with a *continuando*."

C. R. Train, Attorney General, for the Commonwealth.

ENDICOTT, J. In the first of these cases, evidence that the defendant kept a common nuisance on any day between July 2, 1872, and May 1, 1873, was competent, and the government was not confined to July 2 in its proof. The conviction is a bar to any other indictment for the same offence between the days named. But it is not a bar to the indictment in the second case for keeping a common nuisance between May 1, and the time of finding the indictment in June following. Evidence that would have been competent on the one indictment would not have been competent on the other. Distinct offences are charged in each indictment, and the same evidence could not convict in both cases. *Commonwealth v. Wood*, 4 Gray, 11. *Commonwealth v. Armstrong*, 7 Gray, 49. *Commonwealth v. Keefe*, 7 Gray, 332. *Commonwealth v. Traverse*, 11 Allen, 260. *Morey v. Commonwealth*, 108 Mass. 433.

The evidence was properly admitted in the first case, and the demurrer to the defendant's plea in the second properly sustained.

Exceptions overruled.

COMMONWEALTH vs. EDWARD R. CARRINGTON.

Hampden. September 22.—October 23, 1874. MORTON & ENDICOTT, JJ., absent.

In a criminal case, not capital, the jury may be authorized by the court, without the assent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court in accordance with the result so stated and sealed up.

In a criminal case, not capital, the jury were instructed, that if they should agree on a verdict during an intermission, they should seal it up, and then might separate. The following paper was handed to them as the form of their verdict: "In case of *Commonwealth v. —*, the jury find defendant guilty or not guilty, as the case may be." The foreman of the jury added the word "guilty," signed his name, sealed it up, and the jury then separated. On the coming in of the court, the verdict sealed up was opened by the clerk, who read it to the jury, and inquired of them if their verdict was that the defendant was guilty. They replied that it was. Held, that a verdict of guilty was properly ordered to be recorded.

COMPLAINT for larceny of a guinea hen. Trial in the Superior Court, on appeal, before *Dewey, J.*, who allowed a bill of exceptions in substance as follows:

The jury not having agreed at the time of adjournment of the morning session, the presiding judge directed the officer, that if the jury should agree on a verdict before the afternoon session, they should seal up the same and bring it in at the afternoon session, and directed the officer to tell the jury to return a verdict of guilty or not guilty, according as they might agree, and to have it signed by the foreman and sealed up; that then they might separate and return their verdict when they came into court in the afternoon.

The officer thereafter wrote, for the direction of the jury, all that is on the face of the following paper returned by the jury, except the word "guilty" at the conclusion, and the signature, "E. B. Haskell, Foreman," which word and signature were written by the foreman: "Verdict. In case of *Commonwealth vs. —*, the jury find defendant guilty or not guilty, as the case may be. Guilty. Signed, E. B. Haskell, Foreman." After the jury had agreed and this paper had been signed and sealed up with the complaint, the jury separated. On their return into court in the afternoon, the defendant being present and all the jurors, the clerk, by order of the presiding judge, inquired of the

jurors if they had agreed on a verdict in this case, and the foreman replied they had, and handed the envelope to the clerk, who opened the same and read to the jury the paper returned as their verdict, and inquired of them if their verdict in said case was that the defendant was guilty, to which they assented.

The presiding judge ordered said paper to be filed as a verdict, and the clerk to record a verdict of guilty as found by the jury in said case. The defendant objected to the reception of and recording of said paper as a verdict, or of any verdict whatever. The court, overruling said objections, directed the reception and reading of said paper and record thereof and entry of the verdict as above stated. The defendant then moved to set aside the verdict for the following reasons: "1. Because no proper verdict was rendered by the jury. 2. Because, before any verdict was rendered, the jury had separated without the consent of the defendant. 3. Because, after the jury had retired, the officer wrote for their direction the paper returned by the jury as their verdict, and gave it to them with directions that they should return a verdict of guilty or not guilty, as they might agree, and to leave it signed by the foreman and sealed up." This motion was overruled, and the defendant alleged exceptions.

A. L. Soule & E. H. Lathrop, for the defendant. 1. The jury should have received instructions as to the method of returning their verdict from the court only, unless the defendant assented to instructions through the officer. The court cannot delegate such authority to a third person to be exercised out of its presence.

2. The jury should not have been allowed to separate without the consent of the defendant.

3. The paper returned by the jury was filed as the verdict, and must be the verdict of record; and the inquiry by the clerk, "If their verdict in said case was that the defendant was guilty," was improper. An oral verdict, after the jury had separated, could not be received.

4. The verdict does not find that the defendant was guilty. The verdict without the interrogatory by the clerk and the response thereto would not be intelligible: and was not open to explanation or interpretation by the jury after they had separated.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. This bill of exceptions presents the question whether in a criminal case, not capital, the jury may be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court in accordance with the result so stated and sealed up.

The tendency of modern decisions has been to relax the strictness of the ancient practice which required jurors to be kept together from the time they were empanelled until they returned their verdict or were finally discharged by the court.

In civil cases, the jury are never kept together at the intermissions of the sittings of the court pending the trial; and it is well settled that, after the case is finally committed to them, they may be allowed by the court to separate, if they first agree upon and seal up their verdict, and afterwards affirm it in open court; and that if their verdict, when opened, does not cover all the issues upon which they are to pass, the case may be recommitted to them and a verdict subsequently rendered will be good. *Winslow v. Draper*, 8 Pick. 170. *Pritchard v. Hennessey*, 1 Gray, 294. *Chapman v. Coffin*, 14 Gray, 454. But if, upon returning into court, one of the jurors dissents from the verdict to which all had agreed out of court, it cannot be recorded. *Lawrence v. Stearns*, 11 Pick. 501.

In capital cases, indeed, the uniform practice in this Commonwealth has been to keep the jury together from the time the case is opened to them until their final discharge.

But the practice is equally well settled, and in accordance with the decisions elsewhere, that pending a trial for a misdemeanor the jury may be permitted by the court, without the consent or knowledge of the defendant, to separate and go to their homes at night, without vitiating their verdict. *The King v. Woolf* 1 Chit. 401; *S. C. nom. The King v. Kinnear*, 2 B. & Ald. 462. *McCreary v. Commonwealth*, 29 Penn. St. 323.

If the jury in a case of misdemeanor are allowed, without the consent of the defendant, to separate after the case is finally committed to them by the court, and before the verdict is returned, the verdict cannot be recorded, unless it clearly appears that the verdict was not influenced by anything that took place during the

separation. It was accordingly held that where the jury were allowed by the judge to disperse upon stating to the officer they had agreed on and sealed up a verdict, and upon coming into court rendered an oral verdict, without any sealed verdict being produced or opened or its contents made known to the defendant or his counsel, the verdict was invalid. *Commonwealth v. Durfee*, 100 Mass. 146. *Commonwealth v. Dorus*, 108 Mass. 488.

But when all possibility of improper influences is excluded by conclusive evidence that the jury arrived at and reduced to writing before their separation the same result which they afterwards announced in open court, the verdict may be received and recorded. *State v. Engle*, 13 Ohio, 490. *State v. Weber*, 22 Misso. 321. *Reins v. People*, 30 Ill. 256.

In the case at bar, the form of the written verdict is absurd, and, considered as a verdict, (if written verdicts were ever allowable in criminal cases,) could not be sustained. But the word "guilty" and the signature of the foreman, both written by him, taken in connection with the directions of the court under which the paper was written and sealed up, which was afterwards returned and opened in court, proved beyond a doubt that the jury, before they separated, arrived at the same result, which they afterwards orally announced in due form when inquired of by the clerk in open court. The judge might therefore lawfully direct a verdict of guilty to be recorded. *Exceptions overruled.*



COMMONWEALTH vs. ASA N. SMITH.

Worcester. September 29. — October 1, 1874. COLT & MORTON, JJ.,
absent.

An indictment under the Gen. Sts. c. 161, § 38, which charges a defendant with being the clerk, servant and agent of A., B. and C., sufficiently negatives the fact of apprenticeship by averring that he was not then and there an apprentice to the said A., B. and C.

An indictment under the Gen. Sts. c. 161, § 38, which avers the property embezzled to be the property of A., B. and C., sufficiently negatives the consent of the owners by averring that it was without the consent of A., B. and C.

INDICTMENT under the Gen. Sts. c. 161, § 38,* charging the defendant in different counts at a place and time named "being then and there the clerk, servant, and agent of Gustavus F. Swift, Edwin C. Swift and Josiah B. Hallett, and not being then and there an apprentice to the said Gustavus F. Swift, Edwin C. Swift and Josiah B. Hallett, nor a person under the age of sixteen years, did then and there by virtue of his said employment, have, receive and take into his possession" certain described property, the property "of the said Gustavus F. Swift, Edwin C. Swift and Josiah B. Hallett, the said Asa N. Smith's said employers, and the said Asa N. Smith" the said property "then and there did embezzle and fraudulently convert to his own use, without the consent of the said Gustavus F. Swift, Edwin C. Swift and Josiah B. Hallett, the said Asa N. Smith's said employers, whereby and by force of the statute in such case made and provided, the said Asa N. Smith is deemed to have committed the crime of simple larceny."

In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment, and assigned the following causes therefor:

"1. Because in neither of the several counts does it negative the fact that he was then and there the apprentice of some one of the three persons named as owners, to wit, Gustavus F. Swift, Edwin C. Swift and Josiah B. Hallett.

"2. Because in neither of the several counts does it allege that said Asa N. Smith converted said property to his own use, without the consent of some one of the three persons named as owners of said property, to wit, Gustavus F. Swift, Edwin C. Swift and Josiah B. Hallett."

This motion was overruled, the defendant was found guilty, and appealed.

J. A. Titus, for the defendant. The language of the indictment is not precise and conclusive in its attempt to negative the

* This statute provides: "If an officer, agent, clerk or servant of any incorporated company, or if a clerk, agent or servant of any private person or copartnership, except apprentices and other persons under the age of sixteen years, embezzles or fraudulently converts to his own use, or takes or secretes with intent so to do, without consent of his employer or master, any property of another, which has come to his possession or is under his care by virtue of such employment, he shall be deemed guilty of simple larceny."

fact of apprenticeship. The defendant might have been an apprentice to one or two of the joint owners or copartners, and if so, then he would be exempt from the charge contained in the indictment. *State v. Stone*, 15 Misso. 513. The indictment should also negative the consent of all and each of the joint owners or copartners.

C. R. Train, Attorney General, for the Commonwealth.

WELLS, J. The relation, which is essential to the offence charged in this indictment, is that of clerk, agent, or servant by virtue of some contract or employment other than that of apprenticeship. The recitals, in the several counts of the indictment, set forth such a relation to the three persons whose joint property was alleged to have been appropriated by the defendant.

If he was an apprentice to one of them, the question would arise whether the property was intrusted to him in that capacity, or whether he received it by virtue of some other employment by the three owners. But that would be a question of fact to be determined upon the evidence. It is not necessary to negative such a relation in the indictment, any further than it is negatived by the affirmative allegation of the relation, other than of apprenticeship, to the three owners of the property.

Like considerations apply to the allegation that the defendant appropriated the property without the consent of the owners. If the consent of one of the three owners was given and was such as to bind the three, it was the consent of all the owners, and is negatived by the allegation in the indictment.

The motion to quash was rightly overruled, and there must be
Judgment on the verdict.

COMMONWEALTH vs. LUCIAN M. TITUS & another.

Worcester. September 29. — October 6, 1874. COLT & MORTON, JJ.,
absent.

The finder of lost goods, who, at the time of first taking them into his possession, has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has reasonable means of knowing or ascertaining who is the owner, is guilty of larceny.

On an indictment for larceny of goods found by the defendant, the bill of exceptions stated that evidence was admitted to show what the defendant said and did about the property and his possession of it, subsequently to the original finding and taking, for the sole purpose of proving the intent with which he originally took the property into his possession, at the time of finding it. What the acts and admissions were was not stated. *Held*, that the defendant had no ground of exception to the admission of the evidence.

INDICTMENT against Lucian M. Titus and Elbridge F. Horr, charging them jointly with the larceny of certain articles of personal property alleged to be the property of Nancy Meacham.

Trial in the Superior Court, before *Aldrich*, J., who allowed the following bill of exceptions: "The defendant Horr pleaded guilty. Titus pleaded not guilty. Upon his trial the government introduced evidence tending to prove the ownership of the property as alleged in the indictment; and that the owner, while riding on one of the public highways in Athol, lost the wallet or travelling bag containing the articles mentioned in the indictment; that the defendants, passing along the same highway not long after the loss of the bag, discovered it, picked it up, and afterwards appropriated the contents of the bag to their own use, and destroyed the bag by cutting it in pieces and concealing the same in a wood lot remote from the place of finding.

"As bearing upon the question of the intent with which the defendant Titus originally took the bag and its contents, the government, against his objection, was permitted to introduce evidence to show what Titus said and did about the property and his possession of it, subsequently to the original finding and taking. This evidence was offered by the government and admitted by the court for the single purpose of proving, so far as it tended to do that, the intent with which Titus originally took the property into his possession at the time of finding it. And the jury were instructed that they could properly make no other use of this evidence, as against the defendant.

"The defendant's counsel asked the court to rule that lost property cannot be the subject of larceny. This ruling the court declined to give; but did instruct the jury that to authorize a conviction of the defendant Titus, they must be convinced by the evidence in the case beyond all reasonable doubt: First, that at the time of the finding of the property by the defendant and the taking of it into his possession, he had a felonious intent or appro-

priating the property to his own use and depriving the owner of it. Secondly, that he then knew who the owner was, or then had reasonable means of knowing or ascertaining who the owner was.

"The court further instructed the jury that if the evidence failed to satisfy them beyond every reasonable doubt that, at the time of finding the property, Titus knew or had reasonable means of knowing who the owner was; or if they should find that he did not originally take the property with the felonious intent of converting it to his own use, but formed such purpose afterwards, it would be their duty to acquit him.

"To the admission of the evidence objected to, the refusal to rule as requested, and the foregoing instructions, the defendant objected. Other and appropriate instructions, not objected to, in relation to the nature of the offence charged, and in relation to the evidence, the burden of proof, &c., were given.

"The jury returned a verdict of guilty, and the defendant alleged exceptions."

F. T. Blackmer, for the defendant, cited 2 East P. C. 663; *Regina v. Wood*, 3 Cox C. C. 453; *Regina v. Preston*, 2 Den. C. C. 353; *S. C. 5 Cox C. C. 390*; *Regina v. Dixon*, 7 Ib. 35; *Regina v. Christopher*, 8 Ib. 91; *Regina v. Moore*, Ib. 416; *Regina v. Glyde*, 11 Ib. 103; *People v. Anderson*, 14 Johns. 294; *People v. Cogdell*, 1 Hill, 94; *Porter v. State*, Mart. & Yerg. 226; *Tyler v. People*, Breese, 227; *State v. Weston*, 9 Conn. 527.

C. R. Train, Attorney General, for the Commonwealth, cited, in addition to some of the above cases, *Regina v. Thurborn*, 1 Den. C. C. 387; 2 Bennett & Heard's Lead. Crim. Cas. (2d ed.) 409, 417; *Regina v. Shea*, 7 Cox C. C. 147; *Commonwealth v. Mason*, 105 Mass. 163.

GRAY, C. J. The rulings and instructions at the trial were quite as favorable to the defendant as the great weight, if not the unanimous concurrence, of the cases cited on either side at the argument would warrant.

The finder of lost goods may lawfully take them into his possession, and if he does so without any felonious intent at that time, a subsequent conversion of them to his own use, by whatever intent that conversion is accompanied, will not constitute larceny. But if, at the time of first taking them into his posses-

sion, he has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has the reasonable means of knowing or ascertaining, by marks on the goods or otherwise, who the owner is, he may be found guilty of larceny.

It was argued for the defendant that it would not be sufficient that he might reasonably have ascertained who the owner was; that he must at least have known at the time of taking the goods that he had reasonable means of ascertaining that fact. But the instruction given did not require the jury to be satisfied merely that the defendant might have reasonably ascertained it, but that at the time of the original taking he either knew or had reasonable means of knowing or ascertaining who the owner was. Such a finding would clearly imply that he had such means within his own knowledge, as well as within his own possession or reach, at that time.

It was further argued that evidence of acts of the defendant, subsequent to the original finding and taking, was wrongly admitted, because such acts might have been the result of a purpose subsequently formed. But the evidence of the subsequent acts and declarations of the defendant was offered and admitted, as the bill of exceptions distinctly states, for the single purpose of proving, so far as it tended to do so, the intent with which the defendant originally took the property into his possession at the time of finding it. And the bill of exceptions does not state what the acts and declarations admitted in evidence were, and consequently does not show that any of them had no tendency to prove that intent, nor indeed that any acts were proved except such as accompanied and gave significance to distinct admissions of the intent with which the defendant originally took the goods.

Exceptions overruled.

COMMONWEALTH vs. PATRICK GLENNAN.

Worcester. September 29. — October 13, 1874. COLT & MORTON, JJ.,
absent.

Evidence to the effect that a place was a regular drinking saloon kept by A. ; that on the entrance of an officer to the place ale was poured into a sink ; that A. falsely declared it not to be ale ; that there was a bar in the saloon, and men standing in front of it who had been drinking ; is sufficient to warrant a finding that A. kept and maintained a liquor nuisance within the Gen. Sts. c. 87, § 6.

COMPLAINT on the Gen. Sts. c. 87, § 6, for keeping and maintaining a liquor nuisance on July 1, 1873, and on divers other days between that day and October 4, 1873.

At the trial in the Superior Court, before *Dewey, J.*, Augustus W. Keene, called as a witness for the Commonwealth, testified :

"I have known the defendant at Milford for several months, including the time covered by this complaint ; called at his place on Main Street, July 5, 1873. When I went in the defendant emptied the contents of a pitcher into a sink. Should say it was ale in the pitcher. Tasted of it and it was ale. There was a beer pump with beer on draught—this light baker's beer—not intoxicating. No other kind of beer or liquor in the place. It was a regular drinking saloon. There were cigars on the shelves, and this beer pump with baker's beer on draught. Defendant said it was baker's beer in the pitcher which he had turned into the sink, but it was not ; that the place was under attachment and he had been put in by the attaching officer as keeper. Smith Navin was present on October 3, 1873, and said he was the owner ; the place had been attached and the defendant had been put in as keeper by the officer. I was in there several times—two or three times a week after July 5, and found nothing—no liquor. October 3, called there about 7 o'clock P. M. ; the defendant was not present, he went out of the place sometime before I went in. Smith Navin was behind the bar. On the bar were tumblers, and in front men who had been in the process of drinking." There was no other evidence in the case.

The defendant requested the presiding judge to rule that on these facts he was entitled to an acquittal, but the presiding judge declined so to rule, and permitted the evidence to go to the jury, giving them instructions, to which no objection was

made. The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. H. Ball, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. There was evidence to the effect that the place was a regular drinking saloon; that the defendant kept it; that ale was poured into the sink when the witness entered the place; that the defendant falsely declared that it was not ale; and that there was a bar in the saloon, and men standing in front of it, who had been in the process of drinking. The charge against the defendant was one which could be proved by circumstantial evidence. The circumstances described by the witness were proper for the consideration of the jury, and in the absence of any evidence on the part of the defendant would justify the inference of his guilt.

Exceptions overruled.



COMMONWEALTH vs. JOHN W. SNOW.

Worcester. September 29. — October 22, 1874. COLT & MORTON, JJ.,
absent.

An indictment alleged that A. at a time and place stated "in and upon one B. then and there being pregnant with child, unlawfully did make an assault, and a certain instrument, the name of which is to the jurors unknown, up and into the womb and body of the said B. unlawfully did force and thrust, with intent then, there and thereby to cause and procure the said B. to miscarry, abort and to bring forth the said child of which she was pregnant as aforesaid, and to kill and murder said child, by reason," &c. *Held*, that whether it was intended to charge an assault with intent to commit a felony, under the Gen. Sts. c. 160, § 33, or an intent to procure miscarriage of a woman, under the Gen. Sts. c. 165, § 9, yet as the bill of exceptions stated it to be an indictment for procuring an abortion, it must be so regarded in this court. *Held, also*, that the allegation as to the time and place of the offence applied to the particular acts set forth as the means by which the abortion was alleged to be performed, as well as to the alleged assault. *Held, also*, that the instrument and the means by which it was used were sufficiently described. *Held, also*, that it was not necessary to prove an assault, or an intent to kill the child, and that the defendant might be convicted although the woman consented.

At the trial of an indictment on the Gen. Sts. c. 165, § 9, for procuring an abortion, two of the witnesses for the government testified, with great particularity, that the act was performed at a place stated on a certain day named in the indictment. The remaining witness stated that it was on or about that day, that he was not sure of the date. The defendant introduced evidence tending to show that on

this day, the day before and the day after, he was one hundred miles away from the place named. The defendant requested the court to instruct the jury "that there was no evidence in the case which would warrant the jury in finding that the defendant did the act complained of upon any other day than the day named in the indictment, and if the jury are satisfied that the defendant did not do the act upon that day, that they cannot convict." The judge declined to give this instruction, and instructed the jury that it need not be proved that the offence was committed on the exact day alleged; that if the jury found that the witnesses for the government were in error as to the date, this might be considered upon the question of the degree of credit they were entitled to, and that if the jury were not satisfied beyond doubt that the defendant performed the operation as alleged, they should acquit him. *Held*, that the defendant had no ground of exception.

INDICTMENT averring that the defendant on May 20, 1873, "at Athol in the county of Worcester, in and upon one Eliza A. Flint, then and there being pregnant with child, unlawfully did make an assault, and a certain instrument, the name of which is to the jurors unknown, up and into the womb and body of the said Flint unlawfully did force and thrust, with intent then, there and thereby to cause and procure the said Flint to miscarry, abort and to bring forth the said child of which she was pregnant as aforesaid, and to kill and murder said child, by reason and means of which said last mentioned premises, the said child was killed and its life destroyed in its mother's womb, and she, the said Flint, afterwards, to wit, on the twenty-seventh day of May, in the year eighteen hundred and seventy-three, miscarried, and was aborted and delivered of the said child, the sex thereof being to the jurors unknown, said child being at the time of its birth dead."

In the Superior Court, before the jury were empanelled, the defendant filed a motion to quash, and assigned the following grounds:

"1. There is no allegation in the indictment of the time when, and the place where the instrument mentioned in the indictment was unlawfully used.

"2. There is no sufficient description of the instrument alleged to have been used.

"3. There is no allegation of the means or manner in which said instrument was used, whether with the hand or hands of the defendant or otherwise.

"4. There is no averment of time and place when and where the defendant entertained the intent to cause and procure the miscarriage of the said Eliza A. Flint.

"5. The indictment is bad for duplicity, in that it charges that the acts alleged to have been done by the defendant were done with the intent first to procure the miscarriage of the said Eliza Flint, and second because it is alleged they were done with intent to kill and murder said child.

"6. As an indictment charging the acts to have been done with intent to kill and murder said child, it is bad, because there is no averment therein that at the time of doing the acts alleged said child was quick in its mother's womb.

"7. The indictment is uncertain in that it does not plainly, formally and substantially set forth whether said child was killed by the acts alleged to have been done, or by the intent with which they were done.

"8. The indictment is in other respects fatally defective and insufficient in that it does not plainly, formally and substantially set forth any offence in accordance with the rules of criminal pleading."

This motion *Dewey, J.*, overruled, and the defendant alleged exceptions. The case was then tried, the jury returned a verdict of guilty, and the following bill of exceptions was allowed :

"This was an indictment for procuring an abortion, which indictment is to be referred to and made part of the bill of exceptions.

"At the trial, Eliza A. Flint, the woman upon whom the alleged abortion was performed was called as a witness for the government, and among other things testified that the operation was performed upon her by the defendant at Athol, May 20, 1873 ; that she knew it was upon that day ; that she set it down upon her diary upon the evening of that day or the next morning ; that she had seen the memorandum upon her diary a number of times since then, the last time within a week prior to her testimony ; that the operation was performed by the defendant, by his inserting or thrusting some kind of an instrument up into her body and womb ; that she did not see the instrument distinctly, and could give no farther account of it, and that the operation was performed upon her by her procurement and consent. That she was taken very sick on Monday night, June 2, about three o'clock, and between eight and nine that morning the child was delivered ; that it was a week after the operation that the child was

delivered; the child was not living at delivery; she had been pregnant three or four months.

"Sarah Flint, a sister of the last witness, was called as a witness for the government, and testified, among other things, that her sister Eliza went away from her home on May 20, 1873, between one and two o'clock in the afternoon, for the purpose of having an operation performed upon her to procure an abortion, and returned in the evening and informed her that she had had the operation performed; that she was confident it was on May 20; that she recollected perfectly well that it was that day; that her sister was taken very sick just one week after the operation had been performed, about three o'clock in the night, and between eight and nine in the morning the child was delivered; that she was in the room at the time, and the child was not alive.

"Dr. Russell, a physician, was also called by the government, and testified, among other things, that he was called to attend upon said Eliza, May 29, but was absent, and his assistant, Dr. Williams, attended her; that he himself saw her on Sunday, June 1; examined her then and found a good deal of fever. She was pale, weak, and had lost a good deal of blood; that he did not at that time make an internal examination, but did so about a week after; that he was well convinced what was the trouble at his first visit; that he found by inserting his finger into her vagina the womb inflamed and swollen; that the swelling was confined mainly to the left side; that his examination was not such as to enable him to see the womb, but his opinion was that said swelling and inflammation were occasioned by an injury to the womb, which injury he thought was a puncture.

"James Teel, was also called as a witness for the government, and, among other things, testified that the said Eliza was gotten in the family way by himself, and that he took her to Athol on or about May 20, 1873; that he was not sure of the date, and that the defendant performed an operation upon her to procure an abortion with an instrument; that he saw an instrument in the defendant's hand about six or eight inches long, but that he could not tell whether it was a blunt instrument or a sharp instrument; it was a long lance-like, slim instrument.

"This was all the evidence there was in the case as to the time when, or the instrument with which the operation was performed.

Eliza A. Flint and Teel testified fully as to the conversation between them and the defendant, and as to what took place at his rooms at the time of the said operation.

“The defendant introduced testimony tending to show that upon May 19, 20 and 21, 1873, he was not in Athol, but in Norwich, Vt., a distance of more than a hundred miles therefrom, and asked the court to instruct the jury as follows :

“1. That they must be satisfied that the instrument with which said operation was performed was a sharp instrument. That there was no evidence in the case, either directly or from which the jury would be authorized to infer that the instrument with which the act was done was a sharp instrument.

“2. That in order to a conviction, it was necessary for the government to prove that the defendant made an assault upon the said Eliza A. Flint.

“3. That there was no evidence in the case which would warrant the jury in finding that the defendant did the act complained of upon any other day than May 20, 1873, and if the jury are satisfied that the defendant did not do the act upon that day that they cannot convict.

“4. That it was necessary for the government to prove that the defendant did the act complained of with the intent not only to procure a miscarriage, but also with the intent to kill and murder the child with which the woman was pregnant.

“The court refused to give the above requests of the defendant, but gave the following instructions in relation to the matters referred to in his requests :

“1. That in order to authorize a conviction the jury must be satisfied that there was an operation performed upon Eliza A. Flint by the defendant, by thrusting an instrument up into her body and into her womb, with intent unlawfully thereby to procure her miscarriage, she being pregnant.

“2. That if the defendant unlawfully used said instrument as alleged, for the purpose of procuring her miscarriage, it is sufficient to authorize his conviction under this indictment, though the jury are satisfied that the operation was performed by her procurement and with her consent, and that the evidence showed it was with her consent.

"3. In relation to the allegation as to the day, the court instructed the jury, that it was not necessary that it should be proved that the acts complained of were on the day alleged; that the exact day was not material; and if the jury were satisfied that the defendant performed the operation on any day in the month of May, it was sufficient as far as the day was material; that if the jury were satisfied that the witnesses for the government were in error as to the date stated by them, this was a proper matter to be considered upon the question of the degree of credit they were entitled to as to other matters; and if this, either alone or in connection with other evidence, caused the jury so far to doubt as to their truth and the reliability of their testimony in other matters, that they were not satisfied beyond doubt that the defendant did perform the operation as alleged, then they should acquit the defendant.

"4. That it was not necessary for the government to prove that the act complained of was performed with the intention by the defendant to kill and murder the child; it was sufficient if it was done in the manner alleged, with intent to procure a miscarriage unlawfully."

The defendant alleged exceptions.

G. F. Verry, (F. A. Gaskill with him,) for the defendant.

1. Every allegation, whether necessary or not, which is descriptive of the identity of that which is legally essential to the charge, must be proved. It was not necessary to allege an assault in the indictment in this case; but as the essential charge, to wit, the use of the instrument, is alleged to have been made with an assault, and as the only allegation of time and place is in connection with the assault, it must follow that the allegation of an assault cannot be rejected as surplusage because it is descriptive of the essential charge; or, if it may be rejected as surplusage, then the essential charge fails for want of an allegation of time and place. The government proved with certainty that the act complained of was committed on the 20th of May. The defendant has the right to assume that it was also proved by him that he did not do the act if it was done on that day. There being no evidence in the case that would authorize the jury to find it was done on any other day, the defendant was entitled to some appropriate instruction from the court to the jury on this point. There is no

allegation of time and place unless there is an assault. Here there was no assault. *Commonwealth v. Wellington*, 7 Allen, 299.

2. The ruling asked for by the third prayer for instructions sufficiently indicated the proposition upon which the defendant desired the jury to be informed, and stated in sufficiently accurate terms the law applicable to the case. No instructions on the point were given, but what was said in response to this prayer would naturally tend to divert the minds of the jury from the true issue. It had not been contended by the defendant that it was necessary to prove the commission of the offence upon the day alleged, and the instruction given not only did not meet the defendant's claim or do justice to his position, but tended to mislead the jury by turning their attention from the true proposition, to wit, whether it was necessary for them to find the offence to have been committed upon the day proved. The further instruction, that if the jury were satisfied that the witnesses for the government were in error as to the date stated by them, this was a proper matter to be considered by them as affecting their credit, is inaccurate, because an honest mistake of a witness as to the day upon which an event happened may have some tendency to impeach his recollection, but not his credit; and it did not meet the case; because the evidence was clear and conclusive as to the day, and left no room for doubt, and the witnesses were more likely to be mistaken as to the identity of a man whom they did not know, and had never seen, than as to the day. The jury should have been instructed that if they were satisfied that the operation was performed in Athol on May 20, and were also satisfied that the defendant was not in Athol at the time the operation was performed, they must acquit.

C. R. Train, Attorney General, for the Commonwealth.

WELLS, J. It might be difficult to determine, from the form of the indictment, whether it was intended to charge an assault with intent to commit a felony, under the Gen. Sts. c. 160, § 33, as is contended by the Attorney General; or an offence under the Gen. Sts. c. 165, § 9. But as it is stated in the bill of exceptions to be "an indictment for procuring an abortion," we must assume that it was so treated at the trial. No objection on account of duplicity in this particular was made at the trial, or in the motion to quash, and it is therefore not open now.

The objection, made in the motion to quash, on account of duplicity in charging both an intent to procure a miscarriage and an intent to kill and murder the child, and also those to the insufficiency of the allegations for an indictment in the latter aspect, are not insisted on here.

Upon his motion to quash the defendant insists that there is no allegation of time and place, when and where the offence was committed. But the fair and reasonable construction of the language of the indictment appears to us to be that the time and place set forth, at which the assault is alleged to have been committed, extends equally to the particular acts set forth as means by which the abortion is alleged to have been accomplished, and which constituted what is called an assault.

The objection that there is no sufficient description of the instrument alleged to have been used, and of the means by which or manner in which it was used, does not appear to us to be well founded, and is not pressed in argument here.

The same remark will dispose of the defendant's prayer for instructions in relation to the character of the instrument used.

The second prayer, that it was necessary to prove an assault, was properly refused; and the instruction that the defendant might be convicted although the operation was performed by the procurement and consent of the woman, was rightly given. The act is made criminal without regard to the consent of the person upon whom it is performed. The allegation of an assault is in no sense descriptive of the offence, or of the acts which constitute the offence. It may be rejected as surplusage. The same is true of the allegation of intent to kill and murder the child.

The main question arises upon the instructions asked for, and those given upon the evidence offered to prove an alibi. Witnesses for the prosecution testified with great particularity and confidence, that the operation was performed at Athol, on the 20th day of May, 1873; and the woman upon whom it was performed testified that she made an entry of the date in her diary on the evening of the same day or the morning of the next day, and had examined the memorandum since, and shortly before the trial. There was no testimony as to any other date. The defendant introduced testimony tending to show that on the 19th, 20th and 21st days of May 1873, he was in Norwich, Vt., more

than a hundred miles distant from Athol ; and asked the court to instruct the jury "that there was no evidence in the case which would warrant the jury in finding that the defendant did the act complained of upon any other day than May 20, 1878 ; and if the jury are satisfied that the defendant did not do the act upon that day they cannot convict."

This instruction the court refused to give, and instructed the jury that the exact day was not material ; that "if the jury were satisfied that the witnesses for the government were in error as to the date stated by them, this was a proper matter to be considered upon the question of the degree of credit they were entitled to as to other matters ; and if this, either alone or in connection with other evidence, caused the jury so far to doubt as to their truth and the reliability of their testimony in other matters, that they were not satisfied beyond doubt that the defendant did perform the operation as alleged, then they should acquit the defendant."

These rulings and instructions were right. If the alibi was satisfactorily proved, it was for the jury to say what effect it ought to have upon the testimony of the witnesses for the prosecution. It might discredit them altogether. If it did not have that effect, then it required an inference of some mistake on their part either as to the person who performed the operation, or the true date of its performance. Their testimony was no more positive as to the date than it was as to the person ; and they were at least quite as liable to have made a mistake as to the true date, as they were in regard to the identity of the person. But in any aspect it was entirely a question of fact for the jury, and was rightly left to them to decide.

Exceptions overruled.

COMMONWEALTH vs. JOHN C. BLOS.

Worcester. September 29.—October 28, 1874. COLT & MORTON JJ.,
absent.

The St. of 1869, c. 415, § 30, does not prohibit the sale of beer, which is not "ale, porter, strong beer," or "lager bier," unless it is intoxicating; and whether it is intoxicating is a question of fact for the jury, and the fact that it contains a certain percentage of alcohol is not conclusive upon this point.

INDICTMENT on the Gen. Sts. c. 87, § 6, for keeping and maintaining a tenement used for the illegal sale and keeping of intoxicating liquor.

At the trial in the Superior Court, before *Lord, J.*, the government offered the evidence of S. Dana Hayes and C. O. Thompson, chemical experts, who had analyzed samples of beer admitted to have been sold by the defendant in the place and between the times alleged in the indictment. It was also admitted that the place was kept by the defendant for the purpose of selling indisoriminately the beer such as was analyzed by Hayes and Thompson. Said witnesses testified that the beer was composed of an infusion of malted barley and hops, and that it contained from five to five and one half per cent. of alcohol; that the presence of alcohol in beer has no effect upon the keeping of beer; that the keeping a longer or shorter time depends upon the quantity of starch and the temperature at which it is manufactured, and that the amount of alcohol is the same in that which is brewed slowly and at a low temperature as in that which is brewed more rapidly and at a higher temperature, and that the latter goes more rapidly into vinegar than the former; that in no beer is there alcohol enough to preserve it, but that depends upon the stock and mode of manufacture, and that ale contained from four to five, and sometimes six per cent. of alcohol. No question was made of the accuracy of the testimony of the experts in the above particulars.

The government also offered evidence tending to show that said beer was lager bier. Said chemical experts further testified that whiskey contains about fifty-three per cent. of alcohol, and that a gallon of said beer contained as much alcohol as a pint of whiskey.

The government offered the evidence of one Corcoran, that he had drunk said beer at the defendant's place, and it had produced the effect of sickness at the stomach and made him stagger, and that he was arrested for drunkenness while under the influence of it. The above was the only evidence offered by the Commonwealth material to the questions at issue.

The defendant offered to prove in defence by the testimony of the brewers who made it, and by dealers and consumers of said beer, that it was not lager bier, but Schenck beer, an entirely different and distinct article, and recognized in the trade as such; that it did not contain as much stock, by one half, as lager bier; that it would not keep nearly as long as lager, and was of less price than lager; and that Schenck beer was fit for use in a short time after brewing, while lager bier required to be kept several months before use. The defendant also offered to prove that said beer was not intoxicating, by the evidence of witnesses who had drunk said beer for many years in large quantities, and had observed its use by others, and had never experienced or known of any intoxicating effects from it.

The correctness of the analysis of the liquor was conceded for the purposes of this trial, and the presiding judge ruled that the indiscriminate sale of certain liquors is prohibited; that what liquors are prohibited depends upon the nature or character of the liquor and not upon its effects; and that upon the testimony of Hayes and Thompson, the liquors which it is agreed were sold by the defendant come within the prohibited liquors, and that therefore evidence of their peculiar effects upon certain individuals is not competent for the purpose of showing that the liquors do not fall within the prohibition.

The court therefore ruled that the evidence offered by the defendant was incompetent or immaterial, and that it was the duty of the jury upon this proof to return a verdict of guilty; whereupon such verdict was rendered, and the defendant alleged exceptions.

G. F. Verry & F. A. Gaskill, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. Under the law of this Commonwealth the sale of liquors capable of producing intoxication is unlawful and criminal. Of these liquors, those that are known as spirituous form a class

by themselves, and are treated by the statute as not requiring a more specific description. The liquors that have intoxicating qualities, but not included in the class known by the appellation of spirituous, are within the prohibition of the law. The statute makes a partial enumeration of this latter class of liquors, and provides that "ale, porter, strong beer, lager bier, and all wines, shall be considered intoxicating liquors within the meaning of this act, as well as distilled spirits." St. 1869, c. 415, § 30. The apparent purpose of the statute is to provide that distilled spirits, and all liquors with which distilled spirits are mixed, and also all the liquors included by name in the specific enumeration above quoted, shall be conclusively deemed intoxicating, and the question whether they are intoxicating in fact shall not be raised at the trial. But with regard to all other liquors, this question is one to be determined by the jury upon the evidence like any other question of fact.

In the case under consideration, the article sold was not distilled spirits; it was not ale, porter, strong beer, or wine; and the defendant offered to prove that it was not lager bier. The fact that alcohol was discovered in it upon a chemical analysis, although undoubtedly competent evidence, does not necessarily prove that the liquor was spirituous within the meaning of the statute. If it did, it would follow that there was no occasion for, and no significance in, the special provision contained in the statute as to ale, porter, wine, &c. The question whether it was an intoxicating liquor or not should have been submitted to the jury.

We think, therefore, that the evidence offered by the defendant at the trial was competent and should have been received, and it accordingly results that the *Exceptions are sustained.*

116 58
157 553

COMMONWEALTH vs. AUGUST MANN.

Worcester. September 29. — October 24, 1874. COLT & MORTON, JJ.,
absent.

On the trial of an indictment for an assault and battery with a pistol, there was evidence that a quarrel occurred between the defendant and A.; that the latter while retreating threw beer mugs at the defendant, who fired two shots from a pistol, one

of which hit A. The defendant testified that he was in fear of his life ; that he did not intend to hit A., and meant to frighten him and prevent him from further violence. *Held*, that whether the defendant was justified in firing the pistol was a question of fact for the jury, and that an instruction that a person who fires a pistol to frighten an assailant is guilty of an assault if he hits him, was erroneous.

INDICTMENT for assault and shooting Timothy Callaghan with a pistol. At the trial in the Superior Court, before *Lord, J.*, there was evidence tending to show that the shooting took place in the defendant's saloon ; that a quarrel occurred between Callaghan and the defendant, and that Callaghan threw one or more beer mugs at the defendant, who then fired two shots from a revolver, and that the second shot hit Callaghan in the neck.

It appeared that Callaghan threw the mugs as he was retreating towards the door, and when the second shot was fired he was behind a screen that stood near the door, and about thirty feet from where the defendant stood ; and it further appeared that one of the shots entered the sheathing over the door. The defendant testified that he did not intend to hit Callaghan, but meant to frighten him ; that he was in fear of his life, and fired to frighten him and prevent him from further violence. The government offered evidence tending to show that the defendant intended to hit Callaghan.

The defendant requested the court to instruct the jury as follows : 1. If it was under the circumstances reasonably necessary for the defendant to fire the pistol at Callaghan, he would not be guilty of an assault. 2. If it was not reasonably necessary for the defendant to shoot Callaghan, it might be reasonably necessary to fire the pistol in such a manner as to deter him by fright from further violence upon the defendant, and if the defendant intended only to do the latter, he might not be guilty. 3. If the defendant did not intend to aim the pistol at Callaghan, nor to hit him when he fired, he would not be guilty of an assault, even though the shot took effect on Callaghan, unless the defendant fired the pistol recklessly. 4. If the defendant intended merely to fire the pistol in such a direction as to frighten Callaghan, and intended not to hit him, and accidentally, against the defendant's intention, the shot took effect, he would not be guilty of an assault, unless he fired recklessly.

The presiding judge did not read these requests to the jury, but said: "The defendant has asked for certain instructions which state the law correctly. It may be true that a person may be placed in such a situation that it would be reasonably necessary for him to fire a pistol to frighten his assailant, but whether or not this is so is immaterial to this case, and therefore has no application to the case. The real question in this case is, whether the pistol ball hit the party, for if the shot did not take effect, there is no evidence on which the defendant can be convicted of any offence. The defendant does not take the position that he was justified in using the pistol as an instrument of harm in defence of his own safety, but that he was justified in using it to frighten Callaghan. If he fired for the purpose of frightening, and hit the party, it is an assault and battery. If a person fires to frighten another, he fires at his peril, even if he did not intend to hit; and if he does hit, he is guilty of assault and battery." The jury returned a verdict of guilty, and the defendant alleged exceptions.

G. F. Verry & F. A. Gaskill, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

DEVENS, J. The instructions in this case were erroneous in this, that they disposed, as questions of law, of those matters which properly presented questions of fact for the jury. The defendant undertook to excuse his firing his pistol and thus wounding Callaghan, who had assaulted him by throwing one or more missiles, upon the ground that he was in fear of his life, and fired in order to frighten Callaghan and deter him from further violence. He offered his own evidence, to show this, and, while he did not contend that his danger was so great that he was justified in firing at Callaghan, he did contend that it justified him in firing for the purpose of frightening Callaghan, even if such firing was necessarily attended with some danger in the confusion of the brawl; and further that, being thus justified, he was not responsible if Callaghan was accidentally hit, he not having fired recklessly. The ruling of the learned judge while it admits "that it may be true that a person may be so placed that it would be reasonably necessary for him to fire a pistol to frighten his assailant," adds that even if so this is immaterial and has no application to the case, and further that the real question is whether the pistol ball hit the party. It treats the act of the defendant in firing as a wrong-

ful act, for the consequences of which he was to be held responsible if any ill consequences resulted. But whether it was so or not was to be determined by the jury in considering the character of the assault on the defendant, whether it was still continuing, whether it was attended by danger to life or of great bodily harm, and such other circumstances as should properly be weighed in deciding whether the defendant was justified by his own right of self-defence in exposing Callaghan to the danger to which he would be subjected if a pistol were used to frighten him.

The learned judge adds in his instructions that if a person fires a pistol to frighten another, he fires at his peril, even if he does not intend to hit, and that if he does hit, he is guilty of assault and battery. This is certainly correct if the firing be without cause that would justify his exposing the person, to frighten whom he thus fires, to danger from the use of a deadly weapon, but otherwise if such person is one making an assault so formidable in its character that in defence of himself the party assaulted may properly thus expose the assailant. *Exceptions sustained.*



COMMONWEALTH vs. WILLIAM SANBORN.

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| 116 | 61 |
| 149 | 38 |

Bristol. October 27. — 28, 1874. COLT & AMES, JJ., absent.

Under the Gen. Sta. c. 171, § 7, grand jurors sworn by the clerk in the presence of the court are legally charged with the performance of their duties, and it is not essential to the validity of their indictments that they should be instructed by the presiding judge.

Payment of a tax to the United States on sales of intoxicating liquors made in a tenement in this Commonwealth, is no bar to an indictment under the Gen. Sta. c. 87, §§ 6, 7, for keeping the tenement for such sales in violation of law, and thereby maintaining a common nuisance.

Evidence of verbal admissions tending to show that the person making them was guilty of a crime should be received by a jury with great caution, but whether any substantial reliance should be placed upon such evidence depends upon the circumstances of each case; and he is not entitled to an instruction that no substantial reliance can be placed upon them if uncorroborated.

INDICTMENT on the Gen. Sta. c. 87, §§ 6, 7, charging the keeping of a tenement used for the illegal sale of intoxicating liquors.

Before arraignment the defendant filed a plea in abatement, a motion to quash, and a special plea in bar, setting forth that two

of the jurors upon the grand jury by which the indictment was found and presented were not charged by the presiding judge, but were simply sworn by the clerk in open court. The court overruled the pleas and motion.

The defendant also filed a special plea in bar, setting forth that he had paid a special tax to the United States, for his keeping and selling spirituous and intoxicating liquors, at the same time and at the same place for which he was charged in this indictment. The court adjudged the plea bad.

At the trial in the Superior Court before *Putnam, J.*, evidence of verbal admissions by the defendant was admitted, tending to show that he kept and maintained the tenement. At the defendant's request the judge instructed the jury that such evidence should be received with great caution. The defendant further requested the court to instruct the jury that no substantial reliance could be placed upon this class of evidence uncorroborated. This the judge refused, but did instruct them that whether any substantial reliance could be placed upon this class of testimony depended upon the circumstances of each case, and that it was for the jury to say in this case how far they could rely upon it.

The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. Brown, for the defendant. 1. At common law, the "grand jury are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench." 4 Bl. Com. 303. In *Wadlin's Case*, 11 Mass. 142, this court deemed it essential that a grand juror, not present when the jury were empanelled and charged, should be sworn and charged separately before joining the panel. At that time the present explicit directions, by statute, in regard to charging them did not exist. St. 1807, c. 140, § 10. The Gen. Sts. c. 171, §§ 12, 13, are identical with the Rev. Sts. c. 136, §§ 12, 13, and were reported by the commissioners, who, in their note, say, "Perhaps all this may be considered as being comprised in the oath of grand jurors: but it seemed better to express it than to leave it to implication." Report of Commissioners on Rev. Sts. c. 136. It is obligatory on the court to remind the grand jury of the provisions of § 13, and the preceding sections. Gen. Sts. c. 171, § 13. The two jurors were

not therefore qualified, as required by statute, to join the panel, and the indictments were found and presented by a body not duly constituted. It would have the same effect as if twelve or the whole proceeded to business without a charge or this reminder, as a majority are to agree upon a bill. An omission to properly administer the oath to a traverse jury, as required by statute, renders their verdict illegal. *Johnson v. The State*, 47 Ala. 9.

2. In regard to the special plea in bar, setting up that the defendant had paid a special tax to the United States, the defendant relies upon the point that the case of *Pervear v. Commonwealth*, 5 Wall. 475, was decided when the internal revenue law required a license instead of the payment of a special tax, as now, and that the U. S. St. of 1872, c. 315, omitted, or rather repealed by implication, that clause in the former statutes which provided that "no license" should authorize the doing of acts in violation of the laws of any state or territory. No license is now granted, but a special tax is paid to carry on a trade or business.

3. The instructions requested in regard to verbal admissions are in accordance with the law as stated in 1 Greenl. Ev. (Redfield's ed.) § 200. The defendant was entitled to these instructions, and the instructions given instead thereof were erroneous or insufficient.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. 1. Grand jurors, sworn by the clerk in the presence of the court, as required by the statutes, are legally charged with the performance of their duties. Their authority to inquire into crimes is not limited to subjects to which their attention is called by the court or by the attorney for the Commonwealth; and the extent to which they shall be instructed by the court rests in the discretion of the presiding judge.

The language of the Rev. Sts. c. 136, § 7, and the Gen. Sts. c. 171, § 7, which provide that "after the grand jurors have been empanelled and have received their charge from the court," and have retired, they shall elect a foreman before they proceed to the performance of the duties of their office, is hardly so explicit as the St. of 1807, c. 140, § 10, which spoke of their being "sworn, empanelled, and instructed by the charge from the court." Under that statute, when one grand juror arrived after the others had been empanelled and charged and had retired to their room, the

court, after consultation, ordered him to be sworn in the usual form, and then merely charged him to aid the grand jury in their inquiries as to offences which had been stated in detail to them when they were empanelled. *Wadlin's case*, 11 Mass. 142.

The provisions of the Rev. St. c. 136, §§ 12, 13, and the Gen. Sta. c. 171, §§ 12, 13, binding the grand jury to secrecy, and directing the court in charging them to remind them of these provisions, do not make the instructions of the court, on this or any other matter, essential to the validity of their indictments. The note of the commissioners on the Revised Statutes shows that they did not suppose that these sections altered the law in this regard.

2. The payment of a tax to the United States was no bar to this indictment for violating the laws of the Commonwealth. *Commonwealth v. Holbrook*, 10 Allen, 200. *Pervear v. Commonwealth*, 5 Wall. 475.

3. The instructions to the jury were correct and sufficient.

Exceptions overruled.

COMMONWEALTH vs. JAMES MCCLUSKEY.

Bristol. October 27. — 28, 1874. COLT & AMES, JJ., absent.

Under the St. of 1869, c. 415, § 39, a person may be convicted who conveys spirituous or intoxicating liquors in this Commonwealth to another, having reasonable cause to believe that the latter intends to sell them to a third person in violation of law, whether the person so conveying the liquors is the owner of them or not.

COMPLAINT on the St. of 1869, c. 415, § 39, charging the defendant with the illegal transportation of intoxicating liquors, having reasonable cause to believe that they were intended for sale in violation of the laws of the Commonwealth.

At the trial in the Superior Court, on appeal, before *Putnam, J.*, the evidence tended to show that the defendant was in possession of these liquors, and that he was conveying them in a carriage to a liquor saloon kept by one Bliss. The defendant requested the court to instruct the jury that if he was the actual owner of the liquors, and there was no evidence that they had

been previously sold by him, a conviction could not be had under this complaint charging that he had reasonable cause to believe they were intended to be sold in violation of the laws of the Commonwealth, but that such conveyance could be criminal in such case only when the allegation in the complaint charged an intent to sell the same himself or to have it sold by another. The court refused to instruct the jury as requested, but instructed them that possession was *prima facie* evidence of ownership; that if the defendant was the owner of the liquors and intended to sell them to Bliss, or to have Bliss sell them for him, he was not liable under this complaint; but whether he was the owner or not, if he conveyed them to Bliss, having reasonable cause to believe that Bliss intended to sell them to some one else in violation of law, he would be liable under this complaint. The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. Brown, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

WELLS, J. The jury were rightly instructed that if the defendant conveyed the liquors to Bliss, "having reasonable cause to believe that Bliss intended to sell them to some one else in violation of law, he would be liable under this complaint." The instruction accurately defines one mode by which the offence punishable by the St. of 1869, c. 415, § 39, may be committed. If the defendant was owner, and intended himself to make an illegal sale to Bliss, to whom he was conveying the liquors, he was guilty of an offence against the same statute in another mode, not charged in the complaint. But that would not prevent his conviction for violation of the statute in the mode for which he was prosecuted.

Exceptions overruled.

COMMONWEALTH vs. THOMAS MASON.

Bristol. October 27.—28, 1874. COLT & AMES, JJ., absent.

A complaint on the St. of 1869, c. 415, charged the keeping of intoxicating liquors on a day certain with the intent to sell the same in violation of law. The evidence for the government related to certain acts of the defendant in a saloon and that intoxicating liquors were kept there on the day named in the complaint. The defendant testified that he had sold out his interest in the business prior to said day, and had had nothing to do with it since. The government then introduced evidence of the defendant's selling liquor in the saloon on a day subsequent to that alleged, for the sole purpose of affecting the credibility of the defendant as a witness. *Held*, that the evidence was rightly admitted for this purpose.

COMPLAINT on the St. of 1869, c. 415, charging the defendant with the keeping of intoxicating liquors on April 17, 1874, with intent to sell the same in violation of law.

At the trial in the Superior Court, before *Putnam, J.*, the government put in the testimony of two state constables, as to certain acts of the defendant in a saloon, and that intoxicating liquor was found there on said day. The defendant testified for himself, that in March, 1874, he sold out the liquor business in that saloon to his brother, and had had no connection with it since that date, and nothing to do with the bar room since that time.

The government thereupon recalled the state constables, who testified, the defendant objecting, that they visited the place again on May 16, 1874, and on that occasion found some lager bier there, which the defendant was delivering to some customers.

The court instructed the jury that they might consider the evidence of the officers, as to what occurred on May 16, only as contradicting the defendant and as bearing on his credibility, but not to consider it as having any tendency to show that he kept liquors for illegal sale on April 17. The jury returned a verdict of guilty, and the defendant alleged exceptions.

H. J. Fuller, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

BY THE COURT. The evidence admitted tended directly to contradict the defendant's testimony that he had had no connection with the business since March, 1874, and thus to affect his credibility as a witness, and was admitted for that purpose only.

Exceptions overruled.

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116 67
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116 67
154 303

EDWARD LARUE vs. FARREN HOTEL COMPANY.

Franklin. September 15. — October 27, 1874. WELLS & MORTON, JJ.,
absent.

The owner of a building which has a store therein does not, by letting the store, become exempt from liability for damages to persons having lawful occasion to use said store, caused by an opening in the sidewalk in front of the store which was left there in the original construction of the building, if he is otherwise liable.

TORT for a personal injury. At the trial in the Superior Court, before *Lord, J.*, the defendant admitted that it was a corporation, and the owner of the estate at Turner's Falls, upon which the accident was alleged to have happened. The plaintiff put in evidence the lease from the defendant to W. D. Budlong of a store on said estate, with the cellar under the same, by which the lessee covenanted, among other things, that he would not, without the consent in writing of the lessors or their successors or assigns, make or suffer any alterations or additions in or to the said premises, and that he would allow the lessors and their agents or assigns at reasonable times to enter upon said premises and examine the condition thereof, and make necessary repairs.

The plaintiff also introduced evidence tending to show that about half past seven or eight o'clock in the evening of October 23, 1872, the evening being quite dark, he, accompanied by his wife and young child, went to Budlong's store; that he left his baby carriage in the corner, and his lantern, which was burning dimly, on the door step; that after completing his business he came out of the store, leading his child, his wife preceding him; that when he came out of the store he passed around or by his lantern, which was upon the right hand side of the door step, towards his baby carriage, and in doing so fell into an opening in front of the store window, which opening had been left to admit light to the cellar, and fractured one of his ribs and otherwise injured himself. This opening was three inches from the side of the door step and was four feet and seven inches in length, three feet in depth, projected from the line of the building, at each end eleven, and at the centre fourteen inches from the line of the building, and had never been covered by a grate. The only complaint made was that this opening should have been covered by a grate. The front line of this store was twenty feet from the highway, and the entire

space had been paved and was all open, and there was no line of demarcation of the sidewalk. The building was first occupied sometime in August or September, 1872. Since the accident this opening has been covered by a grate, but by whom it did not appear.

Upon this state of facts, the defendant contended that the excavation into which the plaintiff fell was not of such a character as to render the corporation liable for any injury which might result therefrom, and requested an instruction to this effect; but the presiding judge declined so to rule as matter of law, and submitted the question to the jury under instructions as to what would create a liability on the part of the defendant, which were not objected to. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

A. De Wolf, for the defendant, cited *Sweeny v. Old Colony Railroad*, 10 Allen, 368; *Howland v. Vincent*, 10 Met. 371; *Milford v. Holbrook*, 9 Allen, 17; *Robbins v. Jones*, 15 C. B. (N. S.), 221.

W. S. B. Hopkins, for the plaintiff.

AMES, J. Upon the evidence detailed in this bill of exceptions, it would have been improper for the court below to rule as a matter of law that the defendant was not liable. The manner in which the building was constructed, and in which that part of it occupied by Budlong was used, might be considered as an invitation to all persons having lawful occasion to visit that part of it, to make use of the paved sidewalk as a means of access, and as an assurance that with due and reasonable care they might do so with safety. *Sweeny v. Old Colony Railroad*, 10 Allen, 368. *Carleton v. Franconia Iron Co.* 99 Mass. 216. If the excavation was in such a situation and of such a character as to be dangerous to persons going in and out at Budlong's door, while in the exercise of due care, it became the duty of the defendant to take all proper precautions, by means of barriers or grates, to make the passage way reasonably safe. No exceptions were taken to the judge's charge upon this part of the case. It was a question of fact, and was submitted to the jury with proper instructions.

Upon the question whether the action should have been brought against this defendant, or against its tenant Budlong, it is to be observed that the cause of the injury was not to be found in any neglect of the latter to keep the sidewalk in repair. The ex-

cavation, if a fault at all, was a fault in the original construction of the building, and was of course intentional on the part of the defendant. It had the general supervision of the whole, and had the entire control of the premises so far as was necessary to keep them and the approaches in proper and safe condition, and therefore this liability rested upon it. *Kirby v. Boylston Market Association*, 14 Gray, 249. *Exceptions overruled.*

HARRIET W. HARRINGTON vs. WILLIAM CONOLLY & wife.

Hampshire. Sept. 18. — Oct. 11, 1873. WELLS & DEVENS, JJ., absent.
Sept. 16. — Oct. 24, 1874. WELLS & MORTON, JJ., absent.

A writ of dower, made in the form of a writ of summons and attachment, may be served by a nominal attachment of the tenant's goods or estate and delivering a summons to him.

Under the St. of 1869, c. 418, if an interlocutory judgment is rendered that the demandant recover her dower and her damages for the detention thereof as assessed by the jury to that time, and commissioners are appointed to set off the dower, the demandant is entitled to further damages to the time of final judgment upon the report of the commissioners.

WRIT OF DOWER, commanding the officer to attach the goods or estate of the tenants, and summon them to appear and answer at October term, 1872, of the Superior Court. The officer returned that he had attached a chip, the property of the tenants, and "summoned them to appear and answer at court as within directed by giving them each a summons in hand." The tenants, appearing specially for the purpose, moved to dismiss the action, "because the service of said writ was defective and insufficient, and because they have not been duly summoned to appear and answer thereto." *Brigham*, C. J., overruled the motion, a trial was had at February term, 1873, resulting in a verdict for the demandant, with damages in the sum of \$127. judgment was awarded that the demandant recover her dower and for the damages so assessed, and the tenants alleged exceptions, which were argued at September term, 1873.

D. W. Bond, for the tenants.

C. Delano, for the demandant.

GRAY, C. J. A writ of dower is an original writ. By the earlier statutes of the Commonwealth, the form prescribed was that of a writ of original summons, and the service might be by an attested copy or by reading. Sts. 1783, c. 40, § 3; 1797, c. 50, § 2. In practice, however, it was often made in the form of a writ of *capias* and attachment, or — inasmuch as a *capias* was of no value, because by the St. of 1795, c. 75, it was provided that if the tenant was arrested in a real action, his own bond only should be required for his appearance to answer the same — of summons and attachment, in order to obtain security for the costs. Stearns on Real Actions, 200. Howe's Pract. 77. But the Revised Statutes provided, and the General Statutes have reenacted, that original writs may be framed, either to attach the goods or estate of the defendant, or for want thereof, to take his body; or as an original summons, either with or without an order to attach the goods or estate; that when goods or estate are attached, on either of such writs, there shall be a separate summons, to be served on the defendant after the attachment, and the service thereof shall be deemed a sufficient service of the original summons; and that when there is a separate summons to be served after an attachment of goods or estate, it shall be served by delivering it to the defendant, or by leaving it for him as afterwards directed in the statutes; and when there is an original summons without an attachment, the summons shall be served by reading the same to the defendant, or by delivering to him an attested copy, or by so leaving such copy for him; and have made no special provisions as to the form or service of a writ of dower. Rev. Sts. c. 90, §§ 3, 4, 39; c. 102. Gen. Sts. c. 123, §§ 10, 11, 23; c. 135. Since the statutes have restricted the right of arrest on mesne process, it has become a common practice to strike out of writs the command to take the body; and the tenant in this case has not raised any objection to the form of the writ, either by his motion to dismiss or by plea in abatement. As the writ contained a command to attach the property of the tenants, a separate summons to each tenant was proper, and the service returned by the officer was legal, although he delivered to each of the tenants the original of such a summons, and not an attested copy thereof.

Exceptions overruled.

At October term, 1873, of the Superior Court, commissioners were appointed to set out the demandant's dower. The parties did not agree that the commissioners might assess damages for the detention of dower. At September term, 1874, of that court, the commissioners having returned their assignment of dower, it was duly affirmed. The demandant then moved for a further assessment of damages for the detention of dower since the first assessment. The tenants objected to any further assessment. But *Aldrich, J.*, overruled the objection, and (the parties waiving any right to have the additional damages assessed by the jury, but reserving the tenants' objection to any second assessment at this term) assessed further damages as claimed by the demandant in the sum of \$175. The tenants alleged exceptions.

D. W. Bond, for the tenants.

C. Delano, for the demandant.

GRAY, C. J. Under the earlier statutes of the Commonwealth, the judgment that the demandant recover her dower was the final judgment in the case; the damages were assessed by the jury in their verdict upon the principal issue, or by the court upon default or on the agreement of parties, and were included in that judgment; a direction to collect them was inserted in the same writ of execution which commanded the officer to deliver seisin of her third of the premises to the demandant; that third was set off by three persons appointed by the officer, and their doings were returned to the court, not with a view to further judicial action, but merely to preserve the evidence of them, like the certificate of appraisers and other proceedings in the levy of an ordinary execution upon real estate. St. 1783, c. 40. Rev. Sts. c. 102, §§ 3, 6. Jackson on Real Actions, 312. Stearns on Real Actions, 311. *Libbey v. Swett*, Story Pl. 365, 366. *Perry v. Goodwin*, 6 Mass. 498. Under those statutes, it is hard to see how damages could have been assessed in the same action for any period after the judgment for recovery of dower.

But by the existing statute, the judgment that the demandant is entitled to her dower is but interlocutory; the dower is to be set out by three commissioners appointed by the court; the damages are to be assessed, either by a jury under the direction of the court, or, if the parties so agree, by the commissioners; it is only after the return of the doings of the commissioners has been con-

firmed by the court, that final judgment is to be rendered; and "the demandant shall have execution for the damages assessed, either by the jury or the commissioners, after judgment is rendered therefor." St. 1869, c. 418. The statute does not limit the period for which damages shall be assessed, either by the jury or the commissioners; and we are of opinion that it should extend to the time of final judgment.

This rule does the most complete justice between the parties, and corresponds to that which prevailed in England before our Revolution, when the husband died seised of the premises, in which case the St. of Merton, (20 H. III.) c. 1, provided that the widow should have the whole value of her dower to the day that, by the judgment of the court, she should recover seisin therefor. 2 Inst. 80. The practice was, after judgment for the recovery of dower, to assess the damages by a jury on a writ of inquiry; and they were held to be rightfully assessed, not merely to the time of the first judgment, but to the time of the return of the writ of inquiry, unless the demandant was already in possession by virtue of an execution awarded on the first judgment. *Walker v. Nevil*, 1 Leon. 56. *Thynne v. Thynne*, Co. Lit. 32 b note. *Dobson v. Dobson*, Cas. temp. Hardw. 17; *S. C.* 2 Barnard. 180, 207, 443.

The demandant was therefore entitled to damages to the time of the final judgment. If the parties had agreed that the damages might be assessed by the commissioners, they would have been assessed in one sum for the whole period. No such agreement having been made, damages were assessed by a jury, but only to the time of the interlocutory judgment. The damages for the remainder of the period, not having been assessed either by the commissioners or by a jury, might be assessed by another jury if either party so desired, or, upon the agreement of both parties, as in this case, by the court, and added to those already assessed.

Exceptions overruled.

BOSTON AND ALBANY RAILROAD COMPANY vs. COUNTY
COMMISSIONERS OF HAMPDEN.

Hampden. September 26. — October 22, 1874. WELLS & COLT, JJ.,
did not sit.

Upon a petition to the county commissioners under the St. of 1872, c. 262, § 1, for an alteration in the crossing of a railroad by a highway, a county commissioner, who resides in the city or town in which the crossing is situated, is disqualified by the Gen. Sts. c. 17, § 12, to act, unless a board cannot be organized without him. County commissioners have no power, under the St. of 1872, c. 262, to change the grade of a railroad, where it crosses a highway.

A petition by the directors of a railroad corporation to the county commissioners, under the St. of 1872, c. 262, representing that in their opinion it is necessary for the security and convenience of the public that the method of crossing two streets by their railroad should be altered, and requesting the county commissioners "to prescribe such an alteration as will separate the grade of said railroad from the grades of said streets and allow said streets to pass under said railroad," does not prevent the railroad corporation from objecting that an order passed by the county commissioners upon that petition is invalid, because it undertakes to change the grade of the railroad.

Under the St. of 1872, c. 262, § 2, one of the special commissioners to determine by whom an order of the county commissioners for an alteration in the crossing of a railroad by a highway in a city shall be carried into effect, and the expenses thereof paid, is to be named by the county commissioners, and not by the mayor and aldermen, although the highway is wholly within the city.

Upon a petition of the mayor and aldermen of a city in which a railroad crossing was situated, and of the directors of the railroad corporation, under the St. of 1872, c. 262, § 1, for an alteration of the same, the order of the county commissioners required an alteration in the grade of the railroad. *Held*, that upon the petition of the railroad corporation, filed seven months after that order, but before any award of the special commissioners appointed under § 2, a writ of certiorari should issue to quash the order of the county commissioners.

Under the St. of 1873, c. 355, a writ of certiorari may be ordered to be issued in vacation and returnable forthwith.

PETITION for a writ of certiorari, filed September 9, 1874. The case was heard and reserved by *Endicott, J.*, for the consideration of the full court upon the petition and answer, and the record of the county-commissioners, (a copy of which was annexed to the petition,) and was as follows:

On October 1, 1873, the directors of the Boston and Albany Railroad Company, and the mayor and aldermen of the city of Springfield presented a joint petition to the county commissioners, under the St. of 1872, c. 262, § 1, representing that the petitioners

were of opinion that it was necessary for the security as well as the convenience of the public "that the method of crossing Main and Chestnut streets, in said city, by said railroad should be altered," and requesting the commissioners "to prescribe such an alteration as will separate the grade of said railroad from the grade of said streets and allow said streets to pass under said railroad."

In the proceedings upon that petition, Simeon S. Southworth, one of the special commissioners of the county, acted in the stead of George R. Townsley, one of the county commissioners, who was a resident of Springfield, and therefore, as stated in the record of the county commissioners, disqualified to act.

The commissioners, after notice, view and hearing, on January 31, 1874, adjudged that common convenience and necessity required that the prayer of the petition should be granted, and prescribed the manner and limits within which the alteration should be made, the details of which were stated in their order, and by which the grade of the railroad across Main Street was to be raised ten feet, and across Chestnut Street two and a half feet, and the grade of each street where it crossed the railroad was to be lowered; and named S. A. Bartholomew, a resident and tax payer in Blandford in this county, "as one of three disinterested persons to determine the parties by whom the foregoing decision shall be carried into effect."

Main Street is a highway, part of which only is within the city of Springfield. Chestnut Street is entirely within it, and was laid out as a highway before Springfield was made a city.

The reasons assigned in the petition of the railroad corporation for a writ of certiorari to quash these proceedings were as follows:

"First. Because the statute authorizes only the county commissioners to act on the petition to them; and the said Townsley was not disqualified by residence to act; and the said Southworth had no authority to act in the premises; and the two county commissioners, and the said Southworth acting as a county commissioner instead of the third county commissioner, had no jurisdiction of the petition to the county commissioners, and their acts and orders in the premises are without authority.

"Second. Because the county commissioners have no jurisdiction to change the grade of the railroad of this petitioner, under the statute.

"Third. Because the petition to the county commissioners did not ask for a change of grade of the railroad, but did ask that the streets might pass under the railroad; and under the petition the county commissioners had no jurisdiction to change the grade of the railroad.

"Fourth. Because the county commissioners had no authority to appoint a member of the commission, provided for by the statute, to determine who should carry into effect any order relative to Chestnut Street, or the railroad crossing at Chestnut Street, a street the termini of which are entirely within the city of Springfield.

"Fifth. Because S. A. Bartholomew, named as one of the commission to determine by whom the order aforesaid should be carried into effect, was not and is not a disinterested person within the meaning of the statute, being a resident of and a tax payer in Blandford in the county of Hampden."

A. L. Soule, for the petitioner.

B. F. Thomas & H. Morris, for the respondents.

GRAY, C. J. This is an application for a writ of certiorari to quash the proceedings had upon a petition to the county commissioners, under the St. of 1872, c. 262, for an alteration in the method of crossing Main Street and Chestnut Street in Springfield by the Boston and Albany Railroad.

1. By the express terms of the Gen. Sts. c. 17, § 12, if any part of a road upon which the county commissioners are to act lies within the city or town in which either of them resides, he is disqualified to act thereon (unless a board cannot be organized without him) and one of the special commissioners of the county is to act in his place. A petition to the county commissioners under the St. of 1872, c. 262, is addressed to them in their official capacity. In the present case, the petition required their action upon two streets within the city of Springfield. One of the county commissioners, residing in Springfield, was thereby disqualified to act thereon, and one of the special commissioners rightly acted in his stead. The board of county commissioners was therefore legally organized for the performance of the duties required of it by the St. of 1872. *Tolland v. County Commissioners*, 13 Gray, 12. *Haverhill Bridge v. County Commissioners*, 103 Mass. 120.

2. The next and the most important question in the case is whether the St. of 1872, c. 262, has authorized the county commissioners to change the grade of a railroad at a place where it crosses or is crossed by a highway.

In determining the true interpretation and legal effect of this statute, we must keep in mind several important considerations of a general nature, which have been pointed out in the opinions of this court in similar cases.

The statute is not to be read according to the mere letter, but having regard to the nature of the subject matter, the various interests, public and private, which are to be affected, and the policy and intent of the legislature, as appearing from a comparison of the statute to be expounded with earlier enactments upon the same subject. The much greater weight and speed of the engines and cars moved by steam upon a railroad, than of the wagons and carriages travelling upon an ordinary highway, render it necessary that the railroad should be constructed nearly upon a level, and make it much more practicable, in accommodating the necessities of the one to those of the other, to vary the grade of the highway than that of the railroad. The court of county commissioners is a tribunal which has long been vested by law with various and extensive powers in the laying out, discontinuance and alteration of highways, but which was never before clothed with any authority to alter the grade or location of railroads once constructed. And a change of legislative policy in so important a matter is not to be presumed unless clearly expressed. *Springfield v. Connecticut River Railroad*, 4 Cush. 63, 68. *Roxbury v. Boston & Providence Railroad*, 6 Cush. 424, and 2 Gray, 460. *Boston & Maine Railroad v. Mayor &c. of Lawrence*, 2 Allen, 107. *Mayor & Aldermen of Worcester v. Railroad Commissioners*, 113 Mass. *Lancaster v. County Commissioners*, lb.

A recapitulation of the material provisions of the general railroad act, as existing at the time of the passage of the St. of 1872, will show that the railroad corporation alone was authorized to change the grade of its railroad at a crossing, and that only the grade of the highway and the structures at the crossing were submitted to the regulation of the county commissioners.

Upon the laying out of a railroad across a highway or town way, the railroad corporation was required by the statute, with

out any order of the county commissioners, to make its road so as not to obstruct the way; either by passing over it, leaving a sufficient space to conveniently accommodate the travel upon the way; or by passing under it, building and maintaining such bridges with suitable approaches thereto, as in like manner to accommodate such travel. It was only when the corporation found it necessary to raise or lower the way, or to alter its course, or when the railroad caused an obstruction to the way, or when in the opinion of the county commissioners subsequent alterations of the way or additional safeguards were required at the crossing, that any order of the county commissioners was required or authorized; and such an order was limited to prescribing "what alterations may be made in the way, and the manner and time of making the alterations or structures the commissioners may require at the crossing." Gen. Sts. c. 63, §§ 46-49, 55, 60.

The railroad corporation was required to maintain and keep in repair "all bridges with their approaches and abutments," which it constructed over or under any highway or other way. Gen. Sts. c. 63, § 61.

After a railroad had been laid out and made, the county commissioners might, at the expense of the county, city or town, lay out, or authorize the mayor and aldermen or selectmen to lay out, a way across it, passing over, or under, or, if public necessity so required, upon a level with the railroad; and if over, determining and specifying in what manner the bridge necessary for the crossing should be constructed; and it was expressly provided that "such ways shall be so made as not to obstruct or injure the railroad." Gen. Sts. c. 63, §§ 57-59.

"The original jurisdiction of all questions touching obstructions to turnpikes, highways or town ways, caused by the construction or operation of railroads," was vested in the county commissioners. Gen. Sts. c. 63, § 62. But that section, taken in connection with the other provisions of the statute, related to the raising or lowering of ways, bridges or the like, at railroad crossings, and gave the county commissioners no authority over the location or the grade of railroads. *Springfield v. Connecticut River Railroad*, 4 Cush. 63, 68.

When a highway or town way was crossed by a railroad upon a level therewith, the mayor and aldermen or selectmen, if of

opinion that it was necessary for the security of the public that the way should be raised or lowered, might request the railroad corporation to do so, and, upon its refusal, apply to the county commissioners; and if the commissioners decided that such raising or lowering was necessary for the security of the public, their decision was to be carried into effect by the railroad corporation, or, in case of its neglect, by the mayor and aldermen or selectmen, at its expense. Gen. Sts. c. 63, §§ 53, 54. It was held by this court that such an order of the county commissioners should specify and define the alterations to be made; and that a mere order that the way should be raised above the railroad, without defining the height, the grade of the ascent, the mode and method of the structure, or the time within which the work should be done, was too indefinite to be enforced. *Roxbury v. Boston & Providence Railroad*, 6 Cush. 424, and 2 Gray, 460.

The only case, we believe, in which the county commissioners had any authority over the grade of a railroad, was that in which, before its construction, they might, upon the application of the railroad corporation, or the proprietors of a turnpike, or the mayor and aldermen or selectmen, and if public necessity required it, authorize and require the railroad corporation to construct its railroad, at a crossing, upon a level with a turnpike, highway or town way, in such manner as they might direct. St. 1865, c. 239.

The St. of 1872, c. 262, supersedes and expressly repeals §§ 53, 54, of c. 63 of the General Statutes, and differs from them in its provisions as to the parties who may make the application, those who shall carry the order of the county commissioners into effect, and those who shall bear the expense of the alteration, as well as in the definition of the cases in which the application may be made, and of the power of the county commissioners.

Under the General Statutes, the application to the county commissioners could only be made by the mayor and aldermen or selectmen, and after requesting the railroad corporation to make the desired alterations. Gen. Sts. c. 63, § 53. Under the St. of 1872, the application may be made either by the mayor and aldermen or selectmen, or by the directors of the railroad corporation, and without any previous request. St. 1872, c. 262, § 1.

By the former statute, if the application was granted, the railroad corporation was to pay the costs, and the decision of the

county commissioners was to be carried into effect by the railroad corporation, or, upon its refusal or neglect to do so, by the mayor and aldermen or selectmen at its expense. Gen. Sts. *c.* 63, § 54. By the St. of 1872, a special commission, consisting of three disinterested persons, (one a member of the board of railroad commissioners, and the other two named, the one by the railroad corporation, and the other by the county commissioners if the way is a highway, or by the selectmen or mayor and aldermen if it is a town way, or, in case of neglect of either so to nominate, by the board of railroad commissioners,) is to determine "the party by whom such decision shall be carried into effect," and also "by what party all charges and expenses occasioned by making such alteration, and all future charges for keeping in repair such crossing and the approaches thereto, as well as all costs of the application to the county commissioners, or of the hearing before said commission, shall be borne; or said commission may apportion all such charges, expenses or costs between the railroad corporation and the town, city or county in which said crossing is situated." St. 1872, *c.* 262, §§ 2, 4.

The manifest objects of the changes in the statute, thus far mentioned, were, that, as an inconvenient crossing might injuriously affect the public travel on the railroad as well as that upon the highway, the officers of the railroad corporation should have the same right as the municipal authorities of the city or town in which the crossing was situated to apply directly to the county commissioners for a remedy; and that, as it might be inequitable to charge upon the railroad corporation in all cases the expenses of alterations which might be wholly or in part demanded by the exigencies of the travel on the highway, (increased perhaps by the benefits derived to the neighborhood from the establishment of the railroad,) those expenses might be imposed and distributed upon and between the railroad corporation and the city, town or county, as justice might require.

The remaining changes in the statute may have full effect by considering them as intended to carry out the same objects, without attributing to them the intention of implying a grant to the county commissioners of the unusual power to alter the grade of the railroad, which could have been easily and clearly expressed in a few words if the legislature had so intended. But as they

were much relied on by the learned counsel for the county commissioners, it is proper to examine them with care.

The former statute covered only the case of "a turnpike, highway or town way, crossed by a railroad on a level therewith;" the application could only be made when the applicants were of opinion that it was necessary for the security of the public that the "way should be raised or lowered so as to pass over or under the railroad;" and the county commissioners were to decide whether "such raising or lowering" was necessary.

The St. of 1872 extends to every case in which "a highway or town way crosses or is crossed by a railroad," or a railroad "crosses or is crossed by such way;" application may be made to the county commissioners whenever the applicants are of opinion that it is necessary for the convenience or security of the public "that the approaches to or method of such crossing should in any way be altered;" and the county commissioners shall, when they "decide that such alteration is necessary, prescribe the manner and limits within which it shall be made."

The substitution, for the words "highway or town way crossed by a railroad on a level therewith," of the fuller definition — "a highway or town way which crosses or is crossed by a railroad," or a railroad "which crosses or is crossed by such way" — made the statute embrace all cases in which a highway or town way and a railroad crossed each other, whether upon a level or not, and whether the way or the railroad was uppermost, and whichever was made first.

To some of the cases thus brought within the statute, the limited remedy of the former statute — that the "way should be raised or lowered so as to pass over or under the railroad" — would be inadequate, and a further change of phraseology in this respect was therefore requisite. But even under the more comprehensive and flexible provision of the St. of 1872, it is only "the approaches to or method of such crossing" that shall "in any way be altered;" and it is only when the commissioners decide "that such alteration is necessary," that they are to "prescribe the manner and limits within which it shall be made."

The "approaches" to the crossing, in the common use of the word, relate to the grading of the highway and not to that of the railroad. The word is so used in two sections of the former stat-

ute, already referred to. Gen Sts. c. 63, §§ 47, 61. If the grade of the railroad should be altered, such alteration must of necessity be so gradual, and extended over so long a line, that the part so altered could hardly be distinguished from the rest of the railroad; and it cannot have been intended to include the expenses of keeping in repair any part of the railroad among the "future charges for keeping in repair such crossing and the approaches thereto," which by § 2 of the St. of 1872 may be imposed upon the town, city or county.

"The method of such crossing" and "the manner and limits" of the alteration, though not mentioned in the former statute, yet embrace no more than this court held to be necessary to be specified in an order of the county commissioners requiring a highway to be raised or lowered at a railroad crossing. *Roxbury v. Boston & Providence Railroad*, 2 Gray, 460.

By the Gen. Sts. c. 43, county commissioners have full power to lay out, alter and discontinue highways. By the Gen. Sts. c. 63, § 55, they might authorize the course of a highway or town-way to be altered, for the purpose of facilitating the crossing of the same by a railroad. And the St. of 1872 in terms requires the county commissioners, when they decide that an alteration is necessary, to prescribe "the limits," as well as "the manner," in which it shall be made. And yet it has been decided that they have no authority, upon proceedings under this statute, to change the location of the highway. *Lancaster v. County Commissioners*, 113 Mass. . There is even less ground for inferring an authority in them to change the grade of the railroad, which they had no authority by law to do under any other circumstances, or by any other form of proceeding.

The St. of 1874, c. 305, passed while the case of *Lancaster v. County Commissioners* was pending, amends the St. of 1872 by striking out the words "that the approaches to or method of such crossing should in any way be altered," and inserting in place thereof these words: "that any alteration should be made in such crossing, or in the approaches thereto, or in the method of such crossing, or in the location of the railroad, or in the location of the highway or town way, or in any bridge at such crossing." But the St. of 1874 (whatever its effect may be upon future cases) expressly provides that "nothing in this act con-

tained shall in any wise affect any case now pending or in which proceedings have been commenced ;” and, upon familiar rules of construction of statutes, cannot enlarge the interpretation of the St. of 1872 as applied to proceedings had before the St. of 1874 was passed.

Our conclusion therefore is, that the county commissioners had no jurisdiction under the St. of 1872, *c.* 262, to change the grade of the Boston and Albany Railroad at the crossings of Main Street and Chestnut Street.

3. The petition of the directors of the railroad corporation and the mayor and aldermen of the city asks the county commissioners “ to prescribe such an alteration as will separate the grade of said railroad from the grades of said streets and allow said streets to pass under said railroad.” This points rather to a change in the grade of the streets, so as to allow them to pass under the railroad at its existing grade, than to a change in the grade of the railroad ; and certainly does not so distinctly suggest the latter as to prevent the railroad corporation from afterwards objecting that to change the grade of the railroad was beyond the jurisdiction of the county commissioners.

4. As Main Street and Chestnut are both highways, and not town ways, it is immaterial that one of them is wholly within the city of Springfield ; and it was for the county commissioners, and not the mayor and aldermen, to name one of the special commission of three disinterested persons, under St. 1872, *c.* 262, § 2.

5. There is nothing in the petition of the railroad corporation for a writ of certiorari, or in the answer or record of the county commissioners, upon which this case has been submitted to our determination, to support the suggestion, made in behalf of the respondents at the argument, that the railroad corporation, by naming one of the special commission, has consented to the order of the county commissioners and waived any right to object to it for want of jurisdiction.

6. It was argued that the railroad corporation, in neglecting for seven months since the passage of the order of the county commissioners, to apply for a writ of certiorari, had been guilty of such laches that the writ should not be granted. But as that order exceeds the lawful jurisdiction of the county commissioners, and has not been carried into effect, and the special commission

has not even determined the parties by whom it shall be carried into effect, and indeed is not authorized by law to direct any party to make, or to pay the expense of making and maintaining, a change in the grade of the railroad, which is an essential and inseparable part of the order of the county commissioners, the delay affords no reason for allowing that order to stand.

The writ of certiorari must therefore issue as prayed for. The question whether the proceedings of the county commissioners shall be merely quashed and set aside, or the commissioners be directed to proceed anew according to law upon the original petition, will be a matter proper to be considered upon the return of the writ. Gen. Sts. c. 145, § 9. *Lowell v. County Commissioners*, 6 Allen, 181.

By the former practice in cases of certiorari and mandamus, although the hearing upon the petition for the writ might be had in any county, and usually involved a consideration of the whole merits of the case, yet such hearing was had only at a regular term, and the writ, if issued, was made returnable at the next term of the court in the county in which the tribunal was established to which it was addressed. *Taylor v. Henry*, 2 Pick. 397, 400. The delay thereby occasioned was a cause of so much inconvenience, that it is now provided by statute that the petition for either of these writs may be presented, heard and determined in any county, in term time or vacation; and the writ "may be issued from the clerk's office in any county, and be made returnable as the court shall direct." St. 1873, c. 355. Under the power thus conferred, it is ordered that the writ issue from the clerk's office in Hampden, returnable forthwith in the same county.

Writ of certiorari to issue.

LEWIS J. POWERS *vs.* CITY COUNCIL OF SPRINGFIELD.

Hampden. September 26, — October 22, 1874. WELLS & COLT, JJ.
did not sit.

While a petition of the mayor and aldermen of a city in which a railroad crossing is situated, and of the directors of the railroad corporation, to the county commissioners under the St. 1872, c. 262, for an alteration of the crossing, so as to allow the highway to pass under the railroad, is pending, the mayor and aldermen are not authorized to join with the common council in changing the grade of the highway at the same place, even with the consent of the railroad corporation; and a writ of certiorari to quash an order of the city council to that effect will be granted upon a petition filed by an abutter, before any work has been done under the order.

PETITION filed August 31, 1874, for a writ of certiorari, to quash proceedings of the city council of Springfield. The petition set forth the proceedings of the county commissioners, stated in the next preceding case, *ante*, 73, and further alleged that pursuant to the St. of 1872, c. 262, § 2, the Boston and Albany Railroad Company named Isaac Hinckley, of Philadelphia, one of the commission of three disinterested persons therein mentioned, and the board of railroad commissioners designated a member of that board as one of said commission, and the three persons named as aforesaid accepted the appointment and entered upon the duties thereof, and the matters by said statute committed to them were still pending before them.

The petition of Powers further alleged that upon a petition presented on May 9, 1874, by Henry Fuller and others, citizens of and freeholders in Springfield, to the city council of Springfield, and after reference to and report from the board of public works of the city, the city council, a body composed of the board of aldermen and the common council of the city, on July 20, 1874, ordered the grade of Main Street between the tracks of the Boston and Albany Railroad to be raised four feet above the top of the rails, and to the north and south of the railroad so as to fall from the railroad regularly to the present grade of Main Street, and awarded damages to be paid to Powers (who owned a lot of land adjoining the crossing and bounded northerly by the railroad and westerly by Main Street) and other abutters on the part of Main Street the grade of which was so altered.

The reasons assigned in the petition of Powers for a writ of certiorari to quash the proceedings of the city council were that the city council had no jurisdiction in the premises, and that its order was in conflict with the jurisdiction of the county commissioners, and in contravention of the order of the county commissioners on the same subject matter, and of the jurisdiction and duty of said commission of three disinterested persons.

The answer of the city council to this petition for a writ of certiorari admitted the facts stated in the petition ; but denied its conclusions of law ; and alleged that the proceedings upon the petition to the county commissioners were illegal and void, for the same reasons as stated in the petition of the railroad corporation for a writ of certiorari, *ante*, 73, and also because Hinckley, not being a resident of the Commonwealth nor within the jurisdiction of this court, was incompetent to act as one of the special commission ; that, even if all those proceedings were legal, yet, until the special commission should have made and published its award, which they had not done, the order of the county commissioners was and would be inoperative, and the city council of Springfield had full and exclusive jurisdiction of alterations and changes of grade of streets within the limits of the city, and of streets extending beyond the city, so far as it could be exercised without infringing the rights of any railroad corporation whose railroad crossed the streets ; and that the order of the city council was made with the assent of the Boston and Albany Railroad Company, and with its agreement to raise its railroad at the crossing to conform to the new grade of Main Street whenever the order of the city council should be carried into effect.

At the hearing before *Endicott*, J., it appeared that the Boston and Albany Railroad Company assented to the change of grade of Main Street by the city council, and agreed to raise its railroad four feet at the crossing ; and that no work had been done on Main Street when the petition of Powers for a writ of certiorari was filed and served. The case was reserved on the petition and answer and these facts for the determination of the full court.

B. F. Thomas & H. Morris, for the petitioner.

A. L. Soule, for the respondents.

GRAY, C. J. The city council of Springfield has general jurisdiction of the subject of altering highways in the city. Sts. 1852,

c. 94, § 14; 1872, c. 884, § 4; 1873, c. 126, § 1. *Day v. Aldermen of Springfield*, 102 Mass. 310. And we have no doubt that this jurisdiction extends to those portions of the highways which lie at and near railroad crossings, provided that no alteration is made in the grade of a railroad except by the consent of the railroad corporation, and that no other tribunal has previously acquired jurisdiction of the raising or lowering of the highway at the particular crossing in question, by proceedings duly commenced and not legally discontinued or determined.

But the mayor and aldermen of Springfield had joined with the directors of the Boston and Albany Railroad Company in a petition to the county commissioners, within the jurisdiction conferred upon them by the St. of 1872, c. 262, to change the grade of Main Street at this crossing, and proceedings upon that petition are still pending. All the objections made in the present case by the city council to the validity of those proceedings have been considered by the court in the case of *Boston & Albany Railroad v. County Commissioners*, ante, 73, except those relating to the qualifications of the persons nominated as members of the special commission to determine by what parties the order of the county commissioners shall be carried into effect and the expenses thereof paid; and if either of those nominations was illegal, it would not affect the jurisdiction of the county commissioners over the original petition, in case they shall be permitted to proceed thereon, by the final judgment of this court upon the writ of certiorari issued to them.

The jurisdiction of the county commissioners, having first attached to the subject of the alteration of the grade of Main Street at the railroad crossing, necessarily excluded the jurisdiction of any other tribunal over the same subject until those proceedings were ended. *Stearns v. Stearns*, 16 Mass. 167. *Foster v. The Richard Busteed*, 100 Mass. 409, 411. And that principle applies with peculiar force to this case, in which the mayor and aldermen, after joining with the directors of the railroad corporation in invoking the action of the county commissioners, have undertaken, with the assent of the same corporation, and the concurrence of the common council, to nullify and defeat by their own act the proceedings which they had set in motion.

The order of the city council was therefore irregular, and liable to be avoided and set aside by writ of certiorari upon the petition, seasonably filed, of any party whose interests are injuriously affected thereby. *Dwight v. City Council of Springfield*, 4 Gray, 107. Any person whose property will be injured by the proposed change in the grade of the street, and who applies for relief before the order complained of has been so far executed as to affect the interests of other persons or of the public, is entitled to a decision of the court upon the question which of the two proceedings upon the subject is lawful and regular, in order that he may proceed in due form of law to secure his rights, by application for damages or otherwise.

As it appears that the petitioner owns an estate abutting on that part of Main Street the grade of which is proposed to be altered, and that no work upon that street has yet been done under the order of the city council, the

Writ of certiorari must issue.



GEORGE H. NOYES vs. CITY COUNCIL OF SPRINGFIELD.

Hampden. September 26. — October 22, 1874. WELLS & COLT, JJ., did not sit.

A writ of certiorari to quash an order of a city council, altering the grade of a highway at a railroad crossing, and awarding damages to the abutters, passed pending proceedings before the county commissioners for the same object, will not be granted upon a petition filed by an abutter after the work under the order has been, with his knowledge, commenced and prosecuted for more than a month and nearly to completion

PETITION filed August 31, 1874, for a writ of certiorari, to quash an order of the city council of Springfield, passed July 20, 1874, lowering the grade of Chestnut Street at and near the crossing of the same by the Boston and Albany Railroad, and awarding damages to the abutters, of whom the petitioner was one. The case was heard and reserved with that of *Powers, ante*, 84, and was substantially like that case, except that the only hearing upon the question of the assessment of damages, notice of which was

served upon the petitioner, was before the board of public works, and prior to the order passed by the city council on the report of that board; that the city began to cut down Chestnut Street on July 29, and on September 2, when this petition was served, had removed eleven thousand cubic yards of earth, being about eleven thirteenths of the whole amount which would have been removed in completing the work called for by the order of the city council; that it would cost \$5500 to replace the street in the condition in which it was before the work was begun; and that the petitioner knew of the commencement and progress of the work.

H. Morris, (B. F. Thomas with him,) for the petitioner.

A. L. Soule, for the respondents.

GRAY, C. J. This case differs from that of *Powers v. City Council of Springfield*, ante, 84, in an essential point. The order of the city council, lowering the grade of Chestnut Street, was not void, but voidable only, and cannot be avoided except by writ of certiorari, and upon the petition of a party entitled to relief. It appears by the report of the justice of this court before whom the case was heard, that this petitioner, with full knowledge of the proceedings before the city council and its order thereon, has allowed the work to proceed under that order so far, that it has been nearly completed, and the street cannot be restored to its original condition without the expenditure of a large sum of money. His petition for a writ of certiorari to quash that order, being addressed to the discretion of the court, should not therefore be granted. *Whately v. County Commissioners*, 1 Met. 336. *Eaton v. County Commissioners*, 7 Gray, 109, 112. *Pickford v. Mayor & Aldermen of Lynn*, 98 Mass. 491. *Petition dismissed.*

GEORGE C. FISK & others vs. CITY OF SPRINGFIELD.

Hampden. September 26. — October 22, 1874. WELLS & COLT, JJ., did not sit.

The validity of an order of a city council, for the alteration of a highway and the payment of damages occasioned thereby, can only be impeached directly by petition for a writ of certiorari, and not collaterally by petition in equity to restrain the appropriation and payment of money under it.

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PETITION IN EQUITY filed August 27, 1874, under the Gen. Sts. c. 18, § 79,* by ten taxable inhabitants of Springfield, to restrain the city council and all officers, agents and servants of the city, from carrying out the orders of the city council for the payment of money, or borrowing money on the notes of the city to pay for the damages caused by the alteration of the grades of Main Street and Chestnut Street in accordance with those orders, the substance of which is stated in the cases of *Powers & Noyes v. City Council of Springfield*, ante, 84, 87. The city demurred to the petition, and the case was thereupon heard and reserved by *Endicott, J.*, for the determination of the full court.

A. L. Soule, for the respondent.

H. Morris, (*B. F. Thomas* with him,) for the petitioners, cited *Cooley v. Granville*, 10 Cush. 56; *Hood v. Lynn*, 1 Allen, 103; *Frost v. Belmont*, 6 Allen, 152; *Copeland v. Huntington*, 99 Mass. 525.

GRAY, C. J. The city council of Springfield being a tribunal having general jurisdiction of the subject of altering the grade of highways in the city, (as has been decided in the cases of *Powers & Noyes v. City Council of Springfield*, ante, 84, 87,) the validity of its orders as to such alterations of Main Street and Chestnut Street, and the payment of damages therefor, can only be impeached directly by a petition for a writ of certiorari to quash them, and not collaterally by a petition in equity to restrain the appropriation and payment of money under them.

Petition dismissed, with costs.

* "When a town votes to raise by taxation or pledge of its credit, or to pay from its treasury any money, for a purpose other than those for which it has the legal right and power, the Supreme Judicial Court may, upon the suit or petition of not less than ten taxable inhabitants thereof, briefly setting forth the cause of complaint, hear and determine the same in equity."

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TERENCE L. CURRAN vs. THE HOLYOKE WATER POWER COMPANY.

Hampden. September 21. — October 23, 1874. MORTON & ENDICOTT, JJ., absent.

The right of a person to specific performance, who has made an oral agreement for the purchase of a parcel of land for a building lot, and who, having paid the full consideration, has entered into possession, and erected a substantial building thereon, is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of the circumstances of the case.

When a bill in equity is brought for specific performance of a contract for the sale of land, the rights of persons not parties to the contract sought to be enforced, are equitable considerations to be regarded in adjudicating the rights of the parties to the contract, although such rights vested after the contract was made.

BILL IN EQUITY to enforce specific performance of a contract for the sale of a parcel of land in Holyoke. The case was reserved by *Morton, J.*, for the consideration of the full court, upon the bill, answer and a report of a master, and is stated in the opinion.

M. P. Knowlton, for the plaintiff.

N. A. Leonard, for the defendant.

WELLS, J. The plaintiff seeks to enforce specific performance of an oral agreement for the sale and conveyance to him of a parcel of land for a building lot in Holyoke. That such an agreement was made is clearly proved and admitted; also that the plaintiff has paid the full consideration, has gone into possession, and has erected a substantial building upon the lot, in good faith, relying upon the permission of the defendant that he should do so without waiting for the delivery of a deed. The bargain was for a lot with its front upon Park Street, between Adams and Sargeant streets, and adjoining a lot previously sold by the defendant to one McCabe. The plaintiff claims that his lot extends to a line which would leave Park Street fifty feet wide. The defendant contends that the front line should be ten feet further back, leaving Park Street sixty feet wide; and is ready to convey to the plaintiff the lot so bounded.

The master, to whom the case was referred to find and report the facts, does not find what the actual agreement was in this particular; but reports that "At the time of making said bargain a

plan was shown the plaintiff of the lots, on which the line of Park Street was exhibited " drawn so as to make Park Street sixty feet wide, measuring by the scale. He also reports other facts and circumstances from which it might be inferred that the plaintiff supposed his purchase included the ten feet in dispute; and perhaps also that such was the understanding and intention of both parties. But, in the absence of any direct finding of the master upon the point, we do not think the facts and circumstances reported by him, establish the claim of the plaintiff, that such was the original agreement, with that degree of certainty which is required for a decree of specific performance by a conveyance of the land.

It appears however that, subsequently to the oral agreement, the engineer of the defendant, being directed for that purpose by the defendant, at the plaintiff's request, staked out the lot for him, in accordance with his present claim, and he proceeded to erect a building upon the front line so indicated. A deed and mortgage back were prepared and executed; but the deed has not been delivered, for the reason that the defendant discovered this error in the front boundary, as is alleged, and has since refused to deliver it without correction of the alleged error.

Since the agreement of sale was made, the defendant has conveyed to other parties other lots between Adams and Sargeant streets, bounding them upon the line of East Street, which connects with Park Street at a slight angle, at or near the front of the plaintiff's lot. The master reports that "at the time said bargain was made the company contemplated changing, or had changed the line of Park or East Street," so that the new line of East Street, upon which the lots so conveyed to other parties were bounded, would meet the line of Park Street, if only fifty feet wide, at or near the corner of McCabe's lot, cutting off a small piece of the front of the plaintiff's lot, as claimed by him; but if Park Street were to be kept at the width of sixty feet, the two lines would meet near the opposite side of the plaintiff's lot. At that corner the plaintiff's lot, as staked out and built upon by him, projects into the street nearly ten feet in front of the new line of East Street.

The defendant when refusing to deliver a deed in conformity with the claim of the plaintiff, and also by the answer to the suit,

and at the hearing before the master, has offered to make reasonable compensation to the plaintiff, not only by moving back his building, but also by paying him for the land claimed by him, which is cut off by the line of the street. This the plaintiff refuses to accept; but does not show that he may not thus be fully indemnified. His right to a specific performance of the agreement is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the case. (This would be so even if the agreement were fully and satisfactorily made out precisely as claimed by him.

* It is manifest that, if the agreement was so made, it was by inadvertence, the defendant at the time not perceiving the interference with the contemplated lines of East Street. The rights of other parties who have in good faith purchased lots upon East Street, and, as the defendant alleges, have erected buildings thereon, have intervened; and although those rights are subsequent in time, and therefore subordinate to those of the plaintiff, yet they furnish equitable considerations to be regarded in adjudicating the rights between the parties to this suit. If the plaintiff can have full and complete indemnity upon his contract otherwise, equity does not require that he should have specific performance by which he will inflict great and unnecessary injury upon other persons who are in no way responsible for the position in which he is placed. *

We are of opinion therefore that specific performance should be refused, unless the plaintiff will accept a conveyance with boundaries conforming to the line of East Street, and with compensation for the land cut off by that line and for the damages occasioned by the necessity of removing his building from the limits of the street. If he shall elect to accept such conveyance and compensation, a decree may be entered accordingly, and a master appointed to see to its execution and to determine the amount of such compensation, and the mode in which it shall be rendered. Otherwise he will be remitted to his action at law for damages upon the entire contract, and this bill will be

Dismissed. j.

JOHN DOWD vs. INHABITANTS OF CHICOPEE.

Hampden. September 21. — October 28, 1874. MORTON & ENDICOTT, JJ., absent.

In an action under the Gen. Sts. c. 44, § 22, against a town for an injury resulting to a traveller; it appeared that the alleged defect in the highway consisted of two bolts, each five eighths of an inch in diameter, standing vertically an inch and a half or an inch and three quarters in height above an iron plate forming the cover to a sewer which they served to keep in place; that the plaintiff struck his foot against one of the bolts, fell and injured his knee against the other. The question whether the bolts were in the line of travel for foot passengers was in dispute. *Held*, that it was a question for the jury whether there was any defect in the highway for which the defendant was liable.

In an action by a boy fifteen years old against a town, to recover for injuries sustained from a defect in the highway, the plaintiff must show that he exercised that degree of care and attention which might fairly and reasonably be expected from boys of his age and capacity; and he is not bound to exercise the same care as is required of an adult.

TORT under the Gen. Sts. c. 44, § 22, for personal injuries sustained through an alleged defect in a highway which the defendant was bound to keep in repair.

At the trial before *Morton, J.*, the jury found for the plaintiff and a bill of exceptions was allowed in substance as follows: It appeared in evidence that the plaintiff, a lad of fifteen years of age, on the evening of June 12, 1872, while it was dark, was travelling on foot along the highway in question, and, coming upon the alleged defect, fell and received the injury complained of. The highway, from one outside limit to the other, was fifty-five feet wide; upon either side of it dwelling-houses were situated close together and close to the line of the highway, and the immediate vicinity was thickly settled.

The plaintiff also testified that the street in question was one of the greatest business streets in the town; that there was a large school-house fitted for some 250 scholars, within a few rods of this place; that school was kept therein during school hours, and the school children passed all over the street; that a Catholic church was being built near it; that there were no cross-walks, and people crossing from one side of the street to the other were accustomed to cross at all places over the street.

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The alleged defect consisted of two bolts, each five eighths of an inch in diameter, standing vertically an inch and a half or an inch and three quarters in height above a perforated iron plate, which formed the cover to a sewer ; these bolts were used to hold the plate in place, and iron nuts half an inch thick were screwed on the bolts down upon the plate, the bolts extending an inch to an inch and a quarter above the nuts. The plate was two feet square, and the bolts were twenty inches apart. This plate was placed nine feet from the southerly limit of the highway. The highway extended along the side of a steep, sandy hill, down which the water often ran in great quantity over the highway ; to protect the highway from washing away at such times, and to guard the land below, the sewer was constructed.

The evidence as to the description and common use of the said highway was conflicting. Several witnesses testified that from one side to the other it was substantially flat ; that there were no sidewalks or gutters ; that carriages as well as foot passengers travelled over the whole width of the way ; that people in the ordinary line of travel, in carriages or on foot, passed as well over said plate as over any other portion. Several other witnesses testified that an earth sidewalk, well defined, eight feet wide and six to eight inches high above the carriage way, extended along both sides of said way ; that the carriage way between said sidewalks was thirty-nine feet wide ; that the plate was in the bottom of the gutter six inches below the level of the sidewalk, and ten inches below the middle of the carriage way ; that said gutter extended several rods in either direction from the plate, and that the lines of carriage and foot travel were entirely distinct.

There were no posts or trees along the line of said gutter. The plaintiff for several years before had resided a few rods from the place where he received the injury, was familiar with the place, knew where the sewer was, and had noticed the plate and bolts several times before. He testified that while walking along in company with another boy, not thinking anything about the sewer plate, he hit his foot against one bolt, and, falling forward, struck his knee upon the other bolt and was injured. There was evidence which the defendant contended tended to show that the plaintiff was engaged in play at the time of the accident, and that he was not in the exercise of due care as a traveller.

The defendant conceded that the plaintiff was of suitable age to be upon the street as he was; that there was no want of care upon the part of any one in permitting him to be out upon the street at the time he was; and that he was a boy of the ordinary capacity of boys of his age.

After the evidence was all in, the defendant asked the court to rule as follows: "1. The drain cover, with the nuts and bolts used to fasten it down, placed in the highway at the point and in the manner described, was not a defect or want of repair for which the town was liable. 2. On all the evidence in the case the jury would not be warranted in finding that there was any defect in the highway, for which the town was liable. 3. The degree of care required of the plaintiff is such care as persons of common prudence exercise, and the same rules are to be applied to children as to adults, in regulating the use of the highway for the purpose for which it was designed."

The court declined to give these rulings; but instructed the jury that it was in this case for them to determine on all the evidence whether there was any defect, and if so, whether it was such a defect or want of repair as would render the way unsafe for travellers who were using it while in the exercise of due care; that if the plaintiff was engaged in play at the time of the injury he could not recover; that if he was using the street as a traveller, he must show that he was in the exercise of due care; and that due care was such care as is usually and ordinarily exercised by boys of his age and capacity, using the ordinary prudence of boys of that age. The defendant alleged exceptions.

G. D. Robinson, for the defendant.

G. M. Stearns, for the plaintiff.

AMES, J. In that class of cases cited by the defendant, in which the court has decided as a matter of law that the evidence failed to prove a defect in a way, the precise position and characteristics of the alleged impediment or obstruction were not matters of controversy. Thus in *Raymond v. Lowell*, 6 Cush. 524, it was held that a sewer grate, resting against the edge of the curbstone of a sidewalk and projecting an inch or two above it, was not a defect for which a person who chose to cross the street at that point, and in so doing tripped over the grate and fell, could recover damages. In *Macomber v. Taunton*, 100 Mass.

255, a post at the edge of the sidewalk, and not in the carriage path, was held not to be a defect, it appearing that the carriage path was of ample width and in good repair. In the present case it was an open question whether the sewer plate was in a proper place; some of the witnesses testifying that it was in the gutter and close to the edge of the sidewalk, while others described the way as substantially flat, without sidewalk or gutter, and said that the ordinary line of foot travel was over the covering plate. It is impossible for the court upon this report to say that it was not so situated and of such a character that a traveller using due care might be exposed to injury by stepping against it. The court therefore rightly submitted the question to the jury, and refused the first and second requests of the defendant. *Ghenn v. Provincetown*, 105 Mass. 313. *Brooks v. Somerville*, 106 Mass. 271.

Upon the question of due care on the part of the plaintiff, the court was requested in substance to instruct the jury that the same rule is to be applied to children as to adults. This request was properly refused. The streets and highways are intended for the use of travellers generally, and boys of the age of this plaintiff have the same right to travel in them as persons of maturer years. It cannot be contended that a boy of fifteen, by reason of his youth, is an unfit person to be in the street without an attendant or guardian. "If it was proper for him to be there, it was only necessary for him to exercise such capacity as he had." *Lynch v. Smith*, 104 Mass. 52. The rule which the defendant was entitled to insist upon as governing this branch of the case was that the plaintiff should be held bound to prove that he exercised that degree of care and attention which may fairly and reasonably be expected from boys of his age and capacity. *Elkins v. Boston & Albany Railroad*, 115 Mass. 190. This is substantially the instruction that was given, the only difference being that it refers to experience and ordinary practice as furnishing the test of what may properly be expected. As an answer to the specific point presented by the defendant's request, it was all that the case required.

Exceptions overruled.

NANCY P. MORLEY vs. EASTERN EXPRESS COMPANY.

Hampden. September 22. — October 28, 1874. MORTON & ENDICOTT, JJ., absent.

Evidence that A. delivered a box containing his property to a common carrier at one town to be carried to another town; that the box was directed to B. at the latter town; that A. had made efforts to find the box, but had not been able to do so; that he had made inquiries at both towns at the offices of the carrier; that he had not seen the box since he sent it; that he had inquired of B. about the box; is not sufficient evidence to maintain an action by A. against the carrier for the value of the box and its contents, although the defendant put in no evidence.

CONTRACT, to recover the value of a box and its contents, delivered to the defendant at Lewiston, in the State of Maine, to be carried to Dexter, in the same state.

Trial in the Superior Court, before *Putnam, J.*, who, after a verdict for the plaintiff, allowed the following bill of exceptions:

"No question was made as to the delivery of the package to the defendant company, or that it was a common carrier. The plaintiff offered no other witness than herself, and she testified as follows:

" 'I had worked at Lewiston in the mills. I left there August 17, 1869. I boxed up the goods in question, which were my own and mostly my wearing apparel, in a large box, which was nailed and fastened with cleats, and delivered it to the defendant's office in Lewiston. The box was marked Edward Gough, Dexter, Maine. I have made efforts to find the box, but have never been able to do so. I have made inquiries at Lewiston and Dexter, at the offices of said express company, for this box. I have not received it or heard from it since. I made inquiries of the agent. I asked Edward Sands. He was in the express office. He was writing in the office. No one else was in charge. I also made inquiry of Gough about the box. I have not seen it since I sent it.' The rest of her testimony related only to the value of the contents of the box. No testimony was offered by the defendant.

"Upon this evidence the defendant asked the court to rule that the plaintiff had not offered sufficient proof to sustain her case. But the court refused, and submitted the case to the jury under instructions. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions."

N. A. Leonard & G. Wells, for the defendant.

G. M. Stearns & M. P. Knowlton, for the plaintiff, cited *Morse v. Connecticut River Railroad*, 6 Gray, 450; *Ingledeu v. Northern Railroad*, 7 Gray, 86.

WELLS, J. There was no evidence that the box had not been delivered to Gough, according to the directions with which it was sent by the plaintiff. Giving the fullest effect to the testimony of the plaintiff, it had no more tendency to show that the box was withheld or had been lost by the defendant than by Gough. The burden in this respect was upon the plaintiff, and she failed to maintain it. *Smith v. First National Bank in Westfield*, 99 Mass. 605. *Exceptions sustained.*

EBENEZER B. WALKER *vs.* ALBERT CURTIS.

Worcester. September 30. — October 1, 1874. COLT & MORTON, JJ.,
absent.

The findings of a judge presiding at a trial upon preliminary questions of fact material to the competency of evidence introduced at the trial are not open to revision in this court.

Memoranda made by a surveyor as the results of his examinations and calculations, and minutes which help to explain such memoranda, made by him in the scope of his employment by one of the parties to an action with the consent of the other, are admissible in evidence after the death of the surveyor.

In an action to recover for digging a pit for a dam at a certain price for each yard of earth removed, the number of yards of earth was in dispute. The plaintiff put in evidence his books, to show the whole number of days' work done on the pit, an estimate by his foreman of how many days should be deducted from the aggregate on account of workmen not engaged in digging, and an estimate of the number of yards one man would dig in a day. *Held*, that the evidence was competent.

CONTRACT on an account annexed. Writ dated July 24, 1872. Trial in the Superior Court, before *Allen, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions in substance as follows :

The question raised at the trial was in regard to the fourth item of the plaintiff's account, in which he sought to recover \$3361.40 for excavating 9604 yards of earth, at 35 cents a yard. The defendant admitted his liability to pay the price charged per

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yard for whatever earth the plaintiff excavated, at the time and place alleged, but contended that the amount stated in the account was largely in excess of the amount really excavated. It appeared in evidence that the defendant employed the plaintiff to do the earth work of a dam, at the outlet of Ramshorn pond in Sutton, and that John B. Pratt was employed by the defendant, with the consent of the plaintiff, to act as surveyor. Pratt made certain surveys of the piece of land from which earth was to be excavated before the work began, but not in the presence of either of the parties to this suit, nor were his figures or estimates seen, or assented to by them, except as hereinafter appears.

After the work was completed, Pratt again went upon the ground with a man whom the plaintiff had employed as foreman, but it did not appear that he was then in the plaintiff's employment, and made cross sections of the bottom of the pit. This was done without the knowledge of the defendant. He then sent to each of the parties a paper, signed by him, containing a statement of the cubic contents of the pit, as follows: "I certify that the pit excavated by E. B. Walker at the Ramshorn Dam contains 10,281 cubic yards." The defendant at once objected to this estimate as too large, and so informed the plaintiff and Pratt, whereupon Pratt sent another written statement, signed by him, to each of the parties, differing from the first, a copy of the one sent the plaintiff being as follows: "Oxford, July 20, 1872. Dear Sir: In reviewing the work on the Ramshorn Dam, I discovered that in my hurry I included 677 yards which were removed by the day, by the side of the road, which should be deducted from the 10,281, leaving 9604 yards. I have informed Mr. Curtis of the error by mail to-day." The defendant immediately objected to the second estimate as too large, and refused to settle with the plaintiff upon it, and employed another surveyor to measure the pit. In August, 1872, Pratt died.

At the trial the plaintiff offered in evidence to show the amount of earth excavated, the copies of the above statements sent to him by Pratt which were in Pratt's handwriting. He also offered two papers and evidence that the figures upon them were in Pratt's handwriting. These papers were found among Pratt's papers after his decease, in an envelope indorsed

in the handwriting of Pratt, "Ramshorn Dam cross section for Albert Curtis." They appeared to be two plans, one of the surface of the ground before the earth was removed, divided into cross sections with the elevation marked at each corner of the sections with reference to a bench mark, and marked in the handwriting of Pratt, "Cross sections for Ramshorn Dam;" the other of the bottom of the pit divided in the same manner into sections, with the elevation given at the corner of each section, of the surface above the bottom at that point. The plaintiff offered the evidence of an engineer tending to show that the elevations and lengths of lines upon the said two plans corresponded exactly with the banks of the pit as remaining on two sides, the other two sides of the pit having been removed. The defendant offered evidence tending to show that these elevations and length of lines did not so correspond. Pratt's field notes or original measurements were not offered in evidence.

The defendant objected to the introduction of these papers and plans including the one first sent, which stated the contents of the pit; but they were admitted, and the plaintiff was allowed to put in evidence the computations of an engineer of the contents of the pit, computed upon the basis of the various measurements and elevations upon said plans. The defendant offered the evidence of an engineer who had computed the contents of the pit on the basis of the said plans and figures of Pratt, and had drawn plans and profiles of the premises on the same basis, and evidence tending to show that the surface could not have been as high as said engineer's plans and profiles showed it must have been if Pratt's figures were correct. The engineers on both sides testified that the best way to obtain with accuracy the contents of a pit is to take the level of the surface before the excavation, and after the excavation to take the level of the bottom of the pit, and that such is the usual and proper method.

The plaintiff further offered to show the whole number of days' work done on the pit, as shown by his books, an estimate by his foreman how many days should be deducted from the aggregate on account of drivers and other workmen not digging, and an estimate of the number of yards one man would dig in a day; to which the defendant objected, but the evidence was admitted.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

F. T. Blackmer, for the defendant.

H. B. Staples & F. P. Goulding, for the plaintiff.

GRAY, C. J. The findings of the presiding judge upon preliminary questions of fact material to the competency of evidence introduced at the trial are not open to revision in this court, and the bill of exceptions does not show that either of his rulings was erroneous in matter of law.

1. If the papers in Pratt's handwriting were memoranda of the results of his examinations and calculations; or minutes which helped to explain such memoranda made by him, in the scope of his employment as surveyor under the agreement of both parties to this action, they might properly, he being dead, be admitted in evidence. *Kennedy v. Doyle*, 10 Allen, 161, 166, 168. *Washington Bank v. Prescott*, 20 Pick. 339. *Jones v. Howard*, 3 Allen, 223. *Eastern Union Railway v. Symonds*, 5 Exch. 237.

2. The plaintiff's books do not appear to have been admitted as independent evidence of the whole number of days' work, but in connection with his foreman's estimates of the number of yards one man would dig in a day, and how many yards should be deducted from the aggregate on account of some of his men not being actually occupied in digging. Such estimates, made by a witness of competent knowledge, might be submitted to the consideration of the jury. *Carpenter v. Wait*, 11 Cush. 257. *Holyoke Paper Co. v. Conklin*, 2 Allen, 326. *Cornell v. Dean*, 105 Mass. 485. *Miller v. Smith*, 112 Mass.

Exceptions overruled.



TIMOTHY W. NOURSE vs. BENJAMIN NOURSE.

Worcester. September 30. — October 2, 1874. COLT & MORTON, JJ.,
absent.

A. for the purpose of defrauding his creditors made a mortgage of land to his father and brother, and caused the deed to be recorded. Afterwards he had a certificate of peaceable entry and possession by the mortgagees, for breach of the condition of the mortgage, written upon it. The mortgage was never delivered to the mortgagees. The father afterwards died. *Held*, on a petition for partition brought by the brother against A., that the respondent was not estopped either by the deed or

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in pais. Held, also, that it was not competent for the respondent to put in evidence his own declarations made to a third party, in regard to the purpose with which he had, two months before, made and recorded the mortgage, and in regard to its delivery or non-delivery.

PETITION, filed May 28, 1874, for partition of three tracts of land. Trial in the Superior Court, before *Allen, J.*, who, after a verdict that the petitioner held two of the tracts in common with the respondent, but not the last tract described in the petition situated in Oakham, allowed a bill of exceptions in substance as follows :

The petitioner introduced the following evidence. On June 2, 1864, the respondent made a mortgage of the tract of land last mentioned and described in the petition to his father, Timothy Nourse, and his brother, the petitioner, to secure the payment of a note of the same date for two thousand dollars on demand with interest. The mortgage was duly recorded in the registry of deeds, June 6, 1864. On August 6, 1864, the respondent indorsed on the mortgage a certificate, signed by him, of peaceable entry and possession of the premises for breach of condition of the mortgage and for the purpose of foreclosing the same, which was duly recorded on August 9, 1864. Timothy Nourse, the father, died intestate in 1868, and the petitioner died intestate in March, 1872, and this suit is being prosecuted by his heirs. The petitioner claimed to hold the land above mentioned by foreclosure of said mortgage.

The respondent contended that the mortgage was made without consideration and to keep his property from attachment, and that it never was delivered to the mortgagees or either of them ; and against the petitioner's objection was permitted to introduce the following evidence, the petitioner contending that the respondent was estopped to deny the delivery of the mortgage : The respondent testified that he was threatened with an attachment of his property, and that he made and executed the mortgage for the purpose of covering his property from attachment ; that when the mortgage was made neither of the mortgagees was present or knew anything of it, or had ever had any conversation in regard to it, or had ever paid anything for it ; that he sent the mortgage himself to have it recorded, with instructions to have it returned to himself ; and that in a day or two after, and while

the mortgage was at the registry for record, he took the note to his father, and told his father that he had put the property into his and his brother Timothy's hands by mortgage, and had sent the mortgage to Worcester to be recorded; that his father at first said he would have nothing to do with it; that he told his father that unless he assented to it, he, Benjamin, would be in danger of losing his property; that his father finally said he would take the note, and did take it; that subsequently the respondent sent and got the mortgage from the registry of deeds, and had the certificate of possession written upon it, which he signed and acknowledged, and had that also recorded; that subsequently he obtained the mortgage from the registry, and had kept it in his possession ever since, and that he never delivered it to either of the mortgagees; that he did not at the time he made the mortgage intend to deliver it to the mortgagees; that he made the certificate of possession for the purpose of preventing his creditors from attaching the crops, and that he had been in possession of the property ever since.

Mark Haskell was also called as a witness by the respondent, and testified against the petitioner's objection, that he wrote the certificate of possession upon the mortgage, and as a justice of the peace took the acknowledgment of it; that the respondent requested him to send it to be recorded, and also to send to the registry for it, after it was recorded, and keep it till he called for it; that at the same time the respondent told him that he did not intend to deliver the mortgage to the mortgagees; that he made it to cover up his property from attachment, and that he should not deliver it unless it should become necessary, in order to keep it from his creditors; that he was advised to give his father possession under the mortgage so that he could hold the crops; that they had sued him but could not find anything to attach. All of this conversation was in the absence of the mortgagees.

The evidence was conflicting as to the consideration for which the mortgage was given, the respondent testifying that it was entirely without consideration, and several witnesses for the petitioner testifying to admissions of the respondent that it was given for money which he had had from his father. The mortgage was produced at the trial by the respondent upon notice. It appeared that the respondent was the administrator of his

father's estate, and it was contended by the petitioner that he obtained said mortgage from his father's papers.

The question submitted to the jury was whether there was a delivery of the deed. The petitioner alleged exceptions to the admission of the above testimony.

G. F. Verry, for the petitioner.

F. M. Sprague, for the respondent.

WELLS, J. The position of the petitioner, that the respondent was estopped from denying the delivery of the mortgage, cannot be maintained. There could be no estoppel by deed, unless the deed had been delivered. The very question at issue was whether the instrument had been delivered so as to take effect as a deed.

There was no estoppel *in pais*. It was not shown that what was done and said by the respondent was with any intent that his father or brother should take any action in reliance upon it; or that they did act upon it. The essential elements of an estoppel are wanting.

The petitioner was not restricted in his right to use the facts of the making and recording of the mortgage and certificate of possession, as evidence tending to prove the existence of a valid mortgage in the hands of the persons named as mortgagees. The facts in regard to the manner in which the mortgage and the certificate of possession for foreclosure were prepared and placed upon record, and the consideration or want of consideration and purpose of those transactions were competent upon the question of delivery. But it was not competent for the respondent to put in his own declarations, made to the witness Haskell, in regard to the purpose with which he had, two months before that time, made and recorded the mortgage, and in regard to its delivery or non-delivery. On this last ground, the

Exceptions are sustained.

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GEORGE H. CHAPIN vs. JOHN N. BRIDGES.

Worcester. October 1. — 5, 1874. COLT & MORTON, JJ., absent.

A. employed a real estate agent to sell his farm, and agreed in writing to pay him a certain sum "if it is sold to any party within a year from this date, or at any time thereafter, before I have given you thirty days' notice in writing of my intention to withdraw the property from the market." *Held*, that the clause relative to withdrawing the property from the market applied only to the time after the expiration of the year.

Evidence that a real estate broker has advertised a farm for sale, that his agent took several persons to the farm with a view to purchase, and talked upon the subject with others, one of whom testified that he had purchased the farm from the owner in person, paid him money on the farm, and moved himself and his goods upon it, is sufficient (no objection being taken to its competency) to warrant a finding that the broker had faithfully endeavored to sell the farm, and that the owner had made an agreement, binding upon him, to sell it.

CONTRACT upon the following written agreement signed and delivered by the defendant to the plaintiff: "Geo. H. Chapin: Sir, I hereby place the property, of which a description has been given, in your hands for sale. If the same is sold to any party within a period of one year from this date, or at any time thereafter, before I have given you thirty days' notice in writing of my intention to withdraw the property from the market, I hereby promise to pay you the sum of three hundred dollars for your services in selling, or endeavoring to sell, said property. If not sold, I am to be at no expense except for advertising. Warren, October 25, 1871."

Trial in the Superior Court, before *Allen, J.*, who after a verdict for the plaintiff, allowed a bill of exceptions in substance as follows:

The plaintiff introduced the following testimony, which was all the testimony in the case: George W. Doane testified: "The plaintiff is a real estate broker and lives in Boston. I was in his employ in October, 1871, and so continued till the next July. I advertised and did business in the name of the plaintiff, and as his agent. I took parties to see the farm. I showed the farm to eight or ten parties. It was five miles from my office in Brookfield to the farm. My brother came to me with Hall. The place was advertised in a newspaper in Boston in March, 1872. I took Hall and his son to one Bliss, in Brookfield. Talked with them

about the farm. Told him I had the farm for sale, price \$5500. Tried to have him go with me to see it. He did not go. I had 20 or 30 farms in that vicinity to sell. Received the following letter from the defendant: 'Warren, February 4, 1872. Mr. George W. Doane, Dear Sir: I have sold my farm, so that you will not need to be to any further trouble with it, hoping you success, I remain, yours truly, J. N. Bridges.' Saw the defendant at my office about ten days after the letter. He said he wanted me to go on again and sell his farm; that Hall had backed out. I said I would do it. I saw Hall in Worcester. Told him he had better go back and buy this farm. Talked with him nearly an hour. He questioned me about it and I answered. This was two weeks after I received the letter from Bridges. I received the following letter from the defendant: 'Warren, March 2, 1872. Mr. George W. Doane, Dear Sir: I don't wish to have my farm any longer in the market, therefore I give you thirty days' notice of my intention to withdraw it from the same; please write acknowledging the note. Yours Truly, J. N. Bridges.'" Cross-examination: "I did not communicate my contract with the plaintiff to the defendant. Have testified all I know that was done by plaintiff." Re-examination: "All I did was done under the contract declared on."

George Clark testified: "I worked for Doane in 1871. I was in the employment of Doane, not of Chapin. I went to the farm several times with parties to show them the property."

William G. Hall testified: "I lived in Worcester in February, 1872. Moved on to the defendant's farm in 1872. Moved my goods on the last of February, or first of March. I made my trade with the defendant. I had refusal of the farm before I saw Doane about the farm at Brookfield, on the Bliss farm. He said 'he had another farm, the Bridges farm. I had seen the Bridges farm. Had refusal of it from Bridges. Doane praised it up. Went to the defendant's farm from my interview with Doane, and told the defendant I would take the farm. This first trade with the defendant fell through. We agreed to back out. I saw Doane after that in Worcester. He praised up the farm and advised me to buy it. Spoke of its advantages and the fruit that was on it. Don't know as I did anything in consequence of what took place with Doane. I moved up afterwards. Not long after-

wards I went up to see the defendant. Don't know as anything was said about the place. There was a new agreement with the defendant. This was before I saw Doane in Worcester. My son and myself went up to the farm. Paid Bridges money on the farm. Can't tell whether it was before I met Doane in Worcester. Moved up afterwards. I told Doane at Worcester I was going to buy the farm. Trade closed before March 1, 1872. Bridges said Doane had the farm for sale. Don't know when he said it. It was in course of the trade." Cross-examination: "I never saw Chapin in the course of these transactions."

Upon notice from the plaintiff the defendant produced a letter from Bridges to Chapin, dated February 26, 1872, and the same was read to the jury, with the reply of Chapin. These were as follows: "Warren, February 26, 1872. Mr. George H. Chapin, Dear Sir: As I do not wish to have my farm, which is now in your hands, for sale any longer in the market, I hereby give you thirty days' notice of my intention to withdraw it from the market; your agent, George W. Doane, is the one that took the farm to sell. Yours truly, J. N. Bridges." "Dear Sir: As Mr. Doane is the man who took the place please apply to him and arrange the matter. Yours truly, George H. Chapin."

At the close of the plaintiff's case the defendant stated that he should not introduce any testimony, and asked the judge to rule that the plaintiff was not entitled to recover upon the foregoing evidence; and further asked the judge to rule that if the defendant sold the farm after he had given the plaintiff thirty days' notice in writing of his intention to withdraw the property from the market, though less than one year from the date of the contract, the plaintiff could not recover; but the judge declined to give the rulings prayed for, and instructed the jury that upon the foregoing evidence the plaintiff was entitled to a verdict for \$300, and interest from the date of the writ. The jury returned a verdict for the plaintiff for this amount, and the defendant alleged exceptions.

T. L. Nelson, for the defendant.

F. T. Blackmer, for the plaintiff, was not called upon.

GRAY, C. J. This action is brought upon an agreement in writing, by the terms of which, according to their plain meaning, the defendant in October, 1871, employed the plaintiff, a broker

in Boston, to sell his farm in Brookfield, and promised to pay him \$800 for his services in selling or endeavoring to sell it, in either of two alternatives: 1st, of its being sold (whether by the plaintiff or by the defendant without his intervention) to any person within a year; or, 2d, of its being so sold at any time afterwards and before the defendant had given the plaintiff thirty days' notice in writing of a revocation of his authority. To hold the provision for such notice to apply during the first year would render the distinction of time in the agreement wholly unmeaning.

A binding agreement for a sale, made between the defendant and a third person, would be a sale, within the contemplation of the agreement. *Rice v. Mayo*, 107 Mass. 550.

The evidence introduced at the trial tended to show that the plaintiff advertised the farm for sale, and that his agent Doane (whom the defendant by his correspondence impliedly admitted to have been properly employed) took several persons to see the farm with a view to purchase, and talked upon the subject with others, and among them with Hall, who testified that in February, 1872, he purchased the farm from the defendant in person, paid him money on the farm, and moved himself and his goods upon it. No objection was taken at the trial to the competency of any portion of the evidence; the whole evidence was clearly sufficient to warrant a jury in finding that the plaintiff had faithfully endeavored to sell the farm, and that the defendant had made an agreement, binding upon him, to sell it to Hall; and it was admitted at the argument that the defendant was not denied the right to go to the jury if he wished to do so.

Exceptions overruled.

L. BROWN vs. HANNAH SMITH & another.

Worcester. October 1, 3. — 5, 1874. COLT & MORTON, JJ., absent.

A conveyance of real estate made by a mortgagee both in his own name and as attorney of the mortgagor, and which declares that it is made by virtue of every other power and authority then thereto enabling, as well as by virtue of and in execution of the power of sale contained in the mortgage deed, operates as an assignment of the mortgagee's interest, even if the fee is not conveyed by reason of a defect in the execution of the power; and if the assignee is in possession of the premises after condition broken, the owner of the equity of redemption cannot maintain a writ of entry against him.

WRIT OF ENTRY against Hannah Smith and her husband, Henry C. Smith, to recover a tract of land in Westborough. Hannah Smith pleaded *nul disseisin*. Henry C. Smith pleaded non-tenure and disclaimer.

At the trial in the Superior Court, before *Bacon, J.*, it appeared that the demandant's title was derived from a sale of the land on execution as the property of the last named defendant, the same having been attached on February 9, 1870, in an action by the demandant against him.

It further appeared that Henry C. Smith was on April 24, 1868, the owner of the demanded premises, and on that day he conveyed the same in mortgage to George W. Mann. The deed contained a clause authorizing the grantee and his legal representatives, on breach of condition, to sell the granted premises and all benefit and equity of redemption of the grantor, and to execute the necessary deed to convey the premises in fee simple: provided that the person herein authorized to make such sale "shall make before some justice of the peace an affidavit, that he had at the time of such sale an interest in this mortgage, that such sale was made at public auction, on or near said granted premises, and that notice was given of the time and place of such sale, by posting up notifications thereof, thirty days at least before the time of sale, in two public places in said town of Westborough, and publishing the same three weeks successively in some newspaper printed in said county of Worcester, and that such affidavit shall be so made, and, together with a copy of the notice, shall be recorded in the registry of deeds for said county of Worcester within thirty days after such sale."

This mortgage was assigned June 14, 1869, by Mann to Cyrus Fay, to whom also Henry C. Smith had on July 2, 1868, conveyed the demanded premises in mortgage, by a deed whereby the grantee was authorized to sell the premises, in case of any breach by the grantor in the conditions of the deed, and to convey the same in his own name or as attorney of the grantor.

The tenant Hannah Smith put in evidence a deed, dated January 20, 1871, of the premises from Cyrus Fay to John A. Fayerweather; and a deed of the same premises from Fayerweather to her, dated January 20, 1871. Both of these deeds were duly recorded. Annexed to the first deed was an affidavit made by Fay,

which set forth his acts under the powers in the two deeds, but omitted to set forth that he had at the time of the sale an interest in the mortgage. The deed from Fay to Fayerweather recited the two mortgages; that there had been default in respect to each; and that notice had been duly published. The granting clause was as follows: "Now, therefore, know all men that we the said Henry C. Smith, by the said Cyrus Fay, his attorney, duly authorized as aforesaid, and the said Cyrus Fay, by virtue and in execution of the power contained in said mortgage deeds, respectively as aforesaid, and of every other power and authority we thereto enabling, do in consideration of the sum of \$5250, to us paid by John A. Fayerweather, give, grant," &c. The deed was signed "Henry C. Smith, by Cyrus Fay," and also "Cyrus Fay," and sealed.

The demandant asked the judge to rule that the tenant Hannah took no title under the sale by Fay, because his proceedings under the powers were defective and invalid in the following particulars: "1. Because no affidavit was made as required by the first mortgage, that Fay at the time of the alleged sale had an interest in the said mortgage." "2. Because the two mortgages and two powers of sale are entirely distinct, and a notice was given of two distinct sales, one under each mortgage, to take place at the same time and place, and it appears that there was but one sale of the premises for one entire sum, upon one bid to the same purchaser, and one deed was given, and one affidavit made, by which it was sought to execute both powers jointly." Other defects were also insisted upon, which need not now be stated.

The judge directed a verdict for the demandant against Hannah Smith. Judgment was ordered on the pleadings for the tenant Henry C. Smith, to which order no exception was taken. The case was, after verdict, by consent of the parties reported for the consideration of this court.

W. S. B. Hopkins, for Hannah Smith.

H. B. Staples & A. G. Biscoe, for the demandant.

GRAY, C. J. The deed executed by Fay in his own name, as well as in the name and as the attorney of the mortgagor, is expressly declared to be made by virtue of every other power and authority them thereto enabling, as well as by virtue and in execution of the power contained in the mortgage deeds. The aff

davit as to the execution of the power of sale does not affect the legal operation of the deed in other respects. If it was not a valid execution of that power and therefore did not convey an absolute fee, it at least passed the mortgagee's title to the grantee. Mrs. Smith, under his subsequent deed to her, has either an absolute title in fee, or a title in mortgage; and it is unnecessary and immaterial to the judgment in this action to consider which it is; for in either alternative, she being in possession after breach of the condition of the mortgage, the mortgagor, or any other person claiming title under him, cannot maintain a writ of entry against her. *Parsons v. Welles*, 17 Mass. 419.

The verdict directed for the demandant upon the ground that she took no title under the sale by Fay must therefore be set aside, and a *New trial ordered.*

H. P. BOUTELLE & others vs. HENRY F. SMITH & another.

Worcester. October 2. — 5, 1874. COLT & MORTON, JJ., absent.

A. & B., bakers in F., bought of C. & D. their business as bakers in the same town, and their personal property connected with that business, and made a contract with them whereby C. & D. agreed "that they will not or either of them hereafter engage in the business of bakers in the town of F., and will not directly or indirectly engage in any business or do any act that shall interfere with the business thus purchased for the sale of bread on the several bread routes heretofore connected with said business," for five years. *Held*, that the contract was a valid one. *Held, also*, that C. & D. were liable, if one of them drove a bread cart in F. on his former routes and supplied his former customers with bread, acting as the hired servant of a baker in another town.

CONTRACT by H. P. Boutelle, H. R. Horton and H. L. Houghton, against Henry F. Smith and Charles T. Cushing, to recover the sum of one thousand dollars as liquidated damages, on a bond executed by the defendants, March 18, 1873, the condition of which was as follows: "The condition of this obligation is such, that whereas the said Boutelle, Horton and Houghton have this day purchased of the said Smith and Cushing their business as bakers, together with the personal property connected with said business, including the fixtures and property connected with the bakery located on Day Street, together with the bread carts and horses heretofore used by them in said business, and whereas the

said Smith and Cushing have for a valuable consideration agreed with the said Boutelle, Horton and Houghton that they will not or either of them hereafter engage in the business of bakers in said town of Fitchburg, and will not directly or indirectly engage in any business or do any act that shall interfere with the business thus purchased for the sale of bread on the several bread routes heretofore connected with said business. Now if the said Smith and Cushing shall at all times truly and faithfully perform their said agreement, then this obligation shall be void; otherwise to remain in full force and virtue for the five ensuing years."

At the trial in the Superior Court, before *Rockwell, J.*, the plaintiffs, who are bakers in the city of Fitchburg, offered to prove that the defendant Smith had driven a bread cart for the plaintiffs and others in Fitchburg and towns adjoining, on certain established bread routes, (running out from Fitchburg for five or ten miles,) ten or fifteen years, and had an extensive knowledge of said several bread routes and controlled a large trade; that about two years prior to the commencement of this action the defendant Smith had left the employ of the plaintiffs and in connection with the defendant Cushing had commenced the business of bakers in Fitchburg; that the plaintiffs, in March, 1873, purchased the business thus carried on by said defendants, together with all their horses, carts, stock in trade and place of business, and the good will of their business, and took from the defendants the bond declared on; that the plaintiffs paid a large sum to the defendants for the good will of the business and to secure the patronage upon said bread routes and to obtain the right of exclusive sale of bread thereon, as against the defendants, and to prevent the defendants or either of them from using their knowledge thereof in any way to the injury of the plaintiffs; that about four months after the giving the bond, the defendant Smith voluntarily commenced to drive a bread cart in Fitchburg on his former routes and to supply his former customers with bread, acting as the hired servant of one D. C. Miles, a baker in Westminster, and has so continued to drive ever since; that the defendant Cushing had done no act in violation of said bond, but took no measures to prevent the doing of said acts by Smith.

Upon the offer by the plaintiffs to prove said statements and the production of the bond, the judge ruled that the evidence if

admitted would not sustain the action, and directed a verdict for the defendants. No question was raised at the trial as to the form of the pleadings. The plaintiffs alleged exceptions.

H. C. Hartwell, for the plaintiffs, was stopped by the court.

G. A. Torrey, for the defendants. 1. The agreement of the defendants is void as being in restraint of trade. Upon the authority of the older decisions it is void as being limited neither as to time nor place. The bond was to become void at the expiration of five years, but the agreement was perpetual. *Alger v. Thacher*, 19 Pick. 51. *Taylor v. Blanchard*, 13 Allen, 370. According to the later cases a person may "enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject matter of the contract." *Leather Cloth Co. v. Lonsont*, Law Rep. 9 Eq. 845. *Morse Twist Drill Co. v. Morse*, 103 Mass. 73. Tested by this standard, the agreement in the case at bar is unreasonable and void. The sale was of no secret manufacture or process, but the baking and vending of bread in a certain locality. The defendants are restrained, not only from engaging in the business of bakers in said town of Fitchburg, but from engaging in any business or doing any act, at any place or time, that shall in any way interfere with the business of the plaintiffs; and not only on the plaintiffs' theory does each of the defendants restrain himself, but each agrees that the other shall not violate the agreement. The invention of any patent process for manufacturing bread, or the discovery and promulgation of any method to cheapen the price of bread, or to render it more wholesome or nutritious than the kind of bread made by the plaintiffs, would be a violation of the agreement. The restraint is unnecessarily extensive. *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.

2. The plaintiffs cannot recover unless they prove that both of the defendants have violated the agreement. The agreement is that "they will not, or either of them, engage in the business of bakers in said town of Fitchburg, and will not (that is, both of them jointly) directly or indirectly engage in any business or do any act," &c. It is evident that one would not covenant that the other should do no act that might indirectly affect the business. In the case at bar, neither has engaged in the business of bakers in Fitchburg, and Cushing has done nothing.

3. The act of Smith in becoming the servant of another was not in violation of the agreement. If it is, the agreement is unreasonable. *Allsopp v. Wheatcroft*, L. R. 15 Eq. 59.

4. The defendant Cushing is not liable. The agreement could not have been that each should agree to control the other. If such is the effect, it is void.

GRAY, C. J. The validity of this contract is beyond dispute. The restriction which it imposes is confined to a particular place, and is but coextensive with the interests purchased by the defendants of the plaintiffs for a large sum. It is very like the contract upheld in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181; *S. C.* 10 Mod. 27, 85, 130; Fortescue, 296; the principle of which has been repeatedly affirmed by this court. *Alger v. Thacher*, 19 Pick. 51, 53. *Gilman v. Dwight*, 13 Gray, 356. *Taylor v. Blanchard*, 13 Allen, 370, 374. By its grammatical construction and obvious intent, both the defendants agree that both and each of them will neither engage in the business of bakers in Fitchburg, nor directly or indirectly engage in any business or do any act that shall interfere with the business purchased of them by the plaintiffs. The acts of one of the defendants, offered to be proved at the trial, were a clear breach of their joint obligation. *Angier v. Webber*, 14 Allen, 211.

Exceptions sustained.

DANIEL W. CROSBY *vs.* THOMAS H. HARRISON & others.

Worcester. October 3. — 5, 1874. COLT & MORTON, JJ., absent.

A motion to dismiss cannot be sustained which is not founded on matter of law apparent on the record.

If a judge has authority to entertain a suggestion of a fraudulent abuse of the powers of the court, upon a summary motion, without putting the party making the suggestion to plead and try it in regular form, it is within his discretion to decline to do so, and his action cannot be revised by this court.

CONTRACT against residents of another state, commenced by trustee process in which Christopher Haskell was summoned as trustee. The writ was returnable at August term 1870 of the Superior Court. The return of the officer stated that he had attached certain goods as the property of the defendants, and that

he had made no further service upon them, as they were not within his precinct and had not any last and usual place of abode within the Commonwealth. At December term, 1871, the defendants appeared specially and offered to prove the facts set forth in the following paper filed in the case, entitled "Defendants' motion to dismiss":

"And now come the defendants and move that said action be dismissed, because they say that said court has not jurisdiction of said cause or of said defendants, for the reason that they nor either of them were or ever have been residents of this Commonwealth, and that they nor either of them had at the time of the service of said writ or have ever had any attorney, agent or tenant within said Commonwealth, and that no service of said writ hath ever been made upon them or either of them, or upon any agent, attorney or tenant of them the said defendants; and for the further reason that no effectual attachment hath ever been made upon their goods, estate, effects or credits in their own hands and possession, or in the hands and possession of any trustee of them within said Commonwealth, so as to give the court jurisdiction of said cause or to authorize said court to issue any order of notice to said defendants requiring them to appear before said court to answer to said action.

"And said defendants aver that Christopher Haskell, the trustee named in said writ, and Daniel W. Crosby, the plaintiff named in said writ, fraudulently conspired together to induce the said defendants to send merchandise, the property of said defendants, into this Commonwealth, so that the said plaintiff might cause the same to be attached in this suit then by said plaintiff intended to be brought, and also to intrust the same to said Haskell, so that said Haskell might be in said suit summoned as their trustee; and in the execution and carrying out of said conspiracy and fraud upon the said defendants the said Haskell pretended and represented to the defendants, then doing business in the city of New York, that he, said Haskell, wanted to buy certain goods of the defendants, to wit, similar goods to those described in the officer's return upon the writ in said action, and that he would pay for the same upon receipt thereof, and the defendants relying upon such representations, shipped to said Haskell the goods and merchandise aforesaid from New York aforesaid to Webster, in said

county of Worcester, on or about June 14, 1870, and forwarded to said Haskell a bill of lading thereof by mail, and thereupon, to wit, on or about said June 14, drew their draft on said Haskell for the amount of said bill of merchandise, payable to the order of themselves, which said draft they indorsed and delivered to the cashier of the Oxford National Bank, and which said draft was held by said cashier at the time of the service of the plaintiff's writ on said Haskell, and which said draft the said Haskell, upon the presentation thereof, refused to accept. And said defendants aver that said representation and pretence on the part of said Haskell that he desired to buy said merchandise was fraudulent, and made for the purpose of inducing said defendants to send said merchandise into this Commonwealth, so that the same might be attached upon this suit, and so that said Haskell might be summoned as the trustee of said defendants; all which these defendants are ready to verify. Wherefore said defendants pray that they may be held to answer to said suit no further, but that they may be dismissed from hence with their reasonable costs, by them so unjustly sustained."

The plaintiff objected to the motion and the admission of the evidence offered, on the ground that the matters and things set forth in the motion could not be taken advantage of in that form, but only by answer or plea in abatement. *Bacon, J.*, so ruled. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

F. A. Gaskill, for the defendants. The facts set out in the paper entitled "Defendants' motion to dismiss" are universally regarded as constituting a fraud upon the process of the court and causing the proceedings to be utterly void, and upon motion courts will set aside the proceedings in a summary manner. Thus, upon affidavit of the party to the facts, with reference to an arrest, the defendant was discharged. *Stein v. Valkenhuisen*, El., Bl. & El. 65. See also *Pomroy v. Parmlee*, 9 Iowa, 140. Although the title of the motion in this case may not be properly applicable to the facts set out, and though that part of the prayer contained in the last line of the motion, to wit: "but that they may be dismissed from hence," may not be properly used in that connection, yet the prayer is properly stated in so far as "said defendants pray that they may be held to said suit no further,"

and what follows may be rejected as surplusage. The motion is not a motion to dismiss on the ground of any defect apparent on the face of the proceedings, but is a motion on the ground of the offer of proof of certain facts, which are clearly and properly set out. When the conscience of the court is informed of the fraudulent use of its process by the averment of facts, the court will take notice of it, and if the facts are denied an issue may be ordered, or the court may pass upon the evidence as in the above cited instances. The court below treated the plea as a motion to dismiss, but not for defect of form in process, and the ruling is open to exception. Gen. Sts. c. 115, § 7.

W. S. B. Hopkins, for the plaintiff, was not called upon.

GRAY, C. J. The motion of the defendants cannot be sustained as a motion to dismiss, because it is not founded on matter of law apparent on the record. It is not entitled, and was not treated by either party in the court below, as a plea or answer in abatement, as is conclusively shown by the defendants' offer of evidence having been made to the court, whereas any extrinsic fact pleaded in abatement would be triable by a jury. If the court had authority to entertain the suggestion of a fraudulent abuse of process upon a summary motion, without putting the defendants to plead and try it in regular form, it was certainly within its discretion to decline to do so. *Davis v. Marston*, 5 Mass. 199. *Morton v. Sweetser*, 12 Allen, 134. *Exceptions overruled.*

THOMAS HOWARD vs. THE TRUSTEES OF THE COLLEGE OF THE HOLY CROSS.

Worcester. October 1. — 5, 1874. COLT & MORTON, JJ., absent.

A writ of entry may be maintained by proof of title by deed to part of the demanded premises, and by adverse possession to the rest, although the jury cannot say how much the deed covers.

A general verdict for the demandant upon a writ of entry which describes the demanded premises as bounded beginning at the intersection of two streets named, thence northerly on one of those streets three hundred and forty feet to the river, thence easterly on the river forty-eight and a half feet to a willow tree, thence southerly on land of the tenants three hundred and sixty-five feet to the first mentioned bound, is sufficiently definite.

WRIT OF ENTRY to recover "a certain tract of land situated in Worcester on the easterly side of Southbridge Street ; bounded and described as follows : commencing at a point on the easterly side of Southbridge Street where College Street intersects Southbridge Street, thence northerly on said Southbridge Street three hundred and forty feet to the river, thence easterly on said river forty-eight and one half feet to a willow tree, thence southerly on land of the tenants three hundred and sixty-five feet to the first mentioned bound. Plea, *nul disseisin*. Trial in the Superior Court before Bacon, J., who allowed the following bill of exceptions :

The demandant introduced his deeds tending to show his record title to the whole tract as he claimed. He then offered parol evidence, tending to show a prescriptive right by adverse possession of the same entire tract claimed under his deeds ; to which the tenant objected. The judge overruled the objection, and allowed the demandant to introduce the evidence.

The tenants contended and offered evidence tending to show that the demandant's deeds did not cover the entire tract, and that, if they covered any, they covered only a part of it. They also offered evidence tending to show that the demandant had not been in possession of the premises twenty years.

There was evidence tending to show that the tract of land claimed was bounded on the easterly side by land of the tenants, and that the line was straight from a willow tree, by the bank of the river at the northerly end to the intersection of the easterly line of Southbridge Street with the northerly line of College Street. There was a wall on said line for the whole distance, except a few feet, where there was a barway, and it was in issue before the jury whether that wall was or not on the line between the demandant's and the tenants' lands.

The jury returned a general verdict for the demandant, and to a question of the judge, answered that as to a part of the premises they found upon the deed, and as to a part of it by possession. Upon the judge asking the jury if they could state how much they found by deed and how much by possession, they answered that they could not.

The tenants moved to set aside the verdict as against the law and the evidence ; and also moved in arrest of judgment "be-

cause the verdict of the jury does not sufficiently describe the premises so as to define the boundary line between the demandant and tenants whereupon to found a judgment and writ of possession." Both of these motions were overruled, and the tenants alleged exceptions.

G. Swan, (*M. J. McCafferty* with him,) for the tenants. 1. The evidence of a prescriptive right by adverse possession to raise the presumption of a lost grant was inconsistent with the demandant's production of his deed under which he claimed the entire tract demanded.

2. The motion to set aside the verdict as against law should have been allowed, because the demandant claimed no title by grant except by the deed put in the case, and the jury found that this covered only a part of the tract demanded; then his possession of the rest, being under no other claim or title, was not adverse.

3. The motion in arrest of judgment should have been allowed, because the verdict does not describe the premises otherwise than by the implied reference to the writ, and the description in the writ is too indefinite to enable a writ of possession to be executed. *Atwood v. Atwood*, 22 Pick. 283. *Cleveland v. Flagg*, 4 Cush. 76. *Cornell v. Jackson*, 9 Met. 150. *Riley v. Smith*, 9 Allen, 370. *Sparhawk v. Bagg*, 16 Gray, 583.

F. P. Goulding, for the demandant.

GRAY, C. J. The demandant might maintain his title to the demanded premises, either by an express grant, or by adverse possession, or by grant as to part and adverse possession as to the rest. His claim and possession of the whole might be adverse, although his paper title was proved to cover part only. There was therefore no error of law in the admission of evidence, or in overruling the motion for a new trial.

Nor can the motion in arrest of judgment be sustained. The description in the writ, to which it is admitted that the general verdict for the demandant must be applied, does not appear upon its face to be so defective that the officer executing the writ of possession cannot readily identify the land demanded. The description which was held insufficient in *Atwood v. Atwood*, 22 Pick. 283, merely bounded the lot demanded on two sides on land of the tenant, and gave no other bounds or monuments whatever.

But in the case at bar the land is clearly described by unmistakable monuments and boundaries on the west and north sides, and the remaining boundary line (the only one as to which any doubt is suggested) is described as running southerly by land of the tenants from a willow tree to the point first mentioned, which is the intersection of two streets named. Each end of this line is thus clearly specified. And the course "southerly" is not necessarily due south. *Garvin v. Dean*, 115 Mass. 577. A much less precise description was held sufficient in *Silloway v. Hale*, 8 Allen, 61. See also *Adams v. Frothingham*, 3 Mass. 352; *Riley v. Smith*, 9 Allen, 370.

Exceptions overruled.

SIMPSON E. BATES vs. JOSEPH SANTOM, JR.

Worcester. October 5.—6, 1874. COLT & MORTON, JJ., absent.

When it appears in a bill of exceptions that evidence of the conduct of a party was admitted tending to show a waiver of a certain condition, the omission of the exceptions to state that it was also admitted upon the question whether there was any such condition, as to which no exceptions were taken, is immaterial to the truth of the exceptions.

In an action for the conversion of certain oxen, it appeared that the plaintiff's title was derived from a sale made by the defendant to A. who sold to the plaintiff; that the sale to A. was upon a condition which had not been performed, and that at the same sale A. had bought a horse on the same condition, which he had sold to the plaintiff, but not when he sold the oxen. The plaintiff put in evidence tending to show a waiver of the condition as to the horse. The defendant offered evidence to show that upon this issue and upon the same facts, he had obtained a verdict and a judgment against the plaintiff in a former action concerning the title to the horse. This evidence was not admitted. *Held*, that the evidence put in by the plaintiff was competent to show that the defendant had waived the condition as to all the property sold to A., and that the evidence offered by the defendant should have been admitted in rebuttal.

TORT for the conversion of four oxen. At the trial in the Superior Court the jury returned a verdict for the plaintiff, and the defendant presented the following bill of exceptions, which was disallowed by the presiding judge.

"The plaintiff claimed the property by sale from one McFarland, who bought of Santom. The defendant claimed that he never sold to McFarland, and that the oxen were his property.

"It appeared in evidence that on November 1, 1870, the oxen were bid off by McFarland at an auction of the defendant's, the terms of sale being satisfactory security on six months. There was also evidence tending to show that it was agreed by McFarland and the defendant that the oxen should remain Santom's property until satisfactory security was given in payment therefor; and that the oxen were taken by McFarland upon that condition. At the same auction, other property, including a horse, was bid off and taken by McFarland with evidence tending to show the same conditions. The oxen were sold by McFarland to the plaintiff, February 13, 1871. The plaintiff contended that the defendant had misled him by his conduct in regard to the horse, and had induced the plaintiff to believe that the agreement between the defendant and McFarland as to the ownership of the oxen had been waived by conduct tending to show a waiver as to the horse; and the defendant contended that the question of waiver as to the horse was immaterial in this case, as that question had been tried in a former suit in the Superior Court, in which a verdict had been rendered for Santom thereon, which had been paid by Bates. The plaintiff, against the defendant's objections, was allowed to introduce evidence that McFarland, in the latter part of November, 1870, sold said horse to Bates; that Santom knew of the sale, and made no claim on Bates for the horse until after the sale of the oxen to Bates, and had offered to trade with Bates for said horse before the sale of the oxen to the plaintiff. The defendant objected to the admission of this evidence of Santom's acts and declarations as to the horse trade, and offered to show that the same facts were in evidence at said former trial, and offered to introduce the record of said former suit between the same parties in said court, showing that the question of the waiver of the condition aforesaid, and Santom's laches as to the enforcement of his claim of property in said horse was in issue, and a verdict thereon rendered for Santom and judgment satisfied.

"The sale of the horse by McFarland in November, 1870, had no connection with the sale of the oxen in February, 1871. The presiding judge admitted the above evidence offered by the plaintiff, and refused to admit the evidence offered by the defendant; to which rulings the defendant excepted."

The defendant then petitioned this court under the Gen. Sta. c. 115, § 11, for leave to prove his exceptions. A commissioner was appointed who made the following report:

“ The parties agreed that, at the trial of the case in the Superior Court, there was evidence tending to show that in November, 1870, one McFarland bid off at an auction sale of the defendant's the horse and oxen in question, with other property, the terms of the sale being that purchasers shall furnish satisfactory security on six months; and that McFarland having failed to furnish the security, the property was all subsequently delivered to him by the defendant under an agreement that it should remain the property of the defendant until satisfactory security was given in payment therefor. The plaintiff insisted that it did not appear upon the exceptions that the horse and oxen were delivered to McFarland on one and the same condition, as was contended by the defendant. I find that the fact does so appear.

“ The parties agreed that when the plaintiff offered his evidence as to the defendant's conduct respecting the horse, the defendant objected to the admission of the evidence, and claimed that the question had been tried and determined in the former suit between the same parties referred to in the exceptions; that the evidence was admitted against the objection of the defendant; and that after the plaintiff had closed his case, the defendant offered the judgment in evidence, which was excluded by the presiding judge. The plaintiff denied and the defendant insisted that these facts were sufficiently stated in the exceptions. I find that these facts sufficiently appear in the exceptions.

“ The parties also agreed that there was evidence at the trial tending to prove: 1st. That the horse and oxen were delivered by the defendant to McFarland absolutely and without any condition whatever. 2d. If the sale was a conditional one, that the condition had been subsequently waived by the defendant.

“ The plaintiff contended that the evidence as to the conduct of the defendant respecting the horse was admitted generally, without any ruling of the judge that it was competent upon the question of waiver. The defendant insisted that it was admitted as competent upon the question of waiver. Upon this I find, that the point intended to be raised is fairly presented in the excep-

tions, and that the proofs before me establish the fact that the evidence was admitted upon the question of waiver, as well as upon the question whether there was any condition.

"The plaintiff also denied that the defendant offered to prove that the same facts in relation to the horse were in evidence at the former trial; but upon the proofs before me, I find that the defendant did offer to prove this. The above are all the matters which were in dispute between the parties.

"Upon the proofs and admissions of the parties before me, I find that the exceptions as originally presented to the presiding judge, were conformable to the truth, and should be established and allowed."

C. A. Holbrook & G. Swan, for the defendant.

G. F. Verry, for the plaintiff.

GRAY, C. J. Upon the facts reported by the commissioner, the truth of the exceptions as originally presented is substantially and fully established. The exceptions state that the evidence tended to show that the horse was bought and taken by McFarland under "the same condition" as the oxen — not under similar conditions only. The evidence as to the conduct of the defendant having been offered and admitted upon the question of waiver of the condition, the omission of the exceptions to state that it was also admitted upon the question whether there was any condition — as to which he took no exception — was immaterial.

There being evidence that the horse and oxen had been sold by the defendant to McFarland at one time and under the same condition, the evidence offered by the plaintiff, tending to show that the defendant had waived the condition so far as the horse was concerned, was competent to show that he had waived the whole condition. But the evidence, offered by the defendant to show that, upon this same issue and upon the same facts, he had obtained a verdict and judgment against the plaintiff in a former action concerning the title to the horse, should have been admitted, and its rejection requires the

Exceptions to be sustained.

HIRAM TUCKER vs. MASSACHUSETTS CENTRAL RAILROAD.

Worcester. October 6, 1874. COLT & MORTON, JJ., absent.

The verdict of a jury summoned under the Gen. Sts. c. 63, § 22, to assess damages for land taken for a railroad, must be adjudicated upon in the Superior Court; and if the officer presiding at the trial returns to the Superior Court, with the verdict, a bill of exceptions which he certifies to be conformable to the truth, and which the presiding judge allows, without himself passing upon the question of law presented, this court has no jurisdiction of the exceptions.

PETITION for the assessment of land damages sustained by the petitioner by reason of the passage of the respondent's railroad through his farm. The respondent, being dissatisfied with the estimate made by the county commissioners, applied for a jury to assess the damages, pursuant to the provisions of the Gen. Sts. c. 63, § 22. At the trial before the jury, the respondent excepted to the admission of certain evidence, and "prayed the allowance of his exceptions;" and the coroner presiding certified that those exceptions were conformable to the truth, and returned them with the verdict for the petitioner to the Superior Court. At the end of the exceptions so certified and returned, *Brigham, C. J.*, added and signed these words: "Exceptions allowed." No other proceedings or judgment appeared on the record of the Superior Court, or were transmitted to this court.

W. S. B. Hopkins, for the respondent.

J. G. Allen, for the petitioner.

GRAY, C. J. The statute provides that the proceedings upon an application for a jury to assess damages for land taken for a railroad shall be the same as is provided for the recovery of damages in the laying out of highways. Gen. Sts. c. 63, § 22. It is the duty of the officer presiding at the trial before the jury, upon the request of either party, to certify to the Superior Court, with the verdict, the substance of any decision or direction by him given. Gen. Sts. c. 43, § 33. But a tender and allowance of a formal bill of exceptions at such a trial is not required by law nor according to the usual and regular practice. The duty of the Superior Court is also prescribed by statute. "The verdict shall be returned to the next term of the Superior Court to be held for the same county, and the court shall receive it and adjudicate

thereon, and may set it aside for good cause." Gen. Sts. c. 48, § 40. It was therefore the duty of that court to adjudicate upon the verdict, and to accept it or set it aside; and any question of law decided by that court in making such adjudication might be brought to this court, either by appeal or exceptions. *Walker v. Boston & Maine Railroad*, 3 Cush. 1, 17. *Fitchburg Railroad v. Boston & Maine Railroad*, 3 Cush. 58, 78. *Taylor v. Taunton*, 113 Mass. . Gen. Sts. c. 114, § 10; c. 115, § 7. But such exceptions must be to a ruling of the Superior Court. In this case that court has not adjudicated upon the verdict, and has simply allowed exceptions taken before the coroner who presided at the trial. There having been no ruling or judgment in the Superior Court, this court has no jurisdiction, and the exceptions must be

Dismissed.



CHARLES A. DU VIVIER & others vs. ANN HOPKINS, executrix.

Worcester. October 7, 1874. COLT & MORTON, JJ., absent.

A claim against the insolvent estate of a deceased person, pending in the Superior Court on appeal from the decision of commissioners appointed by the Probate Court, cannot be removed to the Circuit Court of the United States, under the U. S. St. of 1867, c. 196.

APPEAL under the Gen. Sts. c. 99, § 8, from a decision of the commissioners, appointed by the Probate Court to receive and examine the claims of creditors against the estate of the defendant's testator, disallowing a claim made by the plaintiffs against said estate.

In the Superior Court the plaintiffs, who were citizens of the State of New York, filed a statement of their claim, from which it appeared that the matter in dispute amounted to \$921.52; and they filed a petition under the U. S. St. of 1867, c. 196, for the removal of the case to the Circuit Court of the United States. *Brigham, C. J.*, refused to grant the petition, and ordered the case to stand for trial. The plaintiffs alleged exceptions.

G. F. Verry & F. A. Gaskill, for the plaintiffs. The petitioners are entitled to a removal. Under the Judiciary Act of 1789, c. 20, § 25, the word "suit," has been held to apply to any pro-

ceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. *Weston v. City Council of Charleston*, 2 Pet. 449, 464. See also *Parker v. Overman*, 18 How. 137. The case of an appeal from commissioners is treated by our statutes and courts exactly like an action brought upon the demand by the creditor against the administrator. Before the Revised Statutes, the law required a writ to be sued out in such cases. St. 1784, c. 2. The Gen. Sts. c. 99, § 8, provide that an appeal from commissioners "shall be determined at common law," and "it shall be tried and determined in like manner as if an action had been brought therefor by the supposed creditor against the executor or administrator;" and by § 10, that "like proceedings shall be thereupon had in the pleadings, trial and determination of the cause, as in an action at law prosecuted in the usual manner." This court has decided that under those sections the proceedings are according to the course of common law. *Waters v. Randall*, 8 Met. 132. *Jacobs v. Jacobs*, 110 Mass. 229. In *Childress v. Emory*, 8 Wheat. 642, it is decided that United States courts have jurisdiction of suits by or against executors and administrators, if they are citizens of different states. Although by the Gen. Sts. c. 99, § 10, no execution shall be awarded against the executor or administrator for a debt found due, it does not follow that the state court is the only forum in which the cause can be prosecuted. The United States courts have power to conform their proceedings to the special requirements of the laws of the state in which the cause of action exists, when necessary, and will so conform them. U. S. St. 1789, c. 20, § 84; 1828, c. 68. *Mutual Assurance Society v. Watts*, 1 Wheat. 279. *Paine v. Wright*, 6 McLean, 395, 398. Our statutes do not require that any notice of the determination of the appeal in the appellate court shall be made to the Probate Court, but provide merely that the final judgment shall be conclusive, and the list of debts allowed by the commissioners shall be altered, if necessary, to conform thereto. Gen. Sts. c. 99, § 10.

M. J. McCafferty, for the defendant, was not called upon.

GRAY, C. J. We have no doubt or hesitation in affirming the order of the Superior Court refusing the petition for the removal of this case into the Circuit Court of the United States, under the act of Congress of 1867, c. 196.

The proceedings in the courts of this Commonwealth were had under the Gen. Sts. c. 99, the material provisions of which are as follows: When the estate of a deceased person is represented to be insolvent, the Probate Court appoints commissioners to receive and examine all claims of creditors against the estate, and return a list of the claims laid before them, with the sum allowed on each claim. §§ 2-4. Any person whose claim is disallowed, and any executor or administrator who is dissatisfied with the allowance of any claim, may appeal from the decision of the commissioners to the Superior Court or this court, according to the amount of the claim. § 8. In the court appealed to, the supposed creditor is to file a written statement of his claim in the nature of a declaration; "and like proceedings shall be thereupon had in the pleadings, trial and determination of the cause, as in an action at law prosecuted in the usual manner; except that no execution shall be awarded against the executor or administrator for a debt found due to the claimant. The final judgment shall be conclusive, and the list of debts allowed by the commissioners shall be altered, if necessary, to conform thereto." § 10. A certificate of such judgment, though not specifically provided for, is of course, as in all cases of appeals, transmitted from the appellate court to the probate court. If the assets prove sufficient, the claims allowed against the estate are to be paid in full; if not, a dividend thereon is to be declared by the Probate Court, and paid by the executor or administrator. §§ 17, 22, 23.

The whole proceeding is a proceeding for the settlement of an estate, according to the statutes and in the courts of the Commonwealth. The demand of each creditor is a claim against the estate, and not a suit between parties. Although an appeal from the decision of the commissioners thereon is to be tried and determined in the same manner as an action at common law, the judgment is not to be followed by execution, and its utmost effect is to modify the list of claims as returned by the commissioners, and to regulate the settlement of the accounts of the executor or administrator in the Probate Court. In short, the trial of each claim, whether before the commissioners or on appeal, is a mere incident to the settlement of the estate. The very statement of the nature of the proceedings suggests several insuperable objections to allowing the claim of one creditor to be removed into the federal courts for trial and judgment.

1st. The jurisdiction of the state courts over the entire proceedings for the settlement of the estate, having once attached, is exclusive, and, so long as those proceedings are pending, no distinct suit for a similar purpose could be entertained by the courts of the United States. *Williams v. Benedict*, 8 How. 107. *Bank of Tennessee v. Horn*, 17 How. 157. *Mallett v. Dexter*, 1 Curtis, 178. *Clifton v. Foster*, 103 Mass. 233.

2d. Nothing less than a whole cause can be removed into the Circuit Court of the United States under the acts of Congress. A part of the cause, or a controversy incidental to the main cause, cannot be so removed. *Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co.* 110 Mass. 70; S. C. 18 Wall. 553. *Bank v. Turnbull*, 16 Wall. 190.

3d. It is only a suit between two parties that can be removed. *West v. Aurora City*, 6 Wall. 139, 142. A claim against an insolvent estate is not such a suit. It is not commenced by writ or other process, and on an appeal of a creditor from the decision of the commissioners no notice is required to be served on the executor or administrator or any other person. Gen. Sta. c. 99, § 9. *Jacobs v. Jacobs*, 110 Mass. 229. It is at least doubtful whether a claim against an insolvent or bankrupt estate is "a suit," in any sense, under the judiciary acts of the United States. *Coit v. Robinson*, 19 Wall. 274, 284.

4th. When a case is legally removed into the Circuit Court of the United States, the jurisdiction of the state courts over it ceases, and the suit is thenceforth to proceed to trial, judgment and execution in the federal courts, and cannot afterwards be remanded to the state courts for any purpose. *Kanouse v. Martin*, 15 How. 198. *Insurance Co. v. Dunn*, 19 Wall. 214. *Mahone v. Manchester & Lawrence Railroad*, 111 Mass. 72. Such removal of a case from the state to the federal courts for trial does not change the nature of the issue to be tried, or of the judgment to be rendered. *West v. Aurora City*, 6 Wall. 139. *Partridge v. Insurance Co.* 15 Wall. 573.

In the present case, if the Circuit Court should assume jurisdiction, and render judgment in favor of the plaintiff, it could issue no execution thereon, without manifest injustice to the rights of other creditors, and an entire departure from the purpose of the trial, which is only to ascertain the amount on which a divi-

dend shall be allowed by the Probate Court. Nor could it transmit any certificate of its judgment to the state courts; because it is not an appellate tribunal, but a court of coördinate and independent jurisdiction. The removal of a case from a state court into the Circuit Court of the United States for trial has no analogy to the taking up of a case by writ of error from the highest court of a state to the Supreme Court of the United States. There is therefore no form in which any judgment of the Circuit Court, if rendered, could be legally carried into execution.

5th. The act of Congress only authorizes a removal before final judgment in the court of original jurisdiction in which the suit is brought; and not after an appeal from that judgment to a higher court. *Stevenson v. Williams*, 19 Wall. 572. The tribunal which had original jurisdiction of the plaintiff's claim in this case was the board of commissioners appointed by the Probate Court; and according to their decision, if not modified on appeal, the Probate Court would proceed to divide the estate.

Exceptions overruled.

CHARLES K. PEVEY vs. PARKER G. SKINNER & another.

Worcester. October 1.—8, 1874. COLT & MORTON, JJ., absent.

Where a person occupies a part of a building under a lease, and has a sign upon the outer wall of a different part of the building, in the same place where it was maintained for a long time previous to the granting of the lease, the law will imply a license from the owner of the building so to maintain it.

The right of a person to use the outer wall of a part of a building occupied by him under a lease which provides "that the lessee may have the right to place signs upon the outer wall of said rooms," is a privilege, and not an exclusive right, and *prima facie* is to be exercised in reference to the condition of the premises at the time the lease was given; and he is not entitled to put another person, who is occupying a part of said outer walls with a sign, to the proof of any title thereto, beyond a license from the owner of the building.

TORT for placing a sign on the outer wall of the plaintiff's room. At the trial in the Superior Court, before *Allen, J.*, the following facts appeared: R. C. Taylor, the owner of a block of buildings on the corner of Main and Pleasant streets in Worcester, gave a lease under seal to the plaintiff of a room in the second story in the block on May 3, 1872, for five years, which provided

"that the lessee may have the right to place signs upon the outer wall of said rooms." On September 6, 1870, Taylor gave the defendant a lease under seal for five years of the following premises: "The corner store in my block, situated upon Main and Pleasant Streets, in said Worcester, with the cellar or basement to the same, and all the privileges thereto belonging, being the same premises that the said lessee now occupies." At the date last named and for a long time prior thereto, during which the defendants had occupied the same store, their sign was placed on the outer wall fronting Main Street, so that more than one half of the width of it extended above the floor line of the plaintiff's room, and covered that part of the outer wall of said room, and continued in such position to the date of the writ. This sign was nearly two feet wide. The width of the lintel above the line of the windows of the store was $11\frac{1}{2}$ inches. The open space from the bottom of the lintel to a point on the outer wall above, opposite the plaintiff's floor line, was $20\frac{1}{4}$ inches. The sign extended above this point $15\frac{1}{2}$ inches. There was a space of 12 inches below the sign unoccupied for any purpose. After the plaintiff took his lease, and before commencing this suit, he requested the defendants to remove their sign from this outer wall, but they refused. The plaintiff had been in possession of the room leased to him for two or three years before he obtained the lease; and when he took his lease he knew the situation of the defendants' sign.

The plaintiff contended and asked the judge to rule that the right to maintain the sign as aforesaid did not pass to the defendants by virtue of their lease, unless the same was reasonably necessary to the beneficial use and enjoyment of the leased premises; and offered evidence tending to show that it was not reasonably necessary to the beneficial use and enjoyment of the defendants' estate to maintain said sign as aforesaid, or to occupy the outer wall of the plaintiff's room for the sign to the extent aforesaid, and that the same could be lowered so as to cover the unoccupied space on the outer wall of the defendants' store at a trifling expense, and such new position would be a fit and suitable one for said sign.

The judge declined so to rule, rejected the evidence offered and instructed the jury as follows: "If at the time the defendants took their lease the sign which is the subject of this complaint

occupied the exact position it did at the time the plaintiff took his lease, if the outer wall had been prepared by the owner of the building or some former occupant for such use by placing therein bolts or iron rests for the purpose of supporting said sign on said outer wall, and at the time the same was apparently so used, and for many years had been so continuously used, the right to such use would pass to the defendants by their lease, if the place of said sign was a reasonable and proper one."

Upon this ruling, the plaintiff consented to a verdict for the defendants, and alleged exceptions.

H. B. Staples & F. T. Blackmer, for the plaintiff.

G. F. Verry & F. A. Gaskill, for the defendants, were not called upon.

WELLS, J. Upon the facts set forth in the bill of exceptions, there was an implied license, at least, from the owner of the building to the defendants, to maintain their sign in the position of which the plaintiff complains. As it was in that position when the defendants took their lease, and had been so for a long time previously, we are inclined to the opinion that the right to continue it in that position was a privilege secured to the defendants by the terms and effect of their lease; and that the ruling and instructions of the court at the trial were right.

However that might be, the plaintiff shows no right of exception. The point, to which the instruction asked for as well as that given were addressed, was not material to the plaintiff's rights. It is true that the ruling that the defendants had a right to maintain the sign, under their lease, made a verdict against the plaintiff the necessary result. But it would have been equally so if the right of the defendants had been held to be a revocable license only. The plaintiff's lease was subsequent to that of the defendants. His right to use the outer surface of the wall was defined and thereby limited by the terms of his lease. Those terms were "that the lessee may have the right to place signs upon the outer wall of said rooms." It was a privilege, not an exclusive right. *Prima facie*, it was to be exercised in reference to the condition of the premises at the time the lease was given. There is nothing to show that it could not be fully enjoyed without interference or obstruction from the sign of the defendants. If it could, then the grant of that privilege to the plaintiff cannot be construed as a revocation of the license to the defendants.

The plaintiff, not having shown any right in himself to the space covered by the sign of the defendants, was not entitled to put them to the proof of any title thereto in their justification beyond that of their original license from the owner.

Exceptions overruled.

MORRIS HOAR *vs.* ELI GOULDING & another.

Worcester. October 8, 1874. COLT & MORTON, JJ., absent.

When a boundary line in a deed is described as running to a railroad and thence by the railroad, and it appears that at the time the deed was made the railroad corporation owned a narrow strip of land contiguous to, but not included in, its original location, there is a latent ambiguity in the description, and extrinsic evidence is required to apply it.

When a case is tried by a judge without a jury, his findings on questions of fact are final.

CONTRACT for breach of warranty. At the trial in the Superior Court, without a jury, before *Brigham*, C. J., the following facts were found: The defendants, by a warranty deed, dated June 5, 1869, conveyed to the plaintiff a lot of land in Worcester, bounded and described as follows: "Beginning one hundred feet northwest from Bloomingdale Road, thence running sixty-nine feet more or less on Ascension Street to the Boston and Albany Railroad, thence turning and running northeast forty-eight feet six inches on the Boston and Albany Railroad; thence turning and running in an easterly direction thirty-two feet on Joyce's land; thence turning and running in a southeasterly direction on John McGill, eighty feet more or less to the first bound mentioned." The plaintiff entered into possession of the premises and was afterwards evicted by the Boston and Albany Railroad of a strip of land forty-eight feet six inches in length and eight feet in width lying next to its road. This strip was not within the original location, of the railroad, but was conveyed to it by a deed of Parley Goddard, dated June 12, 1843. The defendants' title to the land conveyed by them to the plaintiff was derived through mesne conveyances from Goddard. The acts of the Boston and Albany Railroad tending to the eviction of the plaintiff were done under its location and the grant from Goddard.

The judge ruled upon the construction of the defendants' deed to the plaintiff, and the facts affecting the location of, and the grant of Goddard to, the railroad, and its acts under such location and grant, that the plaintiff could not maintain the action. The plaintiff alleged exceptions.

B. W. Potter & G. H. Ball, for the plaintiff.

F. T. Blackmer, for the defendants.

GRAY, C. J. The question whether the railroad, mentioned as a boundary in the deed sued on, was the strip of land owned by the railroad corporation, according to the original location and the apparent occupation, or according to the present legal title, was a latent ambiguity, requiring extrinsic evidence to apply it. *Putnam v. Bond*, 100 Mass. 58. The judgment of the Superior Court, involving a decision of that question of fact, is therefore conclusive. *Backus v. Chapman*, 111 Mass. 386. *Sweetland v. Stetson*, 115 Mass. 49. *Exceptions overruled.*



JOHN B. SANDERSON & another vs. CHARLES A. STEVENS & another.

Worcester. October 5.—8, 1874. COLT & MORTON, JJ., absent.

If A. is arrested in a suit against himself and B. as copartners, and gives a bail bond to appear, answer and abide the judgment in the suit, the liabilities of the sureties on the bond are not affected by a discontinuance as to B. in the original action.

SCIRE FACIAS against Charles A. Stevens and Barnabas Snow, as sureties on a bail bond.

At the trial in the Superior Court, before *Bacon, J.*, it appeared that Norman A. Smith had been arrested on a writ in favor of the plaintiffs, issued against him and Isaac C. Colton, as copartners; and, with the defendants as sureties, executed the bond in suit, the condition of which was that Smith should appear and answer "to the plaintiffs in said suit upon said writ, and shall abide the final judgment of said court thereon." It further appeared that Colton was, at the time the writ against him was issued, and has ever since been, out of the jurisdiction of the court, and the writ was so returned against him, and no service

was ever made upon him, and no notice of the pendency of the action given him; that the plaintiffs discontinued against Colton, and obtained judgment against Smith, and execution was issued against him, on which the officer made a return that he could find neither the property nor the body of Smith within his precinct, and so returned the execution in no part satisfied.

The defendants asked the judge to rule, upon the foregoing evidence, that the plaintiffs could not maintain their action, upon the ground that the defendants were entitled to the protection of a judgment against Smith and Colton jointly; that the discontinuance by the plaintiffs against Colton, without the consent of the defendants in this action, affected their rights and remedies under any judgment obtainable in this action.

The judge declined so to rule, but ruled that the plaintiffs were on the evidence entitled to judgment. The defendants thereupon submitted to a judgment against them, and alleged exceptions.

J. G. Allen, for the defendants.

G. F. Verry & F. A. Gaskill, for the plaintiffs.

WELLS, J. The statement of the case shows a breach of the bail bond. The only point raised by the exceptions is that the judgment was against Smith alone, whereas the writ upon which the arrest was made was against Smith and Colton.

There is nothing in the bond which limits it to a joint judgment, or indicates that it was given with any reference to the joint character of the suit. The objection, therefore, can only have force on the ground that the discontinuance against Colton was prejudicial to the rights of the sureties. This we think cannot be maintained.

The discontinuance and separate judgment were authorized by the Gen. Sts. c. 126, § 14. It introduced no new or greater liability, and neither made nor indicated any change in the nature of the claim which was the subject of the suit and judgment. It did not affect the extent of Smith's liability as principal debtor, nor the amount for which the sureties would be held responsible upon his default. *Leonard v. Speidel*, 104 Mass. 356.

If the sureties would be entitled to any claim against Colton for contribution, it would be by way of subrogation to the rights of their principal; and those would depend, not upon the judgment establishing a joint liability to third parties, but upon the

state of accounts between themselves, including indeed the claim for which this judgment was rendered. Their rights in this direction, whatever they were, would not be enforced through the judgment, and are not defeated by reason of the discontinuance against Colton. *Happenny v. Trayner*, 111 Mass. 279.

Exceptions overruled.

WILLIAM HAAS vs. SALEM HARRINGTON.

Worcester. October 8, 1874. COLT & MORTON, JJ., absent.

Where a case is submitted to a district court upon a statement of facts, by the terms of which the court is to render judgment for one party or the other, and the judge rules that the plaintiff is not entitled to recover, he has no authority except to render judgment accordingly; and the fact that he goes through the form of taking the verdict of a jury does not entitle his ruling to be revised by this court under the St. of 1872, c. 199, § 15, on a bill of exceptions allowed by him.

CONTRACT on an account annexed. Trial in the Central District Court of Worcester, the judge of which allowed a bill of exceptions which stated that on the return day of the writ the plaintiff demanded a trial by jury, and that at March term, 1874, the parties submitted the case upon an agreed statement of facts, which was set forth at length, and by which the parties agreed that if the plaintiff was entitled to recover, he was to have judgment for a sum stated and costs; otherwise, there was to be judgment for the defendant for his costs. On the facts agreed, "the judge ruled as a matter of law that the plaintiff could not maintain his action, and ordered a verdict for the defendant, and the jury returned their verdict accordingly." The plaintiff alleged exceptions to this ruling.

B. W. Potter, for the plaintiff.

G. Swan, for the defendant.

GRAY, C. J. The St. of 1872, c. 199, § 15, (in force when this case was tried,) allowed exceptions and appeals in matter of law from the District Court to this court only "in cases where a jury trial is had," and in other cases required the appeal to be to the Superior Court.

The parties having submitted the case to the District Court upon a statement of facts on which the court was to render judg-

ment for one party or the other, the issue between them was a mere issue of law, there was nothing to be tried by a jury, and there was no jury trial, within the meaning of the statute. When the presiding judge had ruled that upon the agreed statement of facts the plaintiff was not entitled to recover, he had no authority except to render judgment accordingly. The fact that he went through the form of taking a verdict of a jury, in mere obedience to his ruling, and when there was no issue which could legally be submitted to them, is immaterial.

The anomalous clause, inserted in some of the acts creating district courts, which allowed rulings of a local magistrate of inferior jurisdiction to be brought *per saltum* to this court for revision, is now repealed, and appropriate provision made for revising such rulings in the future in the Superior Court. St. 1874, c. 336.

Exceptions dismissed.

HORACE SHELDON & another vs. JOHN C. GRADY.

Worcester. October 5. — 22, 1874. COLT & MORTON, JJ., absent.

At the trial upon charges of fraud filed under the Gen. Sts. c. 124, §§ 31-34, against a poor debtor, evidence was put in tending to show that the property, alleged to be fraudulently conveyed, was encumbered by a mortgage given to secure the purchase money of certain real estate bought by the defendant and A.; that a large part of the mortgage had been paid from the proceeds of sales of said real estate; and that the mortgagee had received all the proceeds of said sales. *Held*, that the deeds of said real estate were not admissible in evidence to show from the consideration expressed therein how much had been paid on the mortgage.

POOR DEBTORS' OATH. On December 31, 1872, after the arrest of the defendant on an execution issued on a judgment recovered in a civil action, and pending his examination before a master in chancery upon his application to take the oath for the relief of poor debtors, the judgment creditor filed charges of fraud, under the Gen. Sts. c. 124, §§ 31-34, alleging that since the debt was contracted and the cause of action accrued for which the defendant had been arrested, he had fraudulently conveyed, concealed and otherwise disposed of some part of his estate, with a design to secure the same to his own use and to defraud his creditors.

Trial in the Superior Court, on appeal, before *Bacon, J.*, who, after a verdict for the defendant, allowed a bill of exceptions in substance as follows :

The plaintiffs offered evidence tending to show that the property which was, as they contended, fraudulently conveyed, was incumbered by a mortgage, given to secure the purchase money of certain real estate, bought by the defendant in company with James Murphy ; but that a large part of the mortgage had been paid from the proceeds of the sales of parts of said real estate. The holder of the mortgage testified for the plaintiffs that he had received all the proceeds of said sales in part payment of said mortgage, and stated the price per foot for which the lots sold, and the amounts received by him as the proceeds of said sales. The plaintiffs then offered to put in the record copies of deeds from Murphy and Grady of the lots sold by them out of said real estate, as evidence tending to show by the amount of the consideration expressed in said deeds, exactly how much had been paid upon said mortgage. The judge ruled that said records could not be admitted ; and the plaintiffs alleged exceptions.

H. B. Staples, for the plaintiffs.

J. R. Thayer, for the defendant.

ENDICOTT, J. The evidence was properly excluded. The plaintiffs attempted to prove how much had been paid by the defendant upon a certain mortgage. They called the mortgagee who testified how much he had received, as the proceeds of the sale by the defendant of certain lands, which proceeds he had applied to the payment of the mortgage debt. The plaintiffs then offered copies of the deeds of the land so sold for the single purpose of showing by the amount of the consideration in each deed how much had been paid on the mortgage. This they contend was competent as an admission by the defendant of the amount paid. The consideration named in the several deeds was *prima facie* evidence of the amount received, and so far an admission by the defendant. But it is no admission of the amount paid on the mortgage ; that was a separate and distinct transaction. Upon the facts before us, and for the particular purpose for which the deeds were offered, they were not competent.

Exceptions overruled.

THOMAS VAUGH vs. JOHN W. WETHERELL.

Worcester. October 2. — 22, 1874. COLT & MORTON, JJ., absent.

A mortgagor may maintain a complaint under the mill act for damages suffered while he was in possession of the land, although his right of possession has been terminated by foreclosure of the mortgage before suit brought.

In a complaint under the mill act by a mortgagor, it is no defence that the respondent has acquired the right of the mortgagees by an assignment of the mortgage.

COMPLAINT for flowing lands under the mill act, Gen. Sts. c. 149. At the trial in the Superior Court before *Bacon*, J., the complainant introduced evidence that on November 18, 1867, he obtained title to the premises described in the complaint by a warranty deed from the Washburn and Moen Manufacturing Company, and that the land described in the complaint was flowed by the dam of the respondent, for the entire period of three years prior to the filing of the complaint, that is, from May 26, 1870, to May 26, 1873.

The respondent put in evidence that on said November 18, the complainant gave back a mortgage of said premises to his grantor, which mortgage was assigned to the respondent May 24, 1869; that said mortgage was given to secure the payment of \$200, in four years, from November 18, 1867, with interest at seven per cent.; that no interest was paid on the note after November 19, 1869, and no part of the principal was ever paid. It also appeared that at the date of the filing of the complaint, the respondent had not entered to foreclose for condition broken, nor was in possession of the premises under his mortgage for the intent or purpose of a foreclosure, nor had ever attempted a foreclosure for condition broken, by entry or otherwise.

Against the complainant's objection, the respondent was permitted to introduce evidence of a second mortgage upon said premises, made by the complainant to one Hobbs, dated December 24, 1868, of an assignment thereof to one Dickinson, of a judgment recovered upon said mortgage by Dickinson, of a writ of possession issued upon said judgment to Dickinson, and of a delivery of possession of said premises to Dickinson, March 21, 1873, by the sheriff who served said writ. It appeared that the complainant had a right to redeem the premises from the fore-

closure of the second mortgage. The first mortgage, of which the respondent is assignee, provided that the mortgagor might remain in possession till condition broken.

There was no evidence that the respondent had ever paid any damages for flowing the complainant's land either to the complainant, or to said Dickinson, or to any other persons, and no evidence was put in of any claim therefor ever having been made by said second mortgagee.

Upon the above evidence the respondent asked the court to direct a verdict for him on the ground that the complainant had not made out sufficient title for a warrant for a jury upon any of the matters prayed for in the complaint, or any right to damages against the respondent, which request was granted, and a verdict was rendered for the respondent. The complainant alleged exceptions.

C. A. Merrill & H. O. Smith, for the complainant.

H. B. Staples, for the respondent.

WELLS, J. That a mortgagor is entitled, exclusively, to the damages to the land caused by flowing while he is in possession, was decided in *Paine v. Woods*, 108 Mass. 160. It follows inferentially, if not necessarily, from that decision that his right ceases when possession is taken from him by the mortgagee. From that time the mortgagee becomes entitled to recover and receive the damages. But the mortgagor is not thereby deprived of his right to past damages suffered while he was in possession; and may maintain proceedings under the mill act for their recovery, notwithstanding the fact that his right of possession has since, and before suit, been terminated. *Walker v. Oxford Woollen Manufacturing Company*, 10 Met. 203.

It is equally clear that a mortgage title in the respondent furnishes no defence, so long as, by the terms of the mortgage, he is restricted from the right of possession. The complainant in this case is therefore entitled to maintain his suit, and to have a jury to assess his past damages, at least so far as they occurred before breach of the condition of the first mortgage; to wit, November 18, 1871.

The question of the complainant's right to recover for the time after breach, and before he was dispossessed under the second mortgage, has also been discussed; and as its decision now will

facilitate the final disposition of the case in its next stage, we proceed to announce our conclusion thereon.

It is true that the mortgagee has the legal title and right of present possession, if he sees fit to exercise that right. But flowing the land by means of a mill dam is not an exercise of any right of possession or of ownership. The injury is an incidental result of the exercise of riparian rights annexed to other lands upon which the mill and dam are situated. The damages recoverable therefor belong to the mortgagor while he is suffered to remain in possession, by virtue of that possession, like other annual products. *Paine v. Woods, supra*. The mortgagee cannot be held to account for and apply them towards payment of his mortgage debt, because he is held to render an account of rents and profits only when he has had possession under his mortgage. Gen. Sts. c. 140, § 15. And even if they were applicable towards payment of the mortgage debt, there is no mode in which the amount can be legally ascertained except by this proceeding. The mortgagor is therefore utterly without remedy unless he can have it in this mode.

We are of opinion that he may have his damages assessed for the whole time during which he held possession, within the limit of the three years, and may recover the same against this respondent, notwithstanding the fact that the latter was the holder of a mortgage upon the premises flowed.

Exceptions sustained.



HENRY CHAPIN, Judge of Probate, vs. RICHARD WATERS.

Worcester. October 6. — 22, 1874. COLT & MORTON, JJ., absent.

Where a testator charges the payment of pecuniary legacies upon his real estate, and directs that they shall be paid by A. and B., and then devises one part of his real estate in trust for B. during his life, with remainder to his children, and the other part to A. in fee, as residuary devisee and legatee, the legacies must be paid by A. and B. in equal proportions; and if there is sufficient personal property in the hands of the executor to pay the testator's debts and A.'s proportion of the legacies, he cannot rightfully sell any part of the real estate devised to A. If during the lifetime of a devisee the real estate devised to him is unlawfully sold by the executor, his heirs are not entitled to an execution under the Gen. Sta.

c. 101, § 28, in a suit brought, in the name of the judge of probate, on the bond of the executor, but it must be applied for and issue to his administrator.

Land devised to A. was mortgaged by him, with other property, and was afterwards unlawfully sold by the executor of the devisor for the payment of debts. After this the mortgage was foreclosed, and the other property was not sufficient to pay the mortgage debt. *Held*, in a suit on the executor's bond, that the amount to be deducted from the value of the land sold was the difference between the mortgage debt and the value of the other property, and not the proportion of the mortgage debt which the land sold bore to the other property.

A devisee of land made a mortgage of it which was fraudulent as to creditors, and died. Subsequently the executor of the devisor, for the purpose of defeating the mortgage and for the benefit of the heirs of the devisee, except one who refused to assent to the transaction, sold the land by a license from the Probate Court as for the payment of the debts of the devisor. The sale was unlawful, and the executor never received anything on it. In an action by the judge of probate on the executor's bond, for the benefit of the heir who did not assent to the sale, it was *held* that the interest for which the executor was liable was simple interest only from the time of the sale.

CONTRACT brought for the benefit of Mary M. Titus, on a joint and several bond to the judge of probate executed by Lewis Torrey as principal, and the defendant and Dexter Putnam as sureties, conditioned that Torrey, who had been appointed executor of the will of John Titus, Sen., should faithfully administer the estate of the testator.

After the former decision, 110 Mass. 195, the case was sent to an assessor, to ascertain and report to the court the amount of damages sustained by Mary M. Titus, and the value of her interest in the estate sold, at the time of the sale and in the condition in which it then was. On the coming in of the assessor's report the plaintiff moved that execution should issue for the benefit of Mary M. Titus, for the sum of \$1367.72, and his costs; and the defendant filed certain exceptions to the report. The case was reserved by *Wells, J.*, for the consideration and determination of the full court, upon the plaintiff's motion, the assessor's report, the defendant's exceptions thereto, and so much of the report of the case at the former hearing, and of the will and other accompanying documents, as either party deemed material and desired to refer to, and appeared to be as follows:

John Titus, Sen., died in 1851, leaving a will, which was duly proved, and by which he devised certain real estate to his son John Titus, Jr., and appointed Torrey executor. Letters testamentary were issued to Torrey, and he gave the bond in suit.

The executor, in April, 1853, in pursuance of a license from the Probate Court, sold part of the real estate which had been devised to John Titus, Jr., for the payment of debts and legacies.

On January 4, 1854, John Titus, Jr., made a mortgage of all his real and personal estate to James T. Howard, which was fraudulent as to creditors ; and he died in September, 1854, intestate, leaving Mary M. Titus, who was of age, and two other children, his heirs at law.

The executor of John Titus, Sen., in December, 1854, in pursuance of a license from the Probate Court, for the payment of debts and legacies, sold to Obadiah Morse some more of the real estate which had been devised to John Titus, Jr., and executed and delivered a deed to the purchaser. Both of these sales were unlawful, the executor having sufficient assets to pay all debts and legacies.

This second sale was made for the purpose of defeating the mortgage to Howard and for the benefit of the heirs of John Titus, Jr., except Mary M. Titus, who refused to assent to the transaction or to have anything to do with it. The executor never received anything on this sale, and has never rendered any account. An entry to foreclose the mortgage was made January 25, 1855, and on August 31, 1858, it was sold and assigned to Morse, who now claims to hold the land under the foreclosure.

The material clauses in the will of John Titus, Sen., are as follows :

“I give to my daughters Betsey Torrey and Seraphina Morse, the sum of five hundred dollars to each of them, to hold to them, their heirs and assigns forever.”

“It is my will that two third parts of the legacies hereinbefore given to my said daughters be paid by my said sons John and Henry, immediately after my decease, and the remaining third part of said legacies to be paid by said John and Henry immediately upon the decease of my said wife, and interest after payable, and hereby charge my real estate with the payment of said legacies.”

“I give, devise and bequeath unto my son John Titus, Jr., one undivided sixth part of my Waters wood lot and one undivided third part of my McKnight lot lying west of and adjoining Manchaug Pond, and the two first following described tracts of land,

to hold the said two tracts of land and said undivided third part of said McKnight lot and the undivided sixth part of said Waters lot, in trust for the especial use and benefit of my son Henry and his wife Mary, during their lives and the longest liver of them, and at the decease of the survivor of them. It is my will and I give and devise the same to all the children then living of my said son Henry and begotten by him, the males to take two dollars each as often as the females do one dollar each, at the appraisal of men ; to hold to them, their heirs and assigns forever."

"I give, devise and bequeath all the rest and residue of my estate, real, personal and mixed, to my son John Titus, Jr., (excepting and reserving one undivided fourth part of all my buildings with the privileges thereto, which it is my will that my son John shall hold in trust for the use and benefit of my son Henry and his wife Mary and their family, during the lives of said Henry and Mary and the survivor of them, and for the use and occupancy of no other person whatsoever."

The assessor ruled that, even if the language of the will did not make the legacies to Betsey Torrey and Seraphina Morse a specific charge upon the real estate devised for the benefit of Henry and John, Jr., equally, and to be paid by them out of said real estate, and not by the executor out of the personal property, yet that one half the amount of them was a charge upon the estate devised in trust for Henry, there being no other real estate of Henry to which the language of the will could have applied, and that the whole could not be legally taken out of the personal property which went to John Titus, Jr., as residuary legatee.

The assessor also found that, at the time of the first sale, there was personal property available for the payment of debts and legacies, (including a note omitted to be accounted for by the executor,) to the amount of \$1117.65, and that the debts and legacies at that time were \$818.23, taking in this estimate one third of the legacies to be due, one third being payable from the estate of Henry Titus, and one third not till after the death of John Titus's widow, leaving a balance of \$299.42. He also found that at the time of the second sale this balance would have been left, and the legacies and expenses to be paid out of it as follows: One sixth of legacies to Betsey Torrey and Seraphina Morse, (two thirds having been paid, and one sixth being payable from

the estate of Henry Titus,) with interest from December, 1853, the time of the death of the widow of John Titus, Sen., \$177.49, which sum, with a balance of charges of administration, amounted to \$227.49; that the sales were unnecessary, and that the damage sustained by Mary M. Titus was the full value of one third of the land of John Titus, Jr., sold at the first sale, and the value of one third of all of his land sold at the second, subject to the mortgage to Howard before mentioned, which the assessor found was given for a legal consideration; that the total value of the land sold at the second sale, belonging to John Titus, Jr., was \$1133.06. This, however, with other property amounting to \$1563.80, was subject to the mortgage to Howard of \$1912.20, which had been foreclosed; and the assessor estimated the difference between these two sums, viz: \$348.40, as the amount of the incumbrance on the land sold; and deducting this from \$1133.06, the amount left viz., \$784.66, represented the damage to the heirs of John Titus, Jr., and one third of the damage to the interest of Mary M. Titus. This sum, with simple interest, amounted to \$568.87. The plaintiff contended that interest should be allowed with annual rests, which claim the assessor disallowed.

The defendant contended that the plaintiff had no claim for damages under the first sale, because John Titus, Jr., was then alive.

The assessor also reported that the evidence showed no property of Henry Titus except that left for his benefit by the will, and tended to show that he had no other; and that the share devised in trust for Henry was amply sufficient to pay one half of the legacies to Betsey Torrey and Seraphina Morse.

The defendant, for the purpose of proving that there were other debts against the estate of John Titus, Sen., which were paid by his executor, offered as evidence before the assessor certain papers purporting to be bills against said estate, and to have been paid by said executor, and amounting in the aggregate to \$150, which were in the possession of the wife of the defendant, who is also the daughter of the executor, and who testified that they were placed in her hands by her father; but this method of proof was objected to by the plaintiff, and was rejected by the assessor.

The assessor reported as the whole damage sustained by Mary M. Titus, if interest shall be allowed by the court with annual rests, the sum, including such interest, of \$1367.72; and if only simple interest shall be allowed, the sum, including such interest, of \$917.48.

The defendant filed the following exceptions to the assessor's report:

"1. That in estimating the property of John Titus, Sen., charged with the payment of debts and legacies, that portion specifically devised in trust for his son Henry and wife for life, with remainder to his children, ought not to have been included.

"2. No interest, either simple or with annual rests, should have been allowed, prior to the date of the writ in this case.

"3. As the legacies to Seraphina Morse and Betsey Torrey are made chargeable by the will upon the real estate, the personal property is exempted from the payment of any portion of them, and the assessor has erred in marshalling the value of the personal property among the assets for their payment.

"4. As the assessor has found that all of the real estate belonging to John Titus, Jr., sold at the second sale, was of the value of \$1133.06, and was incumbered by a mortgage of \$1912.20, he has erred in reducing the amount of that incumbrance by estimating and deducting therefrom the value of other property included in the mortgage, and treating the remainder only as the real incumbrance upon that property.

"5. In any event, only the value of Henry's life estate in the property specifically devised to his children can be marshalled among the assets for the payment of said legacies."

T. G. Kent, for the plaintiff.

G. F. Verry, for the defendant.

WELLS, J. We are of opinion that the assessor decided rightly that the legacies which the testator directed to be paid by his sons John and Henry were intended to be paid one half by each and that, in charging the payment upon his real estate, it was intended to charge one half upon the lands devised to each, if sufficient therefor, without regard to the proportion of value of the two devises. The fact that one devise was specific and the other residuary tends to strengthen this inference from the language directing the payment.

The charge is upon the land, and not upon the limited interest which Henry took under the will. The land devised to Henry and his wife and children being of more than sufficient value to satisfy one half of the legacies, the other half only was treated as chargeable to John's interest. The assessor has in no other way included the property devised to Henry in his estimates. The exceptions to his report in this particular must therefore be overruled.

It is contended that, by the charge upon the real estate, the personal property was exempted from liability for payment of the legacies, and therefore that the real estate was properly sold for their payment. If this were so, it would not justify any sale beyond what was necessary for payment of the legacies. All the debts should have been paid from the personal assets; and if the note had been properly accounted for, those would have been more than sufficient. The greater part of the amount of liability, for which the second sale was authorized, was improperly made up, even if this position of the defendant is sustained.

But we are of opinion that the charge of the legacies upon the real estate did not, of itself, require the executor to sell land devised to John, while he held personal assets that were embraced in the same residuary bequest to him; much less did it justify him in doing so while retaining those assets in his own hands without accounting for them. A general charge by a testator upon his lands does not change the order in which the assets are to be applied, unless there is something further to indicate his purpose that the personal estate, or some specific portion of his property, shall be exempt from liability for the debt or legacy so charged. It is the direction that Henry should pay, in addition to the charge on the land, that shows the intention that the residue of the estate should be relieved of liability for one half of the legacies. But no such inference arises in regard to the separate portions of the residue bequeathed to John. The charge upon the real estate gives to the legatee a lien for payment of the legacy, and a priority in case that fund should be resorted to. But neither that general charge, nor the direction that John should pay, shows that he or the executor was required to pay from the real estate for the exemption of the personal property given to John himself, and furnishes no justification for the fail

are of the executor to account for all the personal assets before proceeding to sell the realty.

The defendant insists that Mary M. Titus has no claim for damages under the first sale, because her father, John Titus, Jr., was living at that time, so that the damages were due to him, and belonged to his estate as personal assets at his death, and did not descend with the realty. This position we think must be sustained. *Moore v. Boston*, 8 Cush. 274. If any damage resulted from that sale, the execution therefor must be applied for and issue to the administrator of John Titus, Jr. The point was not decided, and was not specially considered in the former judgment.

In this aspect of the case, the exclusion by the master of certain evidence offered to prove additional debts of John Titus, Sen., paid by the executor, to the amount of \$150, becomes immaterial.

In determining the value of the interest of Mary M. Titus in the lands sold, which is the measure of her damages, the assessor was obliged to estimate the effect of the incumbrance of a mortgage given by John Titus, Jr., covering all his property, real and personal. The mortgage had been foreclosed. The mortgage debt was less than the value of the whole property, but exceeded the value of all that was not sold by the executor. Of course, the sale defeated the redemption by destroying the value of the right to redeem. The damages for this loss are less than the value of the lands sold, by just so much as would have been required to be paid, beyond the value of that which the mortgagee holds by his foreclosure, in order to have redeemed the whole. The assessor proceeded upon this principle; and his mode of estimating the damages in this particular was entirely correct. The heirs could not have redeemed any part without paying the entire mortgage debt. It would be unjust, therefore, in this proceeding, to estimate the value of their rights in each separate part by apportioning the mortgage *pro rata*. The mortgage debt is in fact paid, to the extent of the value of the property upon which the foreclosure has been operative.

The only other question requiring our decision is that in relation to the claim for interest. It is not a case where funds have been used by an executor that ought to have been invested; or

income withheld that ought to have been paid over or reinvested. The conduct of the executor was wrongful, but it was waste merely. Mary M. Titus might have brought her suit at any time, if she had chosen to do so. The facts were patent. She is not entitled to impose upon the defendant, as the consequence of her own delay, any penalty beyond simple interest.

Execution is therefore awarded for the use of Mary M. Titus, for the amount reported by the assessor as her damages occasioned by the second sale, with simple interest from the date of the sale, and costs of the suit.

REUBEN SPAULDING *vs.* WILLIAM S. KNIGHT.

Worcester. October 1. — 22, 1874. COLT & MORTON, JJ., absent.

In an action to recover damages for the conspiracy of the defendant and A. in inducing the plaintiff to take a forged note as collateral security for a loan to A., who had also given certain due bills as security, evidence is inadmissible, for the purpose of proving the validity of the due bills, that a third person had lent money to A. and had received the same due bills as security, and still retained similar due bills therefor.

If B. conspires with A. to defraud C. by inducing the latter to loan money to A., upon the security of a forged note, the fact that C. in making the loan also relied upon other securities and upon verbal representations made by B. of the ability of A. to repay the loan, will not prevent his recovering against B. in an action for the conspiracy, if C. also relied upon the forged note.

It is no defence to an action for conspiring to obtain money by false pretences that the person so obtaining the money intended to repay it.

In an action to recover damages for the conspiracy of the defendant in inducing the plaintiff to take a forged note as collateral security for a loan to A. it was admitted that the note was forged, and that the defendant said to the plaintiff that he knew nothing about it or the maker of it. The defendant requested an instruction that if he made a false representation as to the note, and had reasonable cause to believe that it was forged, yet if he did not absolutely know that the note was forged or that his representations were false, he was entitled to a verdict. *Held*, that this request was rightly refused.

The value of land conveyed by A. to C. cannot be shown by the recital of the consideration in an unaccepted deed of adjacent land, from A. to C., or by evidence of the value of other land in the same range and county.

TORT. The first count alleged in substance that the defendant contriving and intending to cheat and defraud the plaintiff, fraudulently and unlawfully conspired and confederated with Samuel

K. Elliott to injure, cheat and defraud the plaintiff by passing to him as collateral security for a loan of money, a false, fraudulent, forged and fictitious promissory note of a certain tenor [setting it forth]; that Elliott delivered the note to the plaintiff, representing it to be a good and valid note, although the defendant and Elliott well knew it to be false, forged, fictitious and of no value; that the plaintiff relying upon said statement, and believing the note to be a valid security, delivered to Elliott a large sum of money and a promissory note payable to the defendant's order, and the defendant and Elliott shared the money and note between themselves, and the plaintiff was cheated, injured and defrauded.

The second count alleged that the defendant, with intent to defraud the plaintiff, unlawfully and fraudulently conspired with said Elliott to injure, cheat and defraud the plaintiff by means of a certain false, forged and fraudulent promissory note of the tenor set forth in the first count; that the defendant and Elliott pretended to the plaintiff that Elliott wished to borrow of the plaintiff a large sum of money, and would furnish ample security for such loan, and the plaintiff believing and trusting to said pretences agreed to loan to Elliott said money upon good collateral security, and Elliott thereupon made, forged and counterfeited the said note for the purpose of passing the same to the plaintiff as security for said pretended loan, and Elliott and the defendant falsely represented to the plaintiff that the note was a good and valid security, well knowing the same to be false, fraudulent and counterfeited, and of no value; that the plaintiff, believing the note to be valid, and trusting to and relying upon the said false and fraudulent representations, the defendant then and there intending that the plaintiff should so trust and rely upon said representations, did loan and deliver to Elliott a large sum of money and a promissory note signed by the defendant, and received as collateral security therefor said false, fraudulent and counterfeited promissory note; that the plaintiff by the premises was defrauded and injured.

There were also two counts for false representations, and one in trover. Trial in the Superior Court, before *Allen, J.*, who after a verdict for the plaintiff allowed a bill of exceptions, in substance as follows:

There was evidence tending to show a combination and conspiracy between the defendant and Elliott as alleged in the first and second counts. The defendant, a broker, introduced evidence tending to show that the plaintiff took as security for a loan of eight hundred dollars to Elliott, due bills of the Weed Sewing Machine Company of the apparent value of seven hundred and seventy dollars from Elliott, who gave his note payable to the plaintiff in thirty days for the loan ; that after the loan was made and the transaction fully completed, the plaintiff applied to Elliott for additional security for his loan and received therefor a promissory note purporting to be signed by one John Ward. It was admitted in evidence that the plaintiff retained the said due bills as security for said loan and had them in his possession at the time of the trial but refused to produce them upon the defendant's request, to be used in evidence. To show the validity of said due bills as security for said loan the defendant offered to show that one Sibley had loaned money to Elliott, taking the same due bills as security therefor, and that at the time of said loan by the plaintiff part of said due bills were held by Sibley as security for loans, but this evidence was rejected by the court.

The plaintiff introduced evidence tending to show that the defendant, who was a broker, made certain verbal representations to the plaintiff concerning the conduct, character, credit, ability and dealings of Elliott to enable Elliott to obtain the loan from the plaintiff, to wit : that Elliott owned western lands, was largely engaged in the sale of sewing machines, and had always promptly paid loans ; that the defendant and Sibley had loaned him money ; that Elliott had purchased real estate of one Buttrick ; that he was desirous of borrowing \$800 from the plaintiff, and would furnish ample security ; and that the defendant considered Elliott had ample means and was good. The plaintiff testified that he relied upon Elliott's ability as represented by the defendant in making the loan ; that he believed the due bills to be good when he received them as security for his loan, and agreed to make the loan to Elliott upon these representations of the defendant to him.

The defendant requested the court to rule that if the plaintiff relied upon the verbal representations of the defendant, and by reason of said representations agreed to loan and did loan the

alleged amount, the action could not be maintained, but the request so to rule was refused as wholly immaterial.

Elliott, who was a witness for the plaintiff, testified that the defendant agreed to assist him to take up his note to the plaintiff when it became due and that he intended to pay it, and there was also evidence tending to show that the defendant intended the note should be paid when due.

The defendant requested the court to rule that if the jury believed that the defendant intended that Elliott's note to the plaintiff should be paid when due they must find for the defendant, although the defendant and Elliott combined together to obtain the alleged loan, but the presiding judge declined so to rule.

The evidence was conflicting as to whether or not the Ward note passed to the plaintiff at the time of the delivery of the money loaned by the plaintiff to Elliott, or was taken by the plaintiff as additional security after the loan was made. It was admitted that the Ward note was forged by Elliott, and the evidence was conflicting as to whether the defendant knew said note to be a forgery; and it was also admitted that the defendant represented to the plaintiff that he knew nothing about the forged note or John Ward, the apparent maker of the same, which was the only representation as to the forged note sought to be proved against the defendant.

The defendant requested the court to rule that if the jury are satisfied that the defendant made false representations to the plaintiff concerning his knowledge of the Ward note and that the defendant was so situated at the time said note was made and passed to the plaintiff as to have had reasonable cause to believe said note was forged, and that the representations made by him to the plaintiff were false, yet if he did not absolutely know such note was forged or such representations false when made, the jury should find for the defendant; but this request was not granted.

There was also evidence tending to show that the plaintiff had received a large amount of western land from Elliott in payment of said loan, since the date of the writ. The defendant put in evidence a certain receipt showing the amount of money to be paid by the plaintiff to Elliott for certain western land, the deed of which was sent to the plaintiff with the receipt, which receipt was admitted in evidence. The defendant then offered as evi

dence to prove the value of the lands received by the plaintiff and the responsibility of Elliott, the proof of certain deeds sent by express to the plaintiff by Elliott's agent, which deeds were found in the express office directed to the plaintiff, two of which deeds were of previous sales between the parties owning the land prior to the conveyance to the plaintiff and one of which was to the plaintiff. In the deed to the plaintiff the name of the grantee was left in blank, but the deed was intended for the plaintiff in the same manner as other deeds which the plaintiff admitted he had in his possession from Elliott; but said deed to the plaintiff had not been delivered and he had returned it to the express office unaccepted, and the plaintiff testified that he refused to accept it. In said deeds similar western lands adjacent to the lands already received by the plaintiff were described and the considerations named; but proof of the deeds was rejected. The defendant also offered to prove what lands in the same range and county as those purchased by the plaintiff of Elliott were worth, which was refused. The plaintiff admitted that he had received fifteen hundred acres of western lands from Elliott and had the deeds thereof in his possession but refused to produce them at the trial. The plaintiff denied that the land he had received was in payment of the loan to Elliott, but admitted that he had received the land in question since said loan to Elliott, which lands Elliott had the right to convey by paying a certain amount per acre, the plaintiff paying the amount required to be paid in order to obtain a conveyance, the amount so paid by plaintiff being but a small part of and the balance of the original contract price of said lands. The plaintiff contended that the amount paid by him for said lands as aforesaid was the full value of said lands, which was controverted by the defendant.

The judge instructed the jury that if the lands were received in payment for the loan the plaintiff could not recover; and if he had received his pay for any part of said loan through said lands, whatever he had received was to be deducted from his damages. The judge also instructed the jury that in order to find for the plaintiff, it was necessary to find that the forged note was delivered at the time when the loan was effected. The jury found for the plaintiff, and assessed damages for the full amount of the note given as security, and, in answer to a question of the judge

stated that they found a conspiracy on the first and second counts. The defendant alleged exceptions.

W. A. Gile, for the defendant. The gist of the two first counts of the declaration is the deceit and not the conspiracy. The averments as to combination and conspiracy are mere matters of aggravation. *Skinner v. Gunton*, 1 Wms. Saund. 228 d. *Livermore v. Herschell*, 3 Pick. 33. *Wellington v. Small*, 3 Cush. 145. *Brown v. Castles*, 11 Cush. 348. *Hayward v. Draper*, 3 Allen, 551. *Parker v. Huntington*, 2 Gray, 124. *Pasley v. Freeman*, 3 T. R. 51. *Morgan v. Bliss*, 2 Mass. 111. *Edwards v. Marcy*, 2 Allen, 486. It was requisite for the plaintiff to prove, to sustain this action, that the representations were made as alleged; that they were false; that the defendant knew them to be false; that the defendant intended to deceive the plaintiff thereby; that the plaintiff relied upon them in making the contract for the loan; that the plaintiff sustained damages by reason thereof. *Tryon v. Whitmarsh*, 1 Met. 1. *Pearson v. Howe*, 1 Allen, 207. *Brown v. Castles*, 11 Cush. 348. It was therefore not enough to prove that the defendant had reasonable cause to believe that the note was forged and that the representations were false. *Pearson v. Howe*, *supra*. *Commonwealth v. Davis*, 11 Gray, 4. *Hartford Ins. Co. v. Matthews*, 102 Mass. 221.

F. P. Goulding, for the plaintiff.

WELLS, J. This action is to recover damages for defrauding the plaintiff by inducing him to take, as security for a loan to one Elliott, a forged and worthless note purporting to be made by one Ward. The defendant is a broker. The first two counts of the declaration allege that he conspired and confederated with Elliott thus to injure, cheat and defraud the plaintiff; and the jury answered specially that they found such a conspiracy.

1. The defendant introduced evidence tending to show that the plaintiff also took as security for the same loan certain due bills of another party; and, to show "the validity of said due bills as security," offered to show that one Sibley had lent money to Elliott "taking the same due bills as security therefor, and that at the time of said loan by plaintiff part of said due bills were held by said Sibley as security for loans." This latter evidence was excluded, and rightly. The point needs no discussion.

2. The plaintiff introduced evidence that the defendant made certain representations orally, "concerning the conduct, character, credit, ability and dealings of said Elliott, to enable said Elliott to obtain said loan from the plaintiff;" and testified that he "relied upon Elliott's ability, as represented by the defendant, in making the loan; that he believed the due bills to be good when he received them as security for his loan, and agreed to make said loan to said Elliott upon said representations." The defendant requested the court to rule that "if the plaintiff relied upon the verbal representations of the defendant and by reason of said representations agreed to loan and did loan the alleged amount, the action cannot be maintained." This ruling was rightly refused. Reliance upon such representations and securities is not inconsistent with reliance also, at the same time, upon other collateral security for the same loan.

3. The defendant requested the court to rule that "if the jury believed that the defendant intended that Elliott's note to the plaintiff should be paid when it fell due, they must find for the defendant. This ruling was rightly refused. The intention and expectation to pay does not relieve the false conduct of the parties of its character as a fraud upon the person upon whom it is practised. *Commonwealth v. Coe*, 115 Mass. 481.

4. It is stated in the bill of exceptions that "the only representation sought to be proved as to the forged note against the defendant" was that he knew nothing about the note or John Ward; and this was admitted to have been made. The defendant requested the court to rule "that if the jury are satisfied that the defendant made false representations to the plaintiff concerning his knowledge of the Ward note, and that the defendant was so situated at the time said note was made and passed to the plaintiff as to have had reasonable cause to believe said note was forged, and that the representations made by him to the plaintiff were false, yet if he did not absolutely know that such note was forged or such representations false when made, the jury should find for the defendant." This also was rightly refused. The defendant is charged with assisting Elliott to cheat and defraud the plaintiff by means of the forged note. If Elliott was guilty, the defendant's false statement that he knew nothing about the note, when in fact he had reasonable cause to believe it to be forged,

was sufficient to warrant the jury in finding that he thereby knowingly and intentionally aided in the accomplishment of the fraud.

5. The bill of exceptions contains a confused statement of certain evidence offered apparently to prove the value of certain western lands that had been conveyed by Elliott to the plaintiff, the consideration for which the defendant claimed should be applied towards repayment of the loan for which the forged note was taken as security. The point of the exceptions in this particular appears to be: *First*, that the recitals of the consideration, in an unaccepted deed of adjacent lands from Elliott to the plaintiff, and in previous deeds of the same lands between other parties, were not admitted to prove the value of the lands which the plaintiff had received from Elliott. We see no reason why they should have been. *Second*, that evidence to prove "what lands in the same range and county as those purchased by the plaintiff of Elliott were worth" was rejected. The ruling of the judge at the trial upon the offer of such evidence is conclusive, unless facts appear which clearly show that it was made upon some erroneous application of legal rules. None such appear in this case.

Various other questions have been argued before us by the defendant; but we discover no other point properly raised upon the bill of exceptions.

Exceptions overruled.

116 155
149 382

WILDER S. HOLBROOK vs. HENRY H. CHAMBERLIN & others.

Worcester. September 30. — October 23, 1874. COLT & MORTON, JJ.
absent.

An unauthorized execution of a deed, either of a partnership or an individual, may be ratified by parol.

If A. and B. are partners, and A. signs the names of both to a lease, and both of them enter under the lease, this amounts to a ratification by B. of the act of A.

Lessees of a mill covenanted "to deliver up the premises and all future erections and additions to or upon the same" at the end of the term, "in as good order and condition as the same now are or may be put into by the lessor." The lease was for a term of years to begin at a future day. When the lease was made, glass in some of the windows was broken: New glass was put in by the lessees before the term began, in consideration of being allowed by the lessor to occupy part of the premises in the mean time. *Held*, that the lessees were bound to pay for glass which was broken during the term of the lease. *Held, also*, that the lessees were entitled to

remove all machinery in the nature of trade fixtures or personal property put in during the term of the lease.

Counter-shafting, pulleys, hangers and belts, though fastened to a building, a portable boiler, and steam pipes supported by hooks attached to a building, are either trade fixtures or personal chattels, and may be removed by a lessee who puts them into a building; and the fact that the lease contains an agreement of the lessor to sell the premises to the lessee makes no difference.

A portable wood cutting machine, worked by a belt attached to a factory, is a chattel, and does not pass by a lease which demises the factory and land; and the lessees are not liable for injury done to it by them on the covenants of the lease, whereby they agree to deliver up the premises in good condition at the end of the term.

CONTRACT against Henry H. Chamberlin, John M. Barker and Warren D. Hobbs, to recover the rent of certain premises situated in the town of Sutton, leased by the plaintiff to the defendants by two leases under seal, and for damages resulting from the alleged breach of certain covenants therein. By the first lease, which was dated January 17, 1865, the plaintiff leased to the defendants "a certain factory building and water privilege with all the appurtenances thereto belonging for the term of five years from April 1, 1865. The lessees covenanted, among other things, "to quit and deliver up the premises and all future erections and additions to or upon the same, to the lessor or his assigns peaceably and quietly, at the end of the term, in as good order and condition (reasonable use and wearing thereof, and damages by fire or other casualties excepted) as the same now are or may be put into by the lessor, or those having his estate in the premises." The lessor agreed to sell to the defendants, "at any time within two years from date, all the property known as the Sutton Woollen Manufacturing Establishment" for a specified sum.

By the second lease, which was dated April 1, 1865, the plaintiff leased to the defendants for five years "all the land and buildings as they are upon the premises known as the Sutton Woollen Mills Estate" in Sutton, "meaning and intending to demise and let all that portion of the estate" not let to the defendants by the first lease. The lessees covenanted to deliver up the premises at the end of the term in as good order and condition "as the same now are, or may be put into by the lessor," "and not make or suffer any waste thereof."

At the trial in the Superior Court, before *Bacon, J.*, the report of an auditor was the only evidence offered by the plaintiff. None of the findings of the auditor were controverted except the following :

The defendants offered evidence tending to show that the defendant Barker's name was signed to the first lease by Warren D. Hobbs, one of the other defendants, not in the presence of the said Barker, and without authority in writing from said Barker, and that Barker never personally signed the same; and they requested the judge to instruct the jury that the plaintiff could not recover under that lease unless Hobbs had authority from Barker under seal to execute the same, or unless Barker was present at the time it was so executed. This ruling the judge refused to give, but ruled that even if Hobbs had no authority to sign Barker's name, yet Barker, having entered under the lease, having afterwards taken the second lease of the other premises, and having executed that himself, was estopped from showing that Hobbs was not authorized to sign his name.

The auditor found that after the first lease was executed, but prior to April 1, 1865, the defendants set the glass which was broken in the mill and factory houses and effected other repairs therein, in consideration of being permitted by the plaintiff to occupy part of the mill and one of the factory houses free of rent from the date of said lease to April 1, 1865; and that these repairs were regarded by the parties as if made by the lessor, and that the covenants in the leases referred to the condition of the leased property as it stood on April 1, 1865; and that when the defendants took possession of the premises demised in the first lease, the windows were in good condition in the buildings named therein and the panes of glass properly set therein, but that at the expiration of said lease several of the windows and a large quantity of the glass were broken by some party other than the plaintiff, and the damages sustained by the plaintiff in the premises the auditor found to be seventy-five dollars.

The auditor further found that the premises were used by the defendants from April 1, 1865, until 1866, when they were changed to a cotton mill and afterwards used as such, the machinery used therein was operated by water power in the usual manner; that in 1866 the defendants placed in the mill additional machinery consisting of counter-shafting, pulleys, hangers and belts; the counter-shaft was belted from the main shaft, and with the pulleys and hangers appertaining thereto, was fastened to the timbers or floors of the building by bolts and screws, and was

connected to the machines by belts. All this machinery was purchased for and adapted to the use of the mill as a cotton mill, and all of it could be detached and removed from the building without substantial injury thereto or to the machines. On December 1, 1868, the defendants ceased to occupy the premises, and E. Fisher & Sons occupied the same as lessees of the defendants. The plaintiff assented to this assignment by writing under seal. In 1869, E. Fisher & Sons removed from the premises the said counter-shafting, pulleys and hangers to the value of \$220, and the aforesaid belts to the value of \$50, and converted them to their own use.

The defendants contended upon the above facts, that the plaintiff could not recover for the glass, counter-shafting, pulleys, hangers and belts, but the judge ruled that he could.

It further appeared, from the auditor's report, that the defendants, during their occupation of the mill, introduced appliances for heating it by steam, consisting of a portable boiler for generating steam, set horizontally on a flat stone, with cemented brick and stone set on each side of it, supplied with water by a force pump screwed to the floor, and operated by the wheel of the factory; the steam being conveyed over the building by three rows of steam piping extending horizontally along two sides and one end of three rooms and through the ell, and having the usual joints and elbows; these pipes passed through the floors of the factory from one story to another, and were supported by hooks screwed to the building, and when the posts in the building came in their way, holes were bored therein, through which the pipes ran. While Fisher & Sons were in occupation, a new boiler was put in which was set upright on the ground near where the old boiler had stood, and the connection of the pipes was changed to the new boiler. Both boilers were connected with the chimney by flues. In September, 1869, Fisher & Sons removed said steam pipes, amounting to 1500 feet, with the joints and elbows and other fittings belonging thereto, and converted them to their own use to the value of \$405. The defendants contended, upon the above facts, that the plaintiff could not recover this item.

It further appeared that at the commencement of the leases a machine called Daniels's wood-cutting machine stood on the premises described in the first lease, outside the mill and eighteen

inches therefrom. This machine was movable, weighed about 300 pounds, and was used for cutting up brush and wood. It was operated by a belt running from the main shaft of the factory to a counter-shaft, and thence to the machine. There was no agreement between the parties as to the use of this machine, unless the same passed by the first lease; but when the defendants took possession of the premises under this lease, they continued to use the machine, as it had before been used, and as above stated, until it was broken and disabled by the defendants, and became of but little value, and was not afterwards repaired by them. The table on which the machine stood remained on the premises at the expiration of the lease. The damage to the machine was \$55. The defendants contended, upon the above facts, that the plaintiff could not recover for this item.

The defendants asked the court to rule that upon the above facts the plaintiff was not entitled to recover in this action, which ruling the judge refused to give, and instructed the jury that the plaintiff was entitled to recover the several amounts found by the auditor as in his report stated.

The jury thereupon returned a verdict for the plaintiff for the sum of \$1760, and the questions of law were, by consent of parties, reported for the consideration of this court. "If the foregoing rulings are correct, judgment is to be entered for the amount of the verdict, less any of the foregoing sums which the court may rule he is not entitled to recover, if any, with interest thereon from the time from which interest lawfully runs; if otherwise, the verdict is to be set aside and a new trial granted"

Part only of each argument is reported.

J. Hopkins, for the plaintiff. 1. The shafting, pulleys, hangers, belts and steam pipes were fixtures. The ordinary rule as to fixtures between landlord and tenant differs from that between landlord and tenant having a bond for a deed. In this latter case the same rule applies as prevails between vendor and vendee and mortgagor and mortgagee. *McLaughlin v. Nash*, 14 Allen, 136. *Winslow v. Merchants Ins. Co.* 4 Met. 306. The essential elements of a bond are an agreement in writing, under seal, delivered to the obligee, to do a certain thing therein specified on the performance by the obligee of the condition precedent in the agreement mentioned. *Bac. Ab. Obligations*, A, B. This agree-

ment to sell the premises had all of the essentials of a bond for a deed, was specifically enforceable in equity, and a suit at common law would lie for a breach of it; and the rule as to fixtures between the parties is the same as prevails between vendor and vendee and mortgagor and mortgagee, and not as between landlord and tenant. *McLaughlin v. Nash*, *supra*. *Oakman v. Dorchester Ins. Co.* 98 Mass. 57. Between vendor and vendee things personal in their nature but attached to and specifically designed for use in connection with the granted premises pass by the deed. *Noble v. Bosworth*, 19 Pick. 314. *Weston v. Weston*, 102 Mass. 514.

2. The wood-cutting machine was part and parcel of the demised premises. It was attached to the premises at the time of the demise, was used in connection with them at the time the defendants entered into possession, was by them used afterwards in the same connection, and it passed to them under the lease as it would have passed to them by deed. *Winslow v. Merchants Ins. Co.* 4 Met. 306.

3. If the shafting, pulleys, hangers, belts and steam pipes were not in the ordinary sense fixtures that could not be removed, having reference to the relations of the parties as constituted by the lease and the agreement to sell therein contained, then the plaintiff is entitled to recover for them by reason of the covenant to deliver up the premises and all future erections and additions. *Sunderland v. Newton*, 3 Sim. 450. *Rex v. Topping*, M'Clel. & Y. 544. *Naylor v. Collinge*, 1 Taunt. 19. *Penry v. Brown*, 2 Stark. 403. *Martyr v. Bradley*, 9 Bing. 24. *West v. Blake-way*, 2 Man. & G. 729.

F. T. Blackmer, for the defendants. This suit being on an action of covenant, setting forth a sealed instrument, and declaring thereon as such, the plaintiff must prove that all the defendants signed the instrument under seal, or that Hobbs had authority to sign the name of Barker in order to recover as the pleadings now stand. The plaintiff cannot recover against Barker on this lease, having declared on it as a sealed instrument, as no authority under seal was ever given to Hobbs to sign Barker's name. *Berkeley v. Hardy*, 5 B. & C. 355. *Milton v. Mosher*, 7 Met. 244. 1 Parsons Con. 47. No subsequent ratification of the act of Hobbs or of his authority to sign the lease would make

the instrument the sealed instrument of Barker. Ratification of an act done by one assuming to be an agent relates back, and is equivalent to a prior authority. And when the adoption of any particular form is necessary to confer this authority in the first instance, there can be no valid ratification, except in the same manner. *Despatch Line of Packets v. Bellamy Manufacturing Co.* 12 N. H. 205. *Hunter v. Parker*, 7 M. & W. 322, 343. The acceptance of a deed or lease with a provision that the grantee or lessee shall do something therein expressed, raises an implied contract to do it, but no action can be maintained upon the express covenants contained in the instrument. *Braman v. Dowse*, 12 Cush. 227. *Parish v. Whitney*, 3 Gray, 516.

GRAY, C. J. The law is settled in this Commonwealth, that the unauthorized execution of a deed in the name either of a partnership or of an individual may be ratified by parol. *Cady v. Shepherd*, 11 Pick. 400. *Swan v. Stedman*, 4 Met. 548. *McIntyre v. Park*, 11 Gray, 102. The defendants have therefore no ground of exception to the ruling that the defendant Barker, having entered under the lease sued on, was estopped to show that his copartner was not authorized to sign his name to it.

The remaining questions in the case relate to the effect of the covenant of the lessees to "deliver up the premises and all future erections and additions to or upon the same" to the lessor at the end of the term "in as good order and condition as the same now are or may be put into by the lessor."

The panes of glass in the windows, repaired after the date of the lease and before the beginning of the term, appear by the report to have been so repaired by the lessees in consideration of being allowed by the lessor to occupy part of the premises during the same period. They were thus in effect repaired by the lessees in behalf of the lessor, and stood as if they had been put in repair by the lessor before the execution of the lease; and the plaintiff is entitled to recover the value of the glass afterwards broken during the term.

It was admitted at the argument, that at the beginning of the term there was no machinery on the premises, except the main shaft. The counter-shafting, pulleys, hangers and belts, the portable boiler and the steam pipes connected with it, were either trade fixtures, removable by the lessees during the term, or per-

sonal chattels. *Poole's case*, 1 Salk. 368. *Lawton v. Lawton*, 3 Atk. 13. *Winslow v. Merchants Ins. Co.* 4 Met. 306, 311. *McLaughlin v. Nash*, 14 Allen, 186. *Pierce v. George*, 108 Mass. 78. The fact that the lease contained an agreement of the lessor to sell the premises to the lessees did not affect their rights in this respect.

The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order "all future erections or additions" to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to — putting such erections and additions upon the same footing, in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term. *Bishop v. Elliott*, 11 Exch. 113.

In *Naylor v. Collinge*, 1 Taunt. 19, the things removed were "buildings," coming within the very words of the covenant; and yet such of them only as were affixed to the freehold, and not such as rested upon blocks, were held to be included. In all the other cases cited for the plaintiff upon this point, the covenant either expressly named the fixtures or comprised "all improvements."

It follows that the learned judge of the Superior Court erred in instructing the jury that the plaintiff was entitled to recover the value of the articles put in and taken away by the defendants.

The wood-cutting machine, belonging to the lessor and upon the premises at the beginning of the lease, was also, within the authority of *McLaughlin v. Nash* and *Pierce v. George*, above cited, a mere chattel, which did not pass to the lessees by the lease, and for the destruction of which the lessor cannot maintain an action upon the covenants therein contained.

It follows that, according to the terms of the report, the sums assessed by the auditor for which we have held the plaintiff not to be entitled to recover are to be deducted from the amount of the verdict, interest computed on the remainder from the date of the writ, and

Judgment rendered for the plaintiff accordingly.

STEPHEN TORREY vs. LEWIS A. COOK & another.

Worcester. October 2.—23, 1874. COLT & MORTON, JJ., absent.

Where tenants in common of land, for the purpose of making partition, execute mutual deeds of release of specific portions thereof to each other, and a mortgagee, who has a mortgage from one tenant upon an undivided half of the land, joins with the mortgagor in his release, such release and partition have, as to the interest of both the mortgagor and the mortgagee, the effect to substitute for an undivided half of the whole land the whole of the portion set off to the mortgagor in severalty.

A mortgagee of land cannot execute a power of sale in the mortgage by selling less than the whole title of the mortgagor and himself in the mortgaged premises; and a sale and conveyance of an undivided half of the land mortgaged passes no title to the purchaser.

Recovery of judgment in an action upon a mortgage note, without payment, is not a bar to a writ of entry to foreclose the mortgage.

A., who was tenant in common with B. of a lot of land, mortgaged to C. one undivided half thereof. A. and B. then made a partition of the land and executed mutual releases to each other, and C. joined with A. in his release. C. afterwards sold to D. under a power of sale in the mortgage one undivided half of the land released to A. for a sum not sufficient to pay the mortgage debt. He afterwards recovered judgment against A. for the remainder of the sum due; and subsequently, the judgment remaining unpaid, brought a writ of entry against A. and D. to foreclose the mortgage on that part of the land released to A. *Held*, that he was entitled to conditional judgment.

WRIT OF ENTRY against Lewis A. Cook and Daniel A. Cook, counting upon the plaintiff's title in fee and in mortgage of a farm of two hundred and seventy-five acres. The defendants severally pleaded *nul disseisin*. The case was submitted to the decision of the court upon a statement of facts, in substance as follows:

On June 4, 1869, the tenant Lewis, being the owner in fee of an undivided half of the farm, holding it as tenant in common with Edward H. Cook, executed and delivered to the demandant a mortgage of said undivided half of the farm, to secure the payment of a promissory note for \$2500, in six months from date, and containing a power, upon any breach of condition of the mortgage, to "sell and dispose of the granted premises" at public auction, and in his own name or as attorney of the grantor "convey the same absolutely and in fee simple to the purchaser," "and out of the money arising from said sale to retain all sums then secured by this deed," &c.

On December 10, 1870, Edward executed and delivered to Lewis a quitclaim deed of one hundred and ten acres, part of the

farm ; and Lewis executed and delivered to Edward a like deed, in which the demandant at their request joined, receiving no consideration therefor, releasing all right, title and interest in the rest of the farm. It is agreed, if the fact be competent, that these deeds were executed and delivered principally for the purpose of making partition of the farm between the tenants in common, Lewis and Edward, and that the demandant executed said release with the sole purpose of forwarding said partition.

On October 20, 1871, the mortgage debt remaining unpaid, the demandant sold by auction and conveyed to the tenant, Daniel A. Cook, "by virtue of the authority in me vested by the said mortgage deed," and without any covenants whatever, an undivided half of the tract of one hundred and ten acres conveyed by Edward to Lewis. This sale was made for the sum of \$1531.33, (that being the highest bid therefor,) which was applied on the mortgage debt. It is agreed, if the fact is competent, the tenants objecting to its competency, that when the demandant made said sale under his mortgage, he believed he had no legal title to or interest in the other undivided half of the one hundred and ten acres.

On January 24, 1873, in an action of contract in the Superior Court upon the mortgage note, the demandant recovered judgment against Lewis for the balance due and unpaid, being the sum of \$1244.06, and costs.

If on these facts the demandant is entitled to recover one undivided half of the one hundred and ten acres, conditional judgment is to be rendered for the demandant for the balance found to be due on the mortgage. If the demandant is not entitled to recover, judgment is to be for the tenants.

T. G. Kent, for the demandant.

S. A. Burgess, for the tenants.

GRAY, C. J. The release by the mortgagee, having been made contemporaneously with, and solely for the purpose of aiding in, the partition by deed between the mortgagor and his co-tenant, did not discharge any part of the mortgagor's estate from the mortgage. The effect of the transaction upon the interest of the mortgagee, as upon that of the mortgagor, was simply to substitute, for an undivided half of the whole farm, the whole of the portion set off to the mortgagor in severalty. *Bradley v. Fuller*, 23 Pick. 1.

The mortgagee could not execute the power of sale by selling less than the whole title of the mortgagor and himself in the land mortgaged. His sale and conveyance of an undivided half of the land bound by the mortgage therefore passed no title to the purchaser, and did not affect the mortgagor's right to redeem or his own right to foreclose. *Fowle v. Merrill*, 10 Allen, 350. *McMurray v. Connor*, 2 Allen, 205. This conveyance did not purport to pass any right of the mortgagee, otherwise than by an execution of the power, nor contain any covenants which could estop him to assert his title under the mortgage.

The mortgagee then, still being the lawful holder of the mortgage, had the right to foreclose it by appropriate proceedings, as well as to sue on the mortgage note; and the bringing of an action and recovery of judgment upon the note cannot, without payment, bar this writ of entry. *Ely v. Ely*, 6 Gray, 439.

The result is that, as each tenant has pleaded the general issue, and one of them has no title in the land, the demandant is entitled, unless the other shall pay the amount due on the mortgage, to conditional judgment for the possession of the whole tract of one hundred and ten acres against both. The question what that amount shall be does not appear to have been intended to be presented by the statement of facts, and has not been argued by counsel. The case must therefore stand for a hearing upon that question before a single justice, unless the parties agree upon the amount.

Demandant entitled to conditional judgment.



CYRUS KIDDER vs. INHABITANTS OF OXFORD.

Worcester. October 7.—23, 1874. COLT & MORTON, JJ., absent.

In estimating damages under the Gen. Sts. c. 43, § 73, for land taken for a private way, the jury may include in their assessment an allowance for interest from the time when the land was taken.

When the damages for land taken for a private way, other than by way of interest, awarded by a jury on a petition under the Gen. Sts. c. 43, § 73, are the same in amount as those awarded by the selectmen, the charges arising on the application for a jury must be paid by the petitioner.

PETITION under the Gen. Sts. c. 43, § 73, for a jury to assess the damages occasioned by the laying out of a private way in the defendant town, over land of the petitioner. The way was laid out on March 15, 1862, by the selectmen of Oxford, who awarded the petitioner \$30 as damages. The petitioner in due time applied to the county commissioners for a jury to assess the damages. A jury was not summoned to try the issue until 1874, when on June 3, the case was tried before a sheriff's jury, who rendered a verdict: "That the complainant recover of the inhabitants of said Oxford the sum of \$30 damage, and interest \$21.90, as damages sustained as aforesaid, amounting to \$51.90."

This verdict was duly returned to June term, 1874, of the Superior Court. At the next term the petitioner moved that the verdict be accepted and recorded, and that he be allowed the "charges arising on his application," as well as costs in the county commissioners' court. The respondent objected to the allowance of the charges and costs, and further objected to the acceptance of the verdict on the ground that the petitioner was not entitled to the item of interest therein, and contended that the item of interest should be stricken out, and the verdict accepted for the balance. It was agreed that the jury were instructed by the officer presiding at the hearing to find the item of interest as a separate sum, for the sake of presenting the question of its allowance as damage clearly, and that this instruction was not excepted to.

Brigham, C. J., ruled that the item of interest was improperly included in the verdict, and that the petitioner would not be entitled to costs if he were entitled to have the item of interest stand in the verdict, and ordered the item of interest to be stricken out, and the verdict to be accepted for the balance. The petitioner excepted to this ruling, and appealed from the order directing the item of interest to be stricken out.

W. S. B. Hopkins, for the petitioner.

F. P. Goulding, for the respondent.

GRAY, C. J. The jury were authorized by law to include in their assessment of damages an allowance for interest from the time when the land was taken. *Edmonds v. Boston*, 108 Mass. 535. The bill of exceptions does not show the date of actual entry upon the land, or raise any question as to the amount of

interest, if any interest might be allowed. The direction to the jury to assess the item of interest separately is expressly stated not to have been excepted to. The verdict returns both the principal sum and the interest as "damages sustained" by the petitioner. The entire verdict should therefore have been accepted.

But the verdict also shows that the whole of the damages awarded by the jury, other than by way of interest, was exactly the same in amount as the damages which had been awarded by the selectmen. As it thus clearly appears that the damages were not increased, the charges arising on the application for a jury must be paid by the petitioner, and not by the town. Gen. Sta. c. 43, § 73. *Verdict accepted; petitioner to pay charges.*



ATTORNEY GENERAL vs. UNION SOCIETY OF WORCESTER.

Worcester. October 3. — 23, 1874. COLT & MORTON, JJ., absent.

A testator bequeathed a sum of money to a religious society in trust to invest and apply "the interest thereon and increase thereof" "towards defraying the expenses of maintaining a minister and public worship" in a mission chapel devised by the will to the same trustees. The will provided that the rent of certain real estate should be applied "in keeping the premises," which included the chapel, "in repair, in paying the contingent expenses, in conducting and managing the same," and "the surplus, if any, towards the support of the minister." It further provided that the principal of the fund might be applied to rebuilding the chapel if destroyed. The trustees applied a small part of the income of the trust fund to the payment of the sexton, and for fuel used in the chapel. *Held*, that such use of the income of the fund was not a misapplication of it.

INFORMATION in equity by the Attorney General, at the relation of the Rev. Henry T. Cheever, alleging that the Union Society of Worcester, the trustee under the will of Ichabod Washburn of certain real estate and of a fund of twenty thousand dollars had misapplied a part of the income of said fund. *Gray, C. J.*, gave judgment for the defendant, and the Attorney General appealed. The case is stated in the opinion.

H. T. Cheever, (J. F. Manning with him,) for the Attorney General.

H. Williams, for the respondent.

DEVENS, J. The information before us presents a question of construction, arising upon the will of Ichabod Washburn, late of Worcester, whereby he devised to the Union Society a certain tract of land, with a meeting-house known as the Mission Chapel, and other buildings thereon, and also bequeathed to the same society the sum of twenty thousand dollars, both upon the trusts and for the purposes declared in the will. The plan which the testator proposes as a charity is set forth with some minuteness of detail, and is substantially a provision for a suitable and respectable place of public worship, where every decent and orderly person, under proper regulations, for the adoption of which he arranges, may attend free of charge. After providing for the management of the real estate, and the investment of the fund of twenty thousand dollars, the will directs that "the interest thereon and income thereof" "be applied by said trustees towards defraying the expenses of maintaining a minister and public worship as herein expressed," with a further provision that they may apply the principal towards rebuilding the house, if destroyed.

The trustees have applied a small portion of the income of this fund to payments for the services of the sexton who has had the care of the chapel, and also for fuel used therein. The relator contends that the only object for which they are authorized to expend their income is that of maintaining a minister at the chapel; that it is for the support of the pulpit only; and that even if these expenditures are reasonable, if they could properly be made, it is a misappropriation of the trust funds in the hands of the respondents. This view of the construction of the will is erroneous: it gives no force to the latter clause of the direction as to the application of the income, and treats the words "public worship as herein above expressed" as a mere redundancy of language. This cannot properly be done; the words so clearly indicate an object distinct from that of supporting the minister only, that we should not do justice to the intent of the testator, as expressed by him, to disregard them.

Nor do we find anything, on examining the other parts of the will to which our attention has been called by the relator, to induce us to doubt that the true construction is in accordance with what is the apparent and obvious meaning of this sentence.

Provision is made that the trustees shall permit the deacons (in whose charge the real estate is to be) to let such portions thereof, other than the meeting-house, as they may judge best, upon reasonable rents, and collect and apply the same "in keeping the premises in repair, in paying the contingent expenses, in conducting and managing the same, and causing the same to be insured, and appropriate and apply the surplus, if any, towards the support of the minister." It is argued from this that the testator considered that he had so amply provided for all contingent expenses by the rents that there would be a surplus therefrom to be applied to the support of the minister, and therefore that he could not have intended that any portion of the income of the trust fund should be appropriated to them. But even if we assume that the "contingent expenses" here referred to are those connected with the conducting of public worship, and not those only connected with the care of the real estate, as the association in which the words are found would seem to indicate, we could not hold that, because the testator desired that the rents, if any, should be applied to this purpose, he did not also desire that a reasonable portion of the income of the fund should also be devoted thereto, if in the judgment of the trustees it became necessary.

As indicated by the expressions used in the codicil, the testator undoubtedly also wished, from the greater interest which would thus be created among those who worshipped at the Mission Chapel, that some portion of the expenses should be borne by them, but by such expressions he did not intend to limit the powers he had given to the trustees of his charity. That public worship at the Mission Chapel could not be conducted without certain incidental expenses, he must have contemplated. It does not appear that there are any means of meeting them from the rents of the real estate, and if from indifference or inability those who worship at the Mission Chapel neglect to provide for them, he did not intend that his bounty should fail, but gave an authority by which the trustees are justified in meeting them from the income of the fund in their hands. *Information dismissed.*

ELLJAH D. GOODRICH *vs.* HENRY H. STEVENS.

Worcester. October 2. — 24, 1874. COLT & MORTON, JJ., absent.

When a copy of a judgment roll offered in evidence is partly printed and partly written, but has the clerk's certificate at the end of the written part only, whether the certificate applies to the whole roll or to the written part alone is a question of fact to be determined by examination and inspection of the papers.

It is no defence to an action brought by one citizen of this state against another, on a judgment recovered in suit between the same parties in a court of another state having jurisdiction of the parties, and in which the defendant appeared, that the plaintiff took an assignment of the cause of action without consideration from a citizen of the other state in order to prevent the defendant when sued there from removing the case into the Circuit Court of the United States.

A judgment creditor may bring an action in his own name, although another person is entitled to the avails of it.

CONTRACT upon a judgment of the Supreme Court of the state of New York.

At the trial before *Gray*, C. J., the plaintiff introduced as evidence of the judgment declared on an exemplification of it which was partly printed and partly in writing. The defendant objected that the certificate of the clerk appended to the exemplification applied to the written part only. But upon inspection of the papers it was ruled that the certificate was intended to and did extend to the whole judgment roll.

The defendant offered to show that the real owner of the cause of action so sued upon in New York was Henry P. Smith, a citizen of that state, and that the nominal plaintiff took an assignment of this cause of action from Smith without any consideration, and for the purpose of having the suit brought in New York, between citizens of Massachusetts, in order to confer on the courts of New York final jurisdiction of the cause, and to defraud the defendant of his right to remove the case to the Circuit Court of the United States.

The defendant also offered to show that the nominal plaintiff was not the real owner of the judgment, that the real owner resides in New York, and contended that the writ was defective in not setting forth the name of the real owner of the cause of action.

The evidence was excluded ; a verdict was taken for the plaintiff, and the defendant alleged exceptions.

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| 116 | 170 |
| 146 | 388 |
| 116 | 170 |
| 156 | 200 |

W. S. B. Hopkins, for the defendant.

T. L. Nelson, for the plaintiff.

ENDICOTT, J. A portion of the judgment roll offered by the plaintiff was printed, and a portion was in writing. The only objection to its admission was, that the certificate of the clerk applied to the written part only. This is a matter to be determined by examination and inspection of the papers. No question of law is involved in the decision, and it is apparent that the certificate was intended to and does extend to the whole judgment roll. The ruling of the presiding judge admitting it in evidence was correct. *Knapp v. Abell*, 10 Allen, 485. 1 Greenl. Ev. §§ 504, 506.

The facts which the defendant offered to prove, if proper matter of defence, should have been presented in the original action. It was alleged in the plaintiff's complaint in that action, that the contract and all rights of action arising thereon had, for a good consideration, been assigned to the plaintiff. This would authorize him under the laws of New York to bring an action in his own name. It is not denied that the court had jurisdiction of the parties. Process was duly served, the defendant appeared and made answer, raising no question upon the assignment. The case was tried by a jury upon the issues presented by the defendant. Judgment was rendered against him, which on appeal to the general term was affirmed. He is now concluded by that judgment.

To allow this defence would not be giving full faith and credit to the judicial proceedings of another state, when the court has jurisdiction of the parties, the subject matter, and its proceedings are not founded in fraud; and would open to defendants when sued on a judgment so obtained, any defence which they had neglected to make in the original action. *Carleton v. Bickford*, 13 Gray, 591. *Hall v. Williams*, 6 Pick. 232. 1 Greenl. Ev. § 548.

The action is properly brought in the plaintiff's name, he being the judgment creditor, although another may be entitled to the avails of it. *Moore v. Coughlin*, 4 Allen, 335.

Exceptions overruled.

THERON E. HALL vs. INHABITANTS OF HOLDEN.

Worcester. October 8. — 24, 1874. COLT & MORTON, JJ., absent.

A vote of a town to refund money paid to its agent on a condition, and by him wrongfully delivered to the town treasurer, is an express promise for a valuable consideration, and is competent evidence in an action against the town for money had and received.

A town, into whose treasury money belonging to a person has been wrongfully paid by a town agent, to whom it was given by the person on a condition, may lawfully pass a vote to repay the money, and such a vote is not revocable by a subsequent vote.

Evidence that A. deposited money with a member of a committee, appointed at a town meeting to investigate a claim of the town against A., to hold until such time as A. made an explanation of the matter to the town; that the committee paid the money into the treasury of the town; and that the town afterwards voted to repay it; is sufficient to sustain an action for money had and received brought by A. against the town, within six years from the passage of said vote.

If, in an action against a town to recover money deposited with its agent on a condition, and by him wrongfully paid to the town treasurer, it appears that the town at one time voted to repay said money, evidence is not admissible that subsequently the town passed another vote rescinding the first.

A town having a claim against A. appointed a committee to whom the matter was referred. A. paid the money to the committee, and in an action by him to recover the money against the town, put in the report of the committee for the purpose of showing the receipt of the money by the town. The report stated that A. had paid the money in settlement of the claim, and that the committee had paid it into the town treasury. *Held*, that evidence of what was said between A. and the committee at the time the money was paid tending to show that the money was not in payment of the claim, was admissible.

If A. demand payment of a sum of money from B., and B. gives him the sum demanded, stating that he does so upon certain conditions, and A. receives the money and remains silent, he will be presumed to have acquiesced in the conditions.

CONTRACT for money had and received. Writ dated December 19, 1873.

At the trial in the Central District Court of Worcester; the plaintiff put in evidence tending to show the following facts: In the spring of 1861, the defendant sent to Fort McHenry in Maryland certain pistols and cartridges to be distributed among the members of a company of soldiers recruited in the defendant town; the officers refused to allow the soldiers to have the pistols, and they were found by the plaintiff in the store-house at Fort McHenry; he reported the facts to the selectmen of the town, and they requested him to do what he could with them. The plain

tiff then delivered them to a person who falsely represented that he bought them for the ordnance department. The fact of the sale was communicated to the selectmen of the defendant town, and was assented to by them. Nothing was received for the pistols.

The plaintiff put in evidence certain records of the defendant town, showing the appointment of a committee to whom the matter was referred, and the following report made by them on March 2, 1863, signed by Joab S. Holt and the other members of the committee :

“ The committee chosen by the town to investigate the matter concerning pistols and cartridges which the selectmen of Holden gave an order to Captain T. E. Hall on Major Charles Devens, who had them in charge at Fort McHenry, Maryland, and who delivered them to Captain T. E. Hall, who took them to Washington and sold them to Captain Perkins, whom he supposed to be in the employment of the government. Said Hall says he has never received anything for them, and they were afterwards pawned to the proprietors of the Kirkwood House by Captain Perkins. Your committee have received from Captain T. E. Hall two hundred and seventy-eight dollars and forty cents, the full cost of thirty-two pistols and thirty-two hundred cartridges, and have paid the same to Charles Knowlton, treasurer of the town of Holden, and taken his receipt for the same. Your committee are unanimous in saying that we have received full compensation for the pistols.” The plaintiff's counsel stated that he offered the report of the committee for the purpose of showing the reception of the money.

The plaintiff testified that he received a letter from this committee in regard to the pistols ; and while at home on a furlough in February, 1863, he had a conversation with Holt, who has since died, in regard to the claim of the town. The defendant objected to evidence of any conversation of Holt that would vary and control the written report of the committee, as the report was introduced by the plaintiff, and contended that such conversation was generally incompetent. The objection was overruled, and the defendant alleged exceptions. The plaintiff then testified that Holt told him that he was one of the committee of the town, and wanted to settle the matter about the pistols, and if it was

not settled he should sue the plaintiff; that the plaintiff said he did not owe the town anything; that he then handed to Holt a five hundred dollar bill, and said, "Take this, or just as much as may be necessary, and hold it until such time as I shall make an explanation about the matter to the town; that I know that if the town could know the facts they would be satisfied, and would not press the claim. I wish you to understand that I do not pay this money for the pistols, and that I will not acknowledge that I owe the town for them;" that in the evening of the same day, Holt saw the plaintiff again, and gave him back the change, keeping \$278.40, the original cost of the pistols; that Holt then gave the plaintiff a receipt acknowledging payment for the pistols, which the plaintiff refused to receive, saying to Holt: "You know that is not the transaction; I never paid you money for the pistols."

The plaintiff also put in evidence the record of the defendant town of an article in the warrant for a town meeting and a vote upon it, as follows: "April 7th, 1873. Article 13th. To see if the town will refund to T. E. Hall, money deposited by him in the hands of Colonel J. S. Holt, upon a demand made by the town for payment of a lot of pistols, or act or do anything relative to the same." "Voted that the town refund the money to T. E. Hall, which he deposited in the hands of Colonel J. S. Holt, and interest from the time said Hall made the deposit." It also appeared from records of the town that said sum was paid over to the town treasurer and received by the town before the report of the said committee was made.

On cross-examination the plaintiff testified that he deposited the money voluntarily, knowing all the facts in relation to the matter, because Holt threatened to sue him, and he did not desire to have a suit against him while he was in the field, and could not attend to it, and to stop the rumors against him; that he had article thirteen inserted in the warrant for the town meeting by simply making the request.

The defendant offered to show that the vote of April 7, 1873, had been rescinded at a regular town meeting in November, 1873. The judge excluded this evidence, and the defendant excepted.

The defendant also called Charles Turner, who testified that he was one of the selectmen of the town at the time the order

was given to Hall to get the pistols ; that he did not remember being present when the order was given ; but after the pistols were sold he had an interview with Hall in presence of the other selectmen, in which he said to Hall, " I, for one, do not feel satisfied about those pistols. If some of those blue pills should get through you we have nothing to show for the pistols." Hall replied that he had property, that it was good for it, and he would be responsible. The plaintiff being recalled testified that the testimony of Turner was true, but he supposed at that time that he should get pay for the pistols.

At the close of the evidence the defendant asked the judge to rule that the evidence would not warrant a verdict for the plaintiff. This request was refused.

The defendant also asked the judge to instruct the jury that they must be satisfied that Holt, acting as agent for the town, consented to hold the money on deposit as claimed by the plaintiff in order to make the town liable in this action. The judge gave the instruction as prayed for, but added the following : But if you find that the plaintiff, at the time he deposited the money with Holt, stated to him the terms, purposes and conditions upon which he made the deposit, and Holt made no reply, but accepted the money, he is presumed to have acquiesced in said terms, purposes and conditions.

The judge also, against the defendant's objection, gave the following instruction to the jury :

" If you find that the money was not given in payment of the claim of the town against the plaintiff, but was deposited upon condition that it should be held for him till he should explain his transactions to the town, and he did not make the explanation till within six years next before the date of his writ, the action is not barred by the statute of limitations."

The jury returned a verdict for the plaintiff, and found specially that the plaintiff did not voluntarily pay the money in settlement of the demand made upon him by the town ; that he deposited the money with the committee of the town upon condition that it should be held for him, until he should explain to the town the transaction about the pistols ; that the explanation was made within six years prior to the date of the writ.

The defendant alleged exceptions.

B. W. Potter, for the defendant.

F. T. Blackmer, for the plaintiff.

ENDICOTT, J. The vote of April, 1873, to refund to the plaintiff the money deposited by him with Holt, was an express promise for a valid consideration, and was competent evidence in an action against the town for money had and received. The language of the vote carries with it the admission that the money so deposited belonged to the plaintiff, and there was evidence introduced at the trial that Holt, who acted as one of the committee in behalf of the town, erroneously or wrongfully paid it into the town treasury. It is a case where the money of the plaintiff, having been improperly paid to the town by its agent, the town, in consideration that it has the money under such circumstances, votes to repay it. We know of no reason why a town has not the power to pass such a vote, or, having passed it, is not bound by it. Such a vote is not revocable, but gives a right of action, which cannot be defeated without the consent of the party in whose favor it was made. The vote of the town, in November, 1873, rescinding the vote of April, 1873, was therefore properly excluded. *Nelson v. Milford*, 7 Pick. 18. *Bancroft v. Lynnfield*, 18 Pick. 566. *Thayer v. Boston*, 19 Pick. 511. *Cushing v. Stoughton*, 6 Cush. 389, 392. *Hunt v. Roylance*, 11 Cush. 117.

The vote was in form a contract to pay, and whether it was an original promise, on which an action could be maintained, or an acknowledgment of a debt, barred at the time by the statute of limitations, is immaterial in this case. It was competent evidence in either aspect. It was not therefore important or material when the plaintiff made his explanation in regard to the sale of the arms; the vote of the town shows it was at that time satisfied he was not in default.

The conversation with Holt, the accredited agent of the town, at the time the money was given him, was competent as part of the transaction, and as showing the terms and conditions on which he took it and consented to hold it, and his acquiescence in these terms and conditions may be presumed by his silence. Nor was evidence of the conversation with Holt incompetent because it varied the report, which he afterwards signed and submitted to the town. The report was put in by the plaintiff to show the

reception of the money by the town, the plaintiff was no party to it, and its statements were not binding upon him.

The other instructions prayed for were properly refused, having no application to the facts as presented in the evidence reported. *Exceptions overruled.*

MICHAEL J. MCGENNESS vs. ADRIATIC MILLS.

Worcester. September 30. — October 24, 1874. COLT & MORTON, JJ., absent.

A declaration which alleges that a nuisance has been created and maintained by discharging through a box drain filthy and polluted water upon the land of A. is supported by proof that the waters of a natural stream have been polluted, and by means of a box drain placed partly in the watercourse and partly upon the land of A., discharged upon said land; and A. is not deprived of his remedy for the nuisance by the fact that he has a right of action for the pollution and diversion of the natural stream.

In an action against a manufacturing corporation for a nuisance, a statement of its superintendent that the nuisance existed and would be remedied, and that "he would not have it around his place for \$500," is competent evidence against the corporation.

TORT for a nuisance. Writ dated August 15, 1872. The plaintiff by an amended count to his declaration, which was the one relied on at the trial, alleged that from January 1, 1867, to the date of the writ he was the owner of a certain parcel of land with a dwelling-house thereon, and that the defendant, a corporation, had "created, continued and maintained a nuisance on the land of the plaintiff, to wit: a box drain extending from the mill and premises of the defendant corporation, through which the defendant conveys to and upon the land of the plaintiff filthy and polluted water."

At the trial in the Superior Court, before Allen, J., it appeared that a natural watercourse rising in springs on the defendant's premises flowed therefrom across a street by means of a culvert, thence between the plaintiff's lot and an adjoining lot for some distance, and thence away from the plaintiff's lot. The evidence tended to show that in the year 1866 the defendant put into the channel of the watercourse a covered box, extending from its

premises to and across the street and following the natural channel for a certain distance between the plaintiff's lot and the adjoining lot, and then turning out of the natural channel upon the plaintiff's lot and extending a certain distance from said point of turning, and that the defendant caused the waters of the watercourse to flow through the box into and upon the plaintiff's land; that the defendant used the waters of the watercourse in its business, on its premises, for dyeing and scouring and other purposes, thereby corrupting and rendering the same impure, and then returned it to the said channel and box before it left the premises of the corporation; that the covering of the box at one or more points on the plaintiff's land burst open by reason of being stopped up by waste from the defendant's mill, and the polluted waters gushed out upon and over a part of the plaintiff's lot, causing the nuisance complained of.

The plaintiff was allowed to put in the declarations of the superintendent of the defendant's mill with reference to the alleged nuisance, made in the spring of 1872 to a witness who testified in substance as follows: "I went to Gledhill, the superintendent, in the spring of 1872; asked what he was going to do with the nuisance. He said he had got to put the trough in some other way. I went again and he said, 'John, I am going to stop it.' He said, 'We are are going to take right hold of it.' He said he was going to clear it up. He said, 'I would n't have it round my place as it is around there for \$500.' Said he had to wait the motion of the company." The defendant objected to the admission of this evidence and excepted thereto.

At the close of the evidence the defendant asked the judge to rule that there was no evidence to go to the jury in support of the declaration, and to direct a verdict for the defendant; and also asked the judge to rule as follows: "1. If the stream or channel was a natural watercourse, the plaintiff cannot recover in this action. 2. If there was a natural watercourse running along by the plaintiff's land or on it, and the defendant entered on the plaintiff's land and put down a box or drain into which the waters of that watercourse were turned, the plaintiff in this action can recover only the damage to his land by putting down that drain, and cannot recover for polluting the waters of that watercourse, or for diverting them upon his land, or for any nuisance caused by

polluting the waters of the watercourse. 3. If the defendant put a box into the natural watercourse for a certain distance, and then turned and extended the box out of the natural channel on to the plaintiff's land, and caused the waters of the natural watercourse to flow through the box upon the plaintiff's land after having polluted the water on its own premises, the plaintiff cannot recover in this case, although the purpose and object of the defendant in putting in and using the box were for a drain."

The judge declined to give any of these instructions, and instructed the jury as follows:

"If the defendant in 1866, without right, for the purpose of draining its premises, put the box on the plaintiff's land, and diverted into it the waters of a natural stream, and so maintained and used it during the time alleged in the declaration, it may be liable for the injuries alleged in the declaration, although caused by the pollution of the waters of the natural stream by the defendant before it left its premises."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

F. P. Goulding, for the defendant. 1. There was a variance between the declaration and the proof. The declaration is for erecting and maintaining a box drain and emptying filthy water by means of it upon the plaintiff's property. The proof shows that the cause of action is the diverting and polluting the waters of a natural stream. Gen. Sts. c. 129, § 2, cl. 3. *Hollis v. Richardson*, 13 Gray, 392. *Read v. Smith*, 1 Allen, 519. *Murdock v. Caldwell*, 10 Allen, 299. *Griffith v. Jenkins*, 2 Allen, 589.

2. The rulings prayed for should have been given. A judgment in this case would be no protection against an action for diverting the stream and polluting the water. The injury for which the plaintiff was allowed to recover was the continuance of the polluted condition and diversion of the water after the 1st of January, 1867. If it was an artificial stream, as the declaration alleges, the defendant would be liable for nominal damages, at least, for every moment of time, for the flow of the water at every point on the plaintiff's land. If it was a natural watercourse, the defendant would only be liable above the point of diversion for such time as the water was polluted.

3. It was not within the scope of the superintendent's agency to state the damage arising from the alleged nuisance. The declarations of an agent are admissible only as a part of the *res gestæ*, and it must appear that the declarations had relation to the subject matter of his employment. *Woods v. Clark*, 24 Pick. 35. *Dorne v. Southwork Manufacturing Co.* 11 Cush. 205. *Cooley v. Norton*, 4 Cush. 93. Story Agency, §§ 134, 135.

W. A. Gile, for the plaintiff.

DEVENS, J. It is argued for the defendant that the evidence offered by the plaintiff wholly fails to sustain the amended count in the declaration, which was the one relied on, and which alleges a nuisance caused by erecting and maintaining a box drain and emptying filthy water by means of it upon the plaintiff's estate. The allegation of a nuisance as charged is however sustained by the proof, notwithstanding the water conducted through the box drain may be the water of a natural stream, which, before it was thus confined, was accustomed to flow between the lands of the plaintiff and of another, which water is now conducted upon the plaintiff's land, and notwithstanding the water thus conducted may have been polluted by the act of the defendant before it entered the drain. The gist of the plaintiff's action is the nuisance created by the injury to the atmosphere and consequent danger to health that has been occasioned by confining water of this character in the drain and conducting it in such a manner that it has been caused to flow out upon and over his land. There was evidence of this in the case, and the plaintiff is not to be deprived of remedy for this injury to him in the occupation of his land, because he may have rights in the stream which would enable him also to maintain an action for diverting its waters so that he could not use them as he had been accustomed to do, or for polluting them so that they had been rendered useless or diminished in value for the purposes for which he had the right to enjoy them. The defendant was not therefore entitled to the instructions requested, and that given by the presiding judge was correct.

The remaining question is in reference to the admission in evidence of the statement of the superintendent. The defendant is a corporation, and can only act through agents, and, in the absence of any evidence to the contrary, the superintendent in

charge of the mill must be deemed the proper person to whom to make complaint and to have authority to give information and direction in regard to the drainage from it. His recognition that it was a matter that required to be attended to and should be, was therefore properly put in evidence. *Morse v. Connecticut River Railroad*, 6 Gray, 450. The expression used by him, that he "would not have it around his place as it was around there for \$500," was a mere mode of stating that the nuisance existed, and could not have been considered as an admission that this sum was the amount of the damages, nor do we understand that it was put in evidence as such. *Exceptions overruled.*

BOSTON SEAMEN'S FRIEND SOCIETY vs. MAYOR AND ALDERMEN OF BOSTON.

CHILDREN'S MISSION TO THE CHILDREN OF THE DESTITUTE vs. ALDERMEN OF BOSTON.

Suffolk. March 17. — October 29, 1874. COLT & ENDICOTT, JJ.,
absent.

The exemption of the real estate of charitable institutions from taxation, by the Gen. Sta. c. 11, § 5, cl. 3, is only from taxation imposed for the general purposes of government, and does not extend to taxation for local improvements under the St. of 1865, c. 159, or the St. of 1866, c. 174.

When the owner of an estate upon which a betterment has been assessed by the mayor and aldermen under the St. of 1865, c. 159, applies for a jury under § 8, the proceeding is in the nature of an application for an abatement of the tax, and the assessment by the jury is to be made as of the time when it was made by the mayor and aldermen, without regard to interest since that time.

DEVENS, J. The first case arises upon a petition to the Superior Court for a trial by jury upon a certain assessment made upon the estate and lands of the petitioner at the corner of Purchase and Oliver streets in Boston, for a portion of the expense of laying out, widening and grading said Oliver Street, &c., under a resolve of the mayor and aldermen of the city, approved September 6, 1865, under the St. of 1865, c. 159; and the questions reported to this court are :

"1st. Whether, under the provisions of the St. of 1865, c. 159, the petitioner or its estate is liable for or subject to said assess

ment, or any assessment, for the expense of laying out, widening and grading said streets, and whether said mayor and aldermen had or have any right or authority to lay or collect said assessment, or any assessment, therefor upon the petitioner's estate."

" 2d. Whether, in case said petitioner's estate is liable for an assessment, the petitioner or its estate is liable to pay any interest thereon."

That the legislature had the constitutional authority to pass the act under which this petition is brought was fully determined in *Dorgan v. Boston*, 12 Allen, 223. See also *Jones v. Boston*, 104 Mass. 75.

Recognizing this as settled, the petitioner, a charitable institution incorporated under the laws of the Commonwealth, whose real estate (which at the time of the passage of the St. of 1865, c. 159, had been and still is used by it for the charitable purpose for which it has been incorporated) has been assessed for a portion of the expense of laying out, widening and grading this street, contends that it is improperly assessed, because its property is included in the exemption from taxation contained in the Gen. Sts. c. 11, § 5, cl. 3. This clause provides that "the personal property of literary, benevolent, charitable and scientific institutions incorporated within this Commonwealth, and the real estate belonging to such institutions, occupied by them or their officers for the purposes for which they were incorporated," shall be exempted from taxation.

That an assessment of the character of the one in question is a tax, and that it can only be levied under the power of taxation, confided by the Constitution to the legislature, and exercised by the mayor and aldermen by virtue of the authority given in the statute under which they have acted, is decided by the case of *Harvard College v. Aldermen of Boston*, 104 Mass. 470.

In many instances, the general public may be interested in an improvement of a local character to such an extent that a proportion of the expense should properly be borne by all the citizens and their property, while it is also attended with especial benefit to particular estates or localities. In such cases, it would be competent for the legislature to authorize a certain proportion of the expenditure to be assessed in the general public taxes, and a certain other to be assessed upon the estates in proportion to the

benefit they derive from it. And where, as in the present case, in the judgment of the legislature, a work of a public nature should be undertaken, which is so largely in its immediate advantages for the benefit of the estates in a particular district as to render such an adjustment of the expenditure proper, it is competent for it to define the limits of such district and cause to be therein assessed the whole expenditure which may be incurred for the purpose. In the assessment of such expenditure they may adopt as the rule that it shall be assessed upon the estates in proportion to their value, if in their judgment this mode is equitable. *Springfield v. Gay*, 12 Allen, 612.

But, while impositions for the purpose of carrying on the government and meeting those expenditures which properly rest upon the whole people of the Commonwealth, whether levied by the government of the state directly, or through the various municipalities by which it exercises its powers, and those impositions which are made upon property benefited by improvements which, although demanded by public convenience and necessity, are yet undertaken for, or are attended with, especial benefit to particular localities, are alike taxes, the only power to levy which must be derived from the authority of the legislature, they form two quite distinguishable classes.

Is then the exemption of the General Statutes to be construed as an exemption from taxation for the public charges of government; or is it to be construed as extending so as to include assessments for expenditures of a local character, the benefits of which are immediately experienced in the particular localities where property so claimed to be exempt is situated?

In *Harvard College v. Aldermen of Boston*, *supra*, which raised the question whether an assessment for a betterment was a tax or civil imposition within the meaning of the very broad clause in the charter of Harvard College, by which its property to a certain value was exempted from all "civil impositions, taxes and rates," it was said that the words thus used in a grant of privileges by the body from whose authority alone taxes, and impositions in the nature of taxes, could be levied, must import a renunciation of the taxing power, "and this not only in the forms and modes already established and in use at the time, but in all forms and modes in which the legislature may from time to

time see fit to exercise the power, or authorize it to be exercised, over property within its jurisdiction." But it was also observed that this proposition did not apply to exemptions contained in what are called general tax acts; and the effect of such an exemption on an assessment like that in the case before the court was not necessary to be then considered.

It cannot be denied that it was entirely competent for the legislature to modify or withdraw at any time the exemption given by the General Statutes to particular classes of property, nor could the language of the statute be interpreted as a renunciation of the taxing power in respect to property of such classes. Although the language is general, yet, in our opinion, it was the intent only to exempt property such as that of the petitioner from those public charges which it is the duty of the whole community to sustain, and which are therefore provided for by the general laws relating to taxation.

The exemption is found in the chapter whose object is to set forth all the persons and property subject to taxation, and the mode in which the assessment shall be made for the annual public charges which are incurred by the state, counties and towns; and it neither contains nor alludes to the special modes of assessment which are adopted where a particular district or a particular class of persons is deemed to have received a special benefit from an improvement undertaken as a public one.

From the nature of the case, the acts which provide for such objects are special, and intended for particular places or occasions; and although they have been passed both by the colonial and provincial legislature, as well as since, they have not formed a portion of the general system of taxation, but have been enacted as the exigencies for them have arisen. *Dorgan v. Boston, supra.*

Nor do the considerations, which may fairly be presumed to have influenced the legislature in relieving the estate of the petitioner from the burden of taxation for the general public purposes, apply with the same force when the inquiry is whether it is to be relieved from taxation for a local improvement.

Institutions like the one before us are intended for the benefit of the general public; and even though devoted to the needs of a particular class, they operate, by taking care of such class, to

relieve the community. There is, therefore, a strong reason for exempting them from taxation for the general public purposes, which is borne in some form by the property of the whole community, that does not exist where the legislature has found it necessary to impose or authorize to be imposed a tax for a local purpose or for a local improvement, and to define the limits within which taxation therefor shall be imposed. There is no reason why the property included within such limits should bear the additional assessment to which it would necessarily be subject were property such as that of the petitioner exempted. Even if it be true that the diminution of the petitioner's means, it being engaged in performing what would otherwise be a public duty, must be met in some form by the public, the limits included within the taxation district for the purpose of the improvement do not in any way indicate the property which should bear this burden.

There has been frequent occasion in other states to consider whether language similar to that of our statutes would exempt property of this character from assessment for local improvements, and in all of them where it has been discussed it has been decided that it would not. *In re Mayor of New York*, 11 Johns. 77. *Northern Liberties v. St. John's Church*, 13 Penn. St. 104. *Canal Trustees v. Chicago*, 12 Ill. 403. *Ottawa v. The Free Church*, 20 Ill. 423. *Lefevre v. Detroit*, 2 Mich. 586. *Lockwood v. St. Louis*, 24 Mo. 20. *In re College Street*, 8 R. I. 474. *Crowley v. Copley*, 2 La. An. 329. *People v. Mayor of Brooklyn*, 4 Comst. 419. *Bleecker v. Ballou*, 3 Wend. 263. *Sharp v. Speir*, 4 Hill, 76.

Some of the cases above referred to involved questions as to the construction of charters containing special exemptions from taxation, which were of course to be decided by the particular language used by the power granting the charter; but, so far as they arose under general laws, without finding it necessary to adopt the grounds upon which many of them are placed, they may fairly be considered as recognizing that an assessment or tax of the nature we are here considering is one differing essentially from those which are levied for the general public objects of government.

The distinction to which we are adverting is also recognized in *Bedford Union v. Commissioners of Bedford*, 7 Exch. 777, where an estate which was exempted from "all parliamentary taxes" was held liable to a tax similar to the one in the present case, because, although imposed by the authority of parliament, it was not a tax for the benefit of the whole kingdom, but for the purpose of the local improvement of the district in which the plaintiffs' estate was situated.

That the construction we have given to the clause relied on by the petitioner, is the one contemplated by the legislature, is made clear by an examination of some of the provisions of the St. of 1865, c. 159. By § 6, it is provided that the whole expense of the widening of the street, including the damages, &c., and the net expense of grading, &c., "shall be assessed upon all the estates abutting upon the said widened street." The estate of the petitioner is therefore subject to assessment according to the literal terms of the act; but we agree that too much emphasis should not be given to the word which includes it. An act of this nature is to be construed by considering what it aims to effect, and the character of its general provisions, rather than by particular phrases; and if an examination of these provisions should indicate that property such as the petitioner holds was to be exempt as it is from ordinary public charges, such construction might properly be given to the act. The form in which, under the statute, the estimate for damage for land, &c., taken is made, indicates strongly that the assessment for this improvement is not a tax from which property such as that of the petitioner is intended to be exempt. If it is not so, and if the petitioner is an abutter, a portion of whose land has been taken, its estate is not only to receive the increased value of that which remains without any payment therefor, but the payment therefor must be made by the other abutters, by reason of the larger assessment to which they will be subjected on account of the amounts awarded the petitioner for that portion of its land which is actually taken. Ordinarily, in laying out or altering highways, the damages to the landowner for his property taken are ascertained by determining the value of the property taken, including therein the injury, and deducting therefrom the benefit to that which remains by reason

of the improvement. The damages and benefits are set off against each other, having been included in one estimate, and the award is only of the excess of damages above the benefits. The damages as awarded in this mode are thus an estimate of the net amount of injury occasioned as the result of the whole proceedings on the estate of the landowner. *Harvard College v. Aldermen of Boston, supra.*

But it is obvious that unless this deduction is made, or unless there is an assessment upon the landowner in some form for the advantage that his estate derives from the improvement, he would receive more than he would be fairly entitled to. Instead of adopting the mode of assessment of damages provided by the Gen. Sts. c. 43, § 16, the St. of 1865, c. 159, § 3, provides for no deduction from the value of the land and buildings taken, on account of the benefit which is done by the improvement to the remainder of the estate, and this for the reason undoubtedly that the property is to be subjected under another form to an assessment for that benefit. If therefore the estate of the petitioner is not subjected to this tax two results follow: first, that it receives more than the amount of damages for the actual injury done to it; and second, that the excessive amount which it thus receives is necessarily to be added to the expenses of laying out the street, and with such expenses to be paid by the other abutters. It could not have been intended that any such result should follow the mode of assessing the expenditure for this public improvement from which the abutters are to derive the immediate and especial benefit.

In the present proceeding the question whether the petitioner is liable for interest does not arise. The object of the inquiry is to ascertain whether the assessment as originally laid was correct in amount, according to the rule laid down in the St. of 1865, c. 159, § 8. The assessment by the jury should be made as of the time when it was made by the mayor and aldermen, and without regard to any consideration of interest since that time. The proceeding is in the nature of an application for an abatement. The original assessment and not the verdict of the jury is the foundation of the claim which the city may enforce and for which the lien is given.

Case to stand for trial.

The second case is a petition for a writ of certiorari, and is necessarily disposed of by the construction we have given in the previous case to the clause of exemption in the General Statutes. The statute under which the assessment was here made varies in many and important particulars from the St. of 1865, *c.* 159, but, like that, confirms us in the view we have taken of the meaning of that clause.

The assessment upon the petitioner, (a charitable institution and owning and occupying its estate for the purpose of a charity,) for the benefit and advantage done to its estate by the widening of Tremont Street, was made under the St. of 1866, *c.* 174, entitled "An act concerning the laying out, altering, widening and improving the streets of Boston," amended by the St. of 1868, *c.* 276, by which full powers in reference to the subjects stated in the title were given to the board of aldermen. As under the St. of 1865, *c.* 159, in estimating the damages sustained by the landowners, no deduction is made for any benefit by the improvement to the land not taken, and if there is such benefit the damages received by them are more than the net result of the injury occasioned. St. 1866, *c.* 174, §§ 2, 3.

The mode of assessment for the expenditure for the improvement is however different from that in the former case, and is under the St. of 1868, *c.* 276, § 1, which had taken effect when the proceedings complained of took place.

By this act the number of those who are liable to assessment is extended beyond the abutters; but as the assessment upon them may equal the full amount paid by the city, including therein the damages paid under the statute to the landowners, those liable to pay for this improvement, if the estate of the petitioner was held exempt, might be compelled to pay not only the net damages which the petitioner, if it was a landowner, part of whose estate was taken, had sustained, but the sum which it had received over and above such net damages by reason of the fact that no deduction had been made on account of benefit.

It is argued that the fact that the assessments are, under the St. of 1866, *c.* 174, § 6, to constitute a lien upon the estate charged with them, and that upon notice to the aldermen they shall apportion it into three parts which apportionments shall be certified to the assessors "and the assessors shall add one of said

equal parts to the annual tax of said estate each year for the three years next ensuing," should satisfy us that only those whose estates were subjected to the general annual tax were to be subjected to the assessment for benefits. But, as before suggested in regard to a stronger phrase in the St. of 1865, c. 159, too much weight must not be given to particular phrases in acts which are to be construed by their general intent and purposes. It cannot be fairly inferred from this, that only the estates subject to the general annual tax for public purposes were to be subjected to this imposition. *Writ of certiorari denied.*

C. T. Russell, for the Boston Seamen's Friend Society.

O. W. Holmes, Jr. & R. Gray, for the Children's Mission.

J. P. Healy, for the defendant.



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WORCESTER AGRICULTURAL SOCIETY vs. MAYOR AND ALDERMEN OF WORCESTER.

Worcester. October 5. — 28, 1874. COLT & MORTON, JJ., absent.

The exemption of the real estate of incorporated agricultural societies from taxation by the Gen. Sts. c. 11, § 5, c. 9, is only from taxation imposed for the general public purposes of government, and does not apply to taxation for local improvements under the St. of 1867, c. 106, § 1.

The misnomer of the owner of real estate in laying an assessment thereon is no ground for quashing the proceedings on certiorari unless it is shown that his rights were prejudiced thereby.

A petition for a writ of certiorari to quash the proceedings by which a betterment tax had been assessed upon the real estate of an incorporated agricultural society alleged that the respondents had designedly omitted to assess any part of the expenditures for which the tax was laid upon houses of religious worship. The answer denied that houses of religious worship were designedly omitted from said assessment, but admitted that they were not included therein. The case was reserved on the petition, answer and a demurrer thereto. *Held*, that it did not appear that there were any houses of religious worship so situated as to be liable to the assessment.

PETITION for a writ of certiorari, setting forth that the petitioner was an incorporated agricultural society, having for its limits the county of Worcester; that it was seised in fee of lands on the west side of Seaver Street, in Worcester; that the mayor and aldermen of Worcester, by an order dated April 15, 1872,

"assessed upon said lands the sum of five hundred and ninety-two dollars, describing the same in said order as the 'grounds of the Worcester County Agricultural Society,'" pretending that said lands were liable to such assessment, and that said sum is the proportionate share of the expenditure of said city for sewers and drains constructed under the St. of 1867, c. 106; that the assessment had been committed to the collector, who had advertised the lands for sale.

The petition further alleged that the assessment was void for the following reasons: 1. That the assessment was a tax, and the land of the petitioner was exempt from taxation. 2. That the corporate name of the petitioner was not correctly stated. 3. That the mayor and aldermen have designedly omitted to assess any portion of the expenditures of the city for construction of sewers and drains upon houses of religious worship, or upon the real estate of literary, charitable, benevolent and scientific institutions, or upon any of the other classes of property described in the Gen. Sts. c. 11, § 5, except the lands of the petitioner.

The answer of the respondents denied that the assessment was void, and that it was a tax within the Gen. Sts. c. 11, § 5; and averred that the misnomer of the name of the society was no ground of relief; and denied that the respondents had designedly omitted to assess any portion of the assessment for the construction of drains and sewers upon any class of property described in the above section of the General Statutes; but admitted "that houses of religious worship were not included in said assessment."

Hearing before *Gray, C. J.*, who reserved the case for the consideration of the full court on the petition, the answer and a demurrer thereto.

W. T. Harlow, for the petitioner.

W. A. Williams, for the respondents.

DEVENS, J. This is a petition for a writ of certiorari to quash the respondents' proceedings in laying an assessment upon the lands of the Worcester Agricultural Society. By the St. of 1867, c. 106, § 1, the city council of Worcester were authorized to make and maintain in said city "all such drains and common sewers as they shall adjudge to be for the public health or convenience," and by § 4, of the same statute, it was provided that "every per-

son owning real estate upon any street in which any drain or sewer may be laid under or by virtue of this act, and upon the line thereof, or whose real estate may be benefited thereby, shall pay to said city such sum as the mayor and aldermen shall assess upon him as his proportionate share of the expenditure of the city for drains and sewers." Drains and sewers having been constructed by virtue of this act, and the petitioner owning an estate upon the line of such sewers has been assessed a portion of the expenditure, to which it objects upon the ground that "such assessment is taxation within the meaning of the Gen. Sts. c. 11, § 5, *cl.* 9, which exempts from taxation "the estate, both real and personal, of incorporated agricultural societies."

It was, however, held in *Boston Seamen's Friend Society v. Mayor & Aldermen of Boston*, and *Children's Mission v. Aldermen of Boston*, *supra*, 181, for reasons which need not be here restated, that the exemption given by the Gen. Sts. c. 11, § 5, to charitable societies was an exemption from taxation for the general public purposes of government merely, and that it did not include exemption from taxation for the cost of such local improvements of a public nature, as were in the opinion of the legislature necessary, and therefore authorized in the particular localities where their estates were situated. In those cases the assessments made upon the estates of the societies were for expenditures which the public authorities of Boston were authorized to incur in laying out and widening certain streets, and afterwards to assess in one case upon the abutters, and in the other upon the abutters and those whose estates were benefited, while here the assessment is for expenditures in the construction of certain sewers. In all, however, the taxation is for an improvement local in its operation, effects and immediate benefits, which by the condition of the particular localities, where the estates taxed are situated, has in the judgment of the legislature been rendered necessary. The differences between those cases and the present are not, therefore, essential so far as the nature of the assessment is concerned, and as no distinction can be made, favorable to the petitioner, founded upon any difference in the character of its society, they must be considered conclusive upon the point, that the estate of the petitioner is not exempt from taxation of this description.

Nor can the objection of the petitioner that its corporate name is not the Worcester County Agricultural Society, under which the land was assessed, but the Worcester Agricultural Society, be deemed important. The land in respect to which the assessment was made was sufficiently described, and the accidental misnomer by the introduction of a word into its corporate name can have done the petitioner no injury. The writ of certiorari is not granted on account of errors of form only, where no rights can have been in any way prejudiced. *Jones v. Aldermen of Boston*, 104 Mass. 461.

It remains to be considered whether the writ should be granted on the ground of the omission by the respondents of any estates properly subject thereto from the assessment, by which the burden of the petitioner has been increased. The petition charges that the respondents have "designedly omitted" to assess any portion of their expenditures for the construction of sewers and drains upon houses of religious worship, the real estate of literary, charitable, benevolent or scientific institutions, and the other classes of property described in the Gen. Sts. c. 11, § 5, except the lands of the petitioner." The answer denies that the respondents have "designedly omitted" to assess any portion of this expenditure upon the classes of property named, but admits that "houses of religious worship were not included in said assessment." Whether there were any societies owning houses of religious worship upon any of the streets in which the sewers were laid, and upon the line thereof, or whose real estate was benefited thereby, so that they should have been included in the assessment, does not distinctly appear from a mere statement in the answer that houses of religious worship were not included in the assessment, and we cannot infer, as against the validity of it, that there were any such.

If the petitioner desired to present to us the question whether the omission without design of houses of religious worship would invalidate the assessment, it should definitely appear in some way that there were such so situated as to be liable to it.

Writ of certiorari denied.

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**INHABITANTS OF WORCESTER COUNTY vs. MAYOR AND
ALDERMEN OF WORCESTER.**

Worcester. October 5. — 28, 1874. COLT & MORTON, JJ., absent.

Land of a county used for county purposes is exempt from all taxation, whether imposed for public purposes or for local improvements of a public nature.

DEVENS, J. This is a petition for a writ of certiorari to quash the proceedings of the respondents in laying an assessment, under the St. of 1867, c. 106, upon the property of the inhabitants of the county of Worcester, consisting of the court-house estate used for holding the courts in said county, and the offices of the clerks thereof, the sheriff and other county officers, and of the jail estate, used for a jail and house of correction. These estates are situated upon the line of streets in which the city council of Worcester has caused to be constructed sewers, by virtue of the statute; and if they come within the class which can properly be subjected to assessments of this character, the assessment thereon is valid. The immunity of these estates from taxation depends, however, in our opinion, upon other grounds than that of a statute exemption, and extends to taxation not only for general public purposes, but for local improvements of a public nature. Without regard to the statute exemption, property appropriated to public uses, as by the railroads, has been repeatedly held not to be subject to taxation in this Commonwealth. *Worcester v. Western Railroad*, 4 Met. 564, 567. *Boston & Maine Railroad v. Cambridge*, 8 Cush. 237. *Wayland v. County Commissioners*, 4 Gray, 500. *Charlestown v. County Commissioners*, 1 Allen, 199.

Although taxation in the cases referred to was for general public purposes, and we find no case where the exemption has been extended to assessments like the present, yet the property treated in them as appropriated to public use was not so essentially public in its character, nor so strictly appropriated to public use, as the real estate of these petitioners. The works constructed by a railroad corporation, for instance, and held under its charter, are to a certain extent public works, intended for public use, and under the control of the public, but their management, subject to such control, is in the hands of a private corporation, the property is that of such corporation, and the private rights therein are

of great importance. The property held by the petitioners is strictly public, paid for from the public funds, managed by the public authorities, devoted to public purposes, and no private person has any rights or authority therein.

The property of the Commonwealth is exempt from taxation because, as the sovereign power, it receives the taxation through its officers or through the municipalities it creates, that it may from the means thus furnished, discharge the duties and pay the expenses of government. Its property constitutes one of the instrumentalities by which it performs its functions. As every tax would to a certain extent diminish its capacity and ability, we should be unwilling to hold that such property was subject to taxation in any form, unless it were made so by express enactment or by clear implication. This property of the petitioners is not, indeed, in legal form, the property of the Commonwealth, but the authority by which the county holds it is derived from the statutes by which the duty is imposed upon the various counties of providing suitable court-houses, jails and houses of correction. Gen. Sts. *c.* 17, § 5; *c.* 178, § 6. When thus provided, such estates, although held by the counties, are so held for the uses and purposes of the Commonwealth, are essential to the administration of the executive and judicial duties of its government, and are not to be deemed subject to taxation in any form, unless the intent of the legislature to render them so clearly appears.

The mode provided for the enforcement of the assessment under the St. of 1867, *c.* 106, certainly leads to the conclusion that it was not contemplated that it could be applied to property like this of the petitioners. Where wholly new powers are given, they are to be enforced as the statute giving them provides, and the remedy given thereby is exclusive of every other. *Roxbury v. Nickerson*, 114 Mass. . *West Roxbury v. Minot*, 114 Mass.

The only remedy given for the collection of this assessment is by means of the lien created upon the estates assessed which must be enforced by a sale thereof. We do not think that it was the intent of the legislature to subject estates like these of the petitioners to such a remedy, when its enforcement might operate to deprive them of the very instrumentalities by which they were able to perform the duties imposed upon them, and might be at

tended with serious inconvenience or positive injury to the administration of justice in the Commonwealth.

For these reasons, we are of opinion that the proceedings of the respondents in making this assessment upon these estates of the petitioners was erroneous, and that the writ of certiorari must issue, but, under the Gen. Sts. c. 145, § 9, it will issue only to quash so much of the assessment made by the respondents as relates thereto. *Haverhill Bridge v. County Commissioners*, 103 Mass. 120. *Writ of certiorari to issue.*

T. L. Nelson, for the petitioners.

W. A. Williams, for the respondents.



GEORGE B. BRIGHAM vs. NATHANIEL R. PACKARD.

Plymouth. October 20, 1874. AMES & MORTON, JJ., absent.

Evidence that upon the death of an arbitrator duly appointed by rule of court an entry was made upon the docket of the court of the appointment of another arbitrator, before whom the parties appeared and tried their case without objecting to his authority, is sufficient to warrant a finding as matter of fact that the parties originally assented to the appointment of the arbitrator.

MOTION to accept an award made by William H. Whitman, as arbitrator. The plaintiff objected to the acceptance upon the ground that the appointment of Whitman was invalid. At the hearing in the Superior Court, before *Brigham*, C. J., the following facts appeared :

At June term, 1872, C. I. Reed was appointed arbitrator ; his death was suggested at February term, 1874, and thereupon this entry was made upon the docket by the clerk : " Referred to William H. Whitman." The counsel of record for the plaintiff had notice January 12, 1874, from the counsel of the defendant that Whitman had been appointed arbitrator at October term, 1873. At February term, 1874, Winfield S. Slocum, (whose name did not appear on record as attorney in the case,) the professional partner and son of the counsel of record of the plaintiff, went to Plymouth, and saw and agreed to the above entry made on the docket, and made no objection to the appointment, but at

the hearing on this motion, testified that he was sent to Plymouth by his father, (who supposed the appointment of Whitman had been made at the previous October term,) to ascertain how the appointment was made, and to see the papers in the case, but without express authority or direction to object to the appointment, or to agree to it. Neither of the counsel of record of the plaintiff appeared in person at said February term, 1874, and no express written agreement to refer was in evidence at the hearing.

Before the rule was issued to Whitman, the counsel of the respective parties had some correspondence in relation to the time of hearing, and attended and conducted the hearing before Whitman. No objection was made by the counsel of the plaintiff to Whitman's appointment, nor was any objection made to the same at or before said hearing, or until his award was made and returned into court.

The judge ordered the acceptance of the award, and the plaintiff alleged exceptions.

W. F. Slocum & A. G. Biscoe, for the plaintiff.

J. White & W. H. Osborne, for the defendant, were not called upon.

BY THE COURT. The evidence reported was sufficient to warrant the court below in finding as matter of fact that the parties originally consented to the appointment of the arbitrator.

Exceptions overruled.

CHARLES S. JOHNSON *vs.* MARY BOUDRY.

Plymouth. October 20. — 28, 1874. AMES & MORTON, JJ., absent.

In a proceeding under the Gen. Sts. c. 150, to enforce a mechanic's lien, interest, even if not claimed in the certificate filed with the town clerk, nor in the petition, is to be computed upon the debt from the filing of the petition to the time of judgment, and upon the judgment to the time of satisfaction out of the proceeds of the sale of the estate in execution of the order of the court.

PETITION under the Gen. Sts. c. 150, to enforce a mechanic's lien. No interest was claimed in the petition, nor in the certificate previously filed by the petitioner in the office of the town clerk. At the trial in the Superior Court, before *Putnam, J.*,

no exception was taken to the instructions as to the principal sum for which the petitioner should have a lien. The judge instructed the jury to determine the sum due the petitioner upon the day of filing his certificate, without interest. A verdict was returned accordingly. Upon the motion of the petitioner, the judge ordered a sale of the premises, and payment, out of the proceeds, of the amount so found due, with interest from the time of filing the petition to the time of the sale. The respondent alleged exceptions.

W. E. Jewell, for the respondent. The debt for which the lien is given is defined in the statute as "the amount due for labor or materials." Gen. Sts. c. 150, § 1. No interest was claimed in the certificate filed in the town clerk's office, which is required by § 5 to contain a just and true account of the amount due. No interest was claimed in the petition, and therefore none can be allowed. *Prescott v. Maxwell*, 48 Ill. 82. *Protective Union v. Nixon*, 1 E. D. Smith, 671. *Udall v. Steamship Ohio*, 17 How. 17. At most, it should not have been extended beyond the date of judgment. *Barstow v. Robinson*, 2 Allen, 605.

J. White, for the petitioner.

GRAY, C. J. The respondent has no just ground of exception to the ruling and order of the Superior Court. The certificate filed in the town clerk's office could not properly include interest to accrue afterwards. The sum due to the petitioner having been unlawfully withheld by the respondent, interest, though not specifically claimed in the petition, is to be computed, in this proceeding to obtain payment of the debt by enforcing the lien, as it would have been in an action on the debt itself, from the beginning of the suit to the time of judgment; *Barstow v. Robinson*, 2 Allen, 605; *Mills v. Heeney*, 35 Ill. 173; and from the judgment to the time of satisfaction out of the proceeds of the sale of the estate in execution of the order of the court. Gen. Sts. c. 133, § 8; c. 150, §§ 21, 25.

Exceptions overruled.

CLARINDA M. REED *vs.* IRVING H. HASKINS.

Plymouth. October 20. — 28, 1874. AMES & MORTON, JJ., absent.

When a copy of the accusation, warrant, and proceeding before the court or magistrate to whom a complaint under the bastardy act is made, are filed in the Superior Court, that court has jurisdiction of the case, and it may in its discretion allow the formal complaint to be filed at any subsequent term.

The mother of the child is a competent witness at the trial of a complaint under the bastardy act, to show that in the time of her travail she accused the defendant of being the father of her child.

COMPLAINT under the bastardy act, Gen. Sts. c. 72. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows :

At October term, 1873, of the Superior Court, the complainant entered her action, by filing a copy of her complaint, warrant, and the proceedings before a justice of the peace. At February term, 1874, the complainant filed a formal complaint, against the objection of the defendant. At June term, 1874, the defendant filed a motion to dismiss the case on the following grounds :

1. Because the complainant did not file a supplementary or formal complaint in the Superior Court within the time required by the statute, and not until the second term after the action was entered.

2. Because the court, when it allowed the complainant to file her formal complaint, had no authority so to do, and no jurisdiction therein, as there was no case in court, except by name.

This motion was overruled and the case proceeded to trial, and the complainant was called as the first witness, and was allowed to testify, under objection, that she in the time of her travail accused the defendant of being the father of her child. The defendant alleged exceptions.

E. Robinson, for the defendant.

J. C. Sullivan, for the complainant.

DEVENS, J. The mode in which this proceeding is initiated is by the prosecution before the court or magistrate who takes the accusation and examination of the complainant, upon which a warrant is issued against the party charged thereby as the father of the child. Upon the return of the warrant, after due hearing,

the court or magistrate, before whom the same is returnable, may require the accused to give bond with sufficient surety or sureties to appear at the next term of the Superior Court, and the action is entered by filing therein a copy of the accusation, warrant and proceedings before such court or magistrate, and the Superior Court then has jurisdiction thereof. *Chapel v. White*, 3 Cush. 537. These copies were filed in the present case, and the supplementary and more formal complaint, upon which, although not required by any direct provision of the statute, it has been usual to try the case, was not filed until the second term. To this, however, the defendant cannot properly object, as the time of its filing was a matter for the discretion of the court, the case being properly before it. The formal complaint is simply a mode of stating facts and framing an issue with a view to a convenient and orderly trial of the matter in controversy. *Chapel v. White, supra*. At the first term the woman may not have been delivered of her child; if so, no formal complaint could be made which would embrace all the essential facts necessary to sustain a prosecution against a party as the father of a bastard child, and no judgment of affiliation could be passed. In *Rice v. Chapin*, 10 Met. 5, where a process of this character had been tried upon the accusation as made before the magistrate without filing any more formal complaint in the Court of Common Pleas, and it was on this account remanded to that court for further proceedings, it was said that it would be competent for that court to grant leave to the complainant to file a proper complaint, and that the cause might then proceed to trial, and this, although several terms must have passed since the entry of the action.

Nor can the defendant object that the complainant was permitted to testify that being put upon the discovery of the truth of her accusation, in the time of her travail, she then accused the defendant of being the father of her child. Such evidence was competent as tending to corroborate her testimony at the trial; Gen. Sts. c. 72, § 8; and although it might be more valuable and satisfactory if coming from the lips of another person, yet she was a witness for all purposes, and might properly testify upon this subject. *Murphy v. Spence*, 9 Gray, 399. In *Hawes v. Gustin*, 2 Allen, 402, evidence similar to this had been received and afterwards withdrawn by the judge from the consideration of

the jury. The only point there decided was that, even assuming that an error had been committed, it was competent for the court to withdraw the evidence, having cautioned the jury not to regard it as in the case. Whether the evidence might properly have been received, it was not necessary then to consider.

Exceptions overruled.

JAMES SEXTON vs. INHABITANTS OF NORTH BRIDGEWATER.

Plymouth. October 20. — 28, 1874. AMES & MORTON, JJ., absent.

The betterment act of 1871, c. 382, § 1, does not repeal § 16 of the highway act, Gen. Sts. c. 43.

A petition to the county commissioners for a jury to assess damages, alleged that the petitioner's land had been taken by the selectmen in the alteration of a town way; and the trial was by a sheriff's jury, whose verdict was certified to and accepted by the Superior Court. *Held*, that the proceedings could not be considered by this court as proceedings under the betterment act of 1871, c. 382, but must be considered as proceedings under the highway act, Gen. Sts. c. 43.

At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the petitioner requested an instruction that the jury, in estimating the benefits to be allowed in set-off, were to consider only the special benefit which he might have derived over and above the general benefit to him in connection with others. This instruction the presiding officer declined to give; and instructed the jury that they should allow by way of set-off the benefit, if any, to the property of the petitioner, and that if the laying out of the way had left the petitioner's estate of more value in the market than it was before the laying out, and this benefit was not one common to the petitioner and others owning land on and in the vicinity of the way, such benefit was to be set off against any damage sustained by the petitioner. *Held*, that the petitioner had no ground of exception.

At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the petitioner contended that the way was laid out over a private way over which he was entitled to pass, and that the laying out was of no benefit to him. The presiding officer instructed the jury that if the private way had been opened by the owners and the public permitted to use it, it did not become a public or town way until laid out and established by the town, and that if the owners of the land had opened the way for the use of the public, with the intention that it should be used as a public way, and it had been so used, then the petitioner had a right to pass over it. *Held*, that the petitioner had no ground of exception.

On a petition for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the burden of proof is on the petitioner to prove his right to the damages claimed by him; and if he relies on a previous

right of way to increase or prevent the diminution of those damages the burden is on him to prove it.

At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sta. c. 43, the presiding officer ruled that the jury must take into consideration the more advantageous use to which the petitioner's property might be applied in consequence of opening the new street. Other instructions showed that the question whether the way was more advantageous to the petitioner was left to the jury. *Held*, that this instruction was not to be construed as a declaration that the laying out of the street was necessarily more advantageous.

At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sta. c. 43, the jury are not to consider the liability of the petitioner to an assessment under the betterment act.

At the trial for the assessment of damages sustained by the taking of land for a town way, a witness who had been a selectman and assessor of the town may rightly testify to the difference in the market value of the petitioner's remaining estate before and after the laying out of the way, supposing the way to be made.

At the trial for the assessment of damages sustained by the taking of land for a town way, a witness who has stated that in his opinion the petitioner's remaining estate is worth three times what it was worth before the road was laid out, may state the reasons of his opinion.

PETITION to the county commissioners for a jury to assess damages for the taking of land by the respondent to lay out a town way by widening and straightening a private way extending from Main to Montello street in North Bridgewater. At the trial before a sheriff's jury, evidence was introduced to prove that a worked passage way passing the petitioner's land from Montello Street to Main Street, and more or less used by the petitioner and other abutters, had existed for about twelve years previous to the laying out of the town way; that the town way in question was laid out over this passage way, and the way widened over the petitioner's land so that the line passed through his dwelling-house. It was admitted that the title of said way was in the heirs of Nathan Hayward, deceased, and lots, on which buildings had been erected, had been conveyed to abutters by said heirs, upon condition that said way should remain open forever; but it did not appear that any such conveyance had been made to the petitioner.

The petitioner put in evidence a certified copy of the vote of the defendant town, by which it appeared that the town had voted to accept the St. of 1869, c. 169, § 1-3.

The respondent called as a witness one of the selectmen of North Bridgewater, who was also an assessor; and after he had

testified that the petitioner's estate was increased in value by the laying out of the way, the respondent's counsel was permitted to ask, the petitioner objecting, "What is the difference in the actual market value of the petitioner's estate, before and after the laying out of the town way in question, supposing the town way is to be built?" to which the witness answered, "One thousand dollars is a moderate estimate of the increased value."

The respondent called Frederick Howard as a witness, and after he had testified, the petitioner objecting, that in his opinion the petitioner's estate was worth three times what it was without the road, the respondent was permitted to ask, the petitioner objecting, "What are the facts and reasons for your opinion?" to which the witness answered, "Before the road was laid out the petitioner had no right of way from that lot over this land. The basis of my opinion is that he had no right in this way." On cross-examination the witness testified that in his opinion the laying out of the way increased the value of the estates on the way 33 per cent. Except the petitioner's deed of the premises, no evidence of title, except by parol, was introduced by either party.

The presiding officer at the request of the respondent, the petitioner excepting, instructed the jury as follows:

"1. If the laying out of the town way has left the petitioner's estate of more value in the market than it was before the laying out, and this benefit is not one which is common to the petitioner and others owning land on and in the vicinity of said way, such benefit is to be set off against any damage sustained by the petitioner.

"2. The uses to which the strip of land taken from the petitioner, for the purpose of the town way, would probably be applied for a sidewalk or other use, beneficial to the petitioner, may properly be taken into consideration in estimating the benefit to be set off against the damage done to his estate by the taking.

"3. In estimating the effect upon the market value of the estate of the petitioner occasioned by the laying out of the town way and the taking of a small portion of said estate therefor, the jury are to consider the land so taken, not as it may now lie, or may have lain, at the time of the laying out, unfitted for use as

a street, but according to the prospective use of the street when wrought and fitted for use, as part of the street, for a sidewalk or carriage way. The jury are to consider the consequences of such taking of part of the land, when thus fitted as part of the street, to the residue of the petitioner's land.

"4. If prior to the laying out of the town way, and since 1859, a way or street in substantially the same place had been opened by the owners of the land, and the public had since been permitted to use the same, such way did not thereby become a public or town way until the same was laid out and established by the town according to the ordinary mode prescribed by law.

"5. Such throwing open of the way in this case, and permitting the public to use it, did not amount to a grant or dedication of any permanent right to the petitioner, nor impose any duty or obligation whatever upon the owners of the land, to refrain from obstructing the way. If the petitioner with others might pass over the way while it remained open, the owners might, as against him, shut it up at any time, and his right to pass over it would cease.

"6. In estimating the effects of the laying out of this road upon the petitioner's remaining land, unless it appears affirmatively that the petitioner had before the laying out some legal right of way from his said land on and over the land included in the laying out, then the jury are to proceed upon the basis that the petitioner had no such right of way.

"7. The jury cannot regard only the use to which the petitioner's estate is now applied, and award him a sum sufficient to secure him in that mode of enjoyment for the future; they must take into consideration the more advantageous use to which the property may be applied, in consequence of opening the new street.

"8. The proper inquiry is, what is the value of the property before and after the road is laid out, for the most advantageous use to which it may be applied. In estimating the influence of the laying out of the street upon the value of the land, the jury are not to regard so much the intention of the owner in relation to the future use, as the purpose to which the property may be applied, in the hands of one who is disposed to make it yield the greatest income. What price will it bring in the market? is the proper inquiry."

The petitioner's counsel, after the evidence was closed, requested the presiding officer to give the following instructions to the jury :

"1. That, if the jury are satisfied that the owners of the soil over which the so-called private way or street passed, adjoining the petitioner's land, previous to the laying out in this case, opened the same for the use of the public as a highway or pass-way, and it had been so used by the assent of such owners for a period of twelve years or more, they may infer that such way was dedicated to the public use ; and the petitioner and other abutters would have a right to pass over the same to and from their lands, especially if the original owners had sold land abutting on such way, binding themselves to keep the same open.

"2. That the jury may consider whether it is probable that the way in question would continue open to all the public as a common way, as it was used, and existed at the time of the laying out.

"3. That there being no grade named in the laying out, the jury should estimate the damages upon the basis of the continuance of the present grade, and not upon any speculative grade in the minds of witnesses, and that if there should hereafter be a change of grade, beneficial to his land, the petitioner may be liable to an assessment.

"4. That testimony as to what any witness may be willing, or may have been willing to give for the land, before or after the laying out, is not to be considered by the jury as evidence of the value of the land. The only testimony of the witnesses to be considered is, as to what may have been the fair market value.

"5. That the jury, in estimating the benefits which the petitioner may have derived, if any, by way of set-off, are to consider only the special benefit which he may have derived over and above the general benefit which he may have derived, in connection with others, in consequence of said laying out.

"6. That the jury are to ascertain and find what damage the petitioner has sustained in the taking of his land and buildings in the laying out of the way in question, and this without regard, by way of set-off, to any benefit which the petitioner's land and buildings may have derived from the laying out of the said way, and the jury are not to consider the question of any benefit derived by the petitioner from the laying out of the town way."

The presiding officer declined to instruct the jury in the words requested, but gave the following instructions :

" 1. If the jury find it proved by the testimony that the owners of the land adjoining the petitioner's land, and over which the private way passed, prior to the laying out of the town way, opened the same for the use of the public, with the intention that it should be used as a public way, and it had been used by the public, with the assent of said owners, for a period of twelve years or more, then the jury may infer that such way was dedicated to the public use, and the petitioner and other abutters would have a right to pass over it to and from their estates.

" 2. The jury may take into consideration all the evidence relating to the existence of the way, and the use made of it, at the time of the laying out of the town way, and may consider the probabilities of the same use continuing, in their estimation of the damage and benefit to the petitioner by the laying out of the town way.

" 3. In estimating the damage to the petitioner by the laying out of the town way, the jury are to consider the return of the laying out, and if that states no grade at which the way is to be worked, they may consider the present grade of the street, and the situation of the petitioner's estate in relation to it, and not any speculative grade in the minds of witnesses.

" 4. Testimony of what a witness may have been willing to give for the estate in question, before or after the laying out of the town way, is not evidence for the jury to consider in estimating its value, but only evidence tending to show its fair market value is to be weighed by the jury.

" 5. The jury, in estimating the damage to the complainant by the laying out of this town way, shall regard all the damages done to him, whether by taking his property or injuring it in any manner, and shall allow, by way of set-off, the benefit, if any, to the property of the complainant by reason of said laying out.

" 6. That this petition and proceeding is not under the betterment act, but under the provisions of the Gen. Sts. c. 43, § 16."

The jury returned a verdict that the petitioner had sustained no damage ; the verdict was certified to and accepted by the Superior Court ; and the petitioner appealed.

P. Simmons, for the petitioner.

J. White, for the respondent.

GRAY, C. J. The questions presented by this case are more numerous than novel or difficult.

1. The betterment act of 1871, c. 382, § 1, does not repeal § 16 of the highway act, Gen. Sts. c. 43, but expressly recognizes it as still in force. *Green v. Fall River*, 113 Mass.

2. The proceedings of the selectmen are alleged in the petition to the county commissioners for a jury to have been for the alteration of a town way; the trial was by a sheriff's jury, and the verdict was certified to and accepted by the Superior Court accordingly. Having been treated by that court as proceedings under the highway act, they cannot be considered by this court as proceedings under the betterment act. *Allen v. Charlestown*, 109 Mass. 243. If the proceedings of the selectmen had been under the betterment act, the trial by jury must have been had at the bar of the Superior Court. St. 1871, c. 382, § 7.

3. The direction requested as to the benefits to be set off was rightly refused, because it excluded all benefits whatever that affected any other estate besides the petitioner's. The direction given in answer to that request was in the very terms of the Gen. Sts. c. 43, § 16. It was explained by the first direction of the presiding officer, which excluded all benefits "common to the petitioner and others owning land on or in the vicinity of said way," and was quite favorable enough to the petitioner. *Allen v. Charlestown*, 109 Mass. 243. *Upham v. Worcester*, 113 Mass. . *Green v. Fall River*, Ib.

4. The direction originally given — that if, prior to the laying out of the town way, the owners of the land had opened a way at the same place, and permitted the public to use it for twelve years, it did not become a public way until laid out and established by the town — was afterwards modified, at the request of the petitioner, by directing the jury that if it had been so opened for the use of the public, with the intention that it should be used as a public way, and it had been used by the public, with the assent of said owners, for twelve years, the jury might infer that it was dedicated to the public use, and the petitioner and other abutters would have a right to pass over it to and from their estates. If there was any error in the direction as thus modified, it was in being too favorable to the petitioner. St. 1846, c. 203, § 1. Gen. Sts. c. 43, § 82. *Morse v. Stecker*, 1 Allen, 150.

5. The burden of proof was on the petitioner to prove his right to the damages which he claimed. If he relied on a previous legal right of way to increase or prevent the diminution of those damages, the burden was upon him to prove it, and the jury were rightly so directed.

6. The direction that the jury should not regard only the use to which the petitioner's land was applied by him, but "must take into consideration the more advantageous use to which the property may be applied in consequence of opening the new street," was correct. It did not, rightly construed, and taken in connection with the other directions upon the same point, declare that the use for a street would necessarily be more advantageous, but left it to the jury to consider whether this use, to which the property might be applied, would be more advantageous.

7. The direction that the jury should estimate the damages upon the basis of the continuance of the present grade, and not upon any speculative grade in the minds of the witnesses, was given in substance, and in nearly the same words in which it was requested. The jury, in assessing damages under the highway act, had nothing to do with the question what might thereafter be done under the betterment act; and the refusal, in proceedings under the one, to direct them as to what might be done under the other, afforded the petitioner no just ground of complaint. *Up-ham v. Worcester*, 113 Mass.

8. The witness who had been a selectman and assessor of the town was rightly permitted to testify to the difference in the market value of the petitioner's estate before and after the laying out of the town way, supposing this way to be made. *Shaw v. Charlestown*, 2 Gray, 107. *Dickenson v. Fitchburg*, 13 Gray, 546. *Swan v. Middlesex*, 101 Mass. 173.

9. The other witness was rightly permitted to state the reasons of his opinion as to the increase in value of the petitioner's estate. *Dickenson v. Fitchburg*, 13 Gray, 546. The nature of those reasons affected only the weight of his testimony.

Judgment accepting the verdict affirmed.

EDWARD COYLE vs. WILLIAM CLEARY.

Bristol. October 28, 1874. COLT & AMES, JJ., absent.

Where the boundary line between adjacent lots of land is in dispute, evidence that a stone wall had stood between the lots for more than twenty years, and that the adjoining owners had occupied up to the wall and treated it as a division wall, is competent evidence of the true line, although the wall is not referred to as a monument in any deed.

TORT for breaking and entering the plaintiff's close in Taunton. Trial in the Superior Court before *Allen, J.*, who allowed a bill of exceptions in substance as follows :

It appeared in evidence that Oliver Danforth formerly owned a large tract of land in Taunton, of which the tracts now owned by the plaintiff and defendant were a part. The land of the defendant was conveyed by Danforth in 1828 to Edward Phillips, through whom it came by mesne conveyances to the defendant in 1868. The description in each of these conveyances is as follows : "Beginning at a corner of a lot of land of William Hodges' on the northerly side of the road leading from said William Hodges' to widow Hannah Danforth's; thence westerly by said road nine rods and six feet to a corner; thence northerly nine rods to a corner; thence *easterly eight rods ten and a half feet to land of said William Hodges*, a corner; thence southerly nine rods to the first mentioned corner." The rest of the estate of Danforth, after his decease, came into the possession of two of his daughters, and that portion of it adjoining the land of the defendant to one of them, Nancy Stanley, who had it laid out into house lots; one of which, next adjoining the land of the defendant on the north, was conveyed by her to Hugh Coyle and by him to the plaintiff. The description in these conveyances is as follows : "Beginning on said avenue at a corner of John Hughes' lot; thence easterly 49 feet by Hughes' lot; *thence easterly 138 feet by A. D. Hodges' lot to Robert S. Dean's lot*; thence northerly by said Dean's land about 32 feet; thence westerly by Abraham Briggs' lot 176 feet to said avenue; thence southerly by said avenue 60 feet to the first corner."

The line in dispute is printed in italics in each of these descriptions.

It was also in evidence that, at the time these lots were laid out, there was and has been for thirty years or more a stone wall on the north side of Cleary's lot, described by the witness as an old wall, and there was evidence tending to show that it had been during that time recognized by the adjoining owners as a division wall.

The plaintiff, to prove his title, put in his deed, and also, as part of his case, the deed of the defendant and of his grantors ; but contended nevertheless that this wall was to be considered a division fence between the adjoining owners, and offered evidence tending to prove that the defendant's fence was not on the line of the wall, but partly on his land ; and this was the trespass complained of.

It was also in evidence that in 1870 the plaintiff took away the westerly half of said wall, and three years after erected a wooden fence in its place, and that the defendant afterward removed the other half and erected a similar fence on the easterly half, where it now stands.

The defendant also put in his deed and evidence tending to show that he had his lines run out by a surveyor according to his deed, and that he built his fence on the line and in the place indicated and directed by the surveyor, and that his fence as it then stood was wholly on his land and on the line of the old wall, which he contended was originally built wholly on his land, and that said wall had not been recognized by the adjoining owners as the true division line.

Upon this evidence, the defendant asked the judge to instruct the jury that the line described in his deed must be taken to be the true original line between it and the contiguous lot ; that the wall not being referred to in any deed as a monument was only evidence of the direction of the line, and that the wall could not vary or control the line described in the deeds, unless the same had been established by mutual agreement of the adjoining owners, understood and acted upon by them for twenty years or more, or by prescription, or by a legal assignment under the statute. The judge declined to give such instructions, but ruled that the question was, what was the line described in the deed ; that in determining that, the acts of the owners were competent, and if the wall had existed twenty years or more and the adjoining own-

ers had occupied up to said wall and treated it as a division wall, they might find that as the true line.

The jury returned a verdict for the plaintiff for \$125, and the defendant alleged exceptions.

S. R. Townsend, for the defendant.

W. H. Fox, for the plaintiff, was not called upon.

BY THE COURT. The old wall and the occupation in accordance therewith, as existing when each party to this action acquired his title and for many years before, were rightly submitted to the jury as evidence of the true line between them. *Hathaway v. Evans*, 108 Mass. 267. *Exceptions overruled.*

FRANCIS LEONARD vs. NEW BEDFORD FIVE CENTS SAVINGS BANK.

Bristol. October 28. — 30, 1874. COLT & AMES, JJ., absent.

In an action against the New Bedford Five Cents Savings Bank to recover back money deposited by the plaintiff, the case was submitted on an agreed statement of facts, from which it appeared that the defendant had been summoned as the trustee of the plaintiff and had paid the money in controversy on an execution which recited a judgment against the defendant, (the present plaintiff,) and that "execution was likewise awarded against the goods, effects and credits of the said defendant in the hands and possession of the Five Cents Savings Bank, trustee of the said defendant." The agreed statement of facts contained the following: "It did not appear by the record, nor by the docket of the court, that said savings bank was ever adjudged trustee." *Held*, that, notwithstanding the last recited statement, and the misnomer of the trustee, the defendant was entitled to judgment.

CONTRACT for money had and received. The case was submitted to the Superior Court, and to this court on appeal, on an agreed statement of facts, in substance as follows:

Elijah G. Hammond brought an action in the Police Court of New Bedford, May 5, 1873, against Leonard, the present plaintiff, in which suit the present defendant was duly summoned as trustee, under the name of the "Five Cents Savings Bank."

On May 12, 1873, Hammond recovered judgment against Leonard, for \$13.20 damage, and \$9.22 costs, and execution was issued in favor of Hammond against Leonard for said sum, and

against his goods, effects and credits, in the hands of the "Five Cents Savings Bank," said debt and costs amounting in all to the sum of \$22.19. It did not appear by the record, nor by the docket of the said Police Court, that said savings bank was ever adjudged trustee. The execution was placed in the hands of an officer competent to serve the same, and upon demand being made upon the savings bank under the execution it paid the officer the sum of \$23.19.

No question is made as to the identity of the bank, and it is agreed that the original writ in the Police Court, the execution issuing therefrom, and the writ in this case were all served upon the same officer and at the same place.

This suit is brought by the plaintiff to recover said sum, and it is agreed that he had deposited said sum of money in said bank before the commencement of the suit in which it was summoned as trustee, and that it is liable in this action, unless it is protected by the fact that it paid over said sum upon said execution; the defendant contending that said execution is conclusive evidence that judgment was rendered against the trustee.

The writ and execution were made part of the agreed facts. So far as they are material, they are stated in the opinion.

Judgment was ordered for the defendant, and the plaintiff appealed.

H. M. Knowlton, for the plaintiff. 1. The defendant is liable unless it brings itself within the Gen. Sts. c. 142, § 87. "The judgment against a trustee shall acquit and discharge him from all demands by the defendant, or his executors or administrators, for all goods, effects and credits, paid, delivered or accounted for, by the trustee, by force of such judgment." The only defence, therefore, is the judgment. The execution is neither admissible or conclusive evidence that judgment was rendered against the defendant as trustee.

2. The execution contains no recitals of any such judgment. It says, "The Five Cents Savings Bank . . . trustee of the said defendant, as to us appears of record;" and for the purposes of this case it may as well have said "John Smith" as "The Five Cents Savings Bank." If the execution is conclusive evidence of the judgment it recites, the defence is still incomplete, for the execution does not recite a judgment against the defendant. It

must go further, and show that judgment was properly rendered against it under the name mentioned in the execution. To do this, it must go back of the execution to the proceedings in court. But the record shows no judgment at all ; a necessary link in the evidence is wanting, and the defence fails.

L. T. Willcox, for the defendant.

WELLS, J. The defendant having been summoned as trustee of Leonard in an action against him, and the whole amount due to him having been paid over upon the execution issued upon the judgment in that suit, which ran against his goods, effects and credits in the hands of this defendant as trustee therein, is exonerated from further liability, if those proceedings were regular and valid. These facts are agreed, and shown also by the copies of the writ and execution, with the return upon each, annexed to the agreed statement. The execution recites the judgment against Leonard, and that "execution was likewise awarded for the same sums against the goods, effects and credits of the said defendant, in the hands and possession of the Five Cents Savings Bank, a corporation duly established, trustee of the said defendant, as to us appears of record." The regularity and validity of the proceedings, thus shown, is not impeached by the statement of the agreed facts that "it did not appear by the record, nor by the docket of the said Police Court, that said savings bank was ever adjudged trustee."

It is not to be inferred from this statement that the savings bank was discharged as trustee. The record is not produced. Whether it was imperfect, or merely incomplete, we have no means of knowing. It may have existed only in memoranda of the magistrate or clerk upon the writ or other papers on file. It would have been well for the parties to have caused the record to be made up if incomplete, or amended if imperfect, before engaging in extended litigation upon its effect. In the absence of the record, the next best evidence of what the judgment was in fact, is the recital in the execution. The case having been submitted upon an agreed statement, it is too late to object to the competency of that evidence on the ground that the record should have been produced.

We do not intend to decide that the execution itself would not be a sufficient justification to the defendant in paying over, in

good faith, to the officer making demand upon it, what was due to the judgment debtor, even if the record should show that the proceedings were irregular in omitting the formal adjudication charging the trustee.

The misnomer of the trustee can be taken advantage of only by the trustee. *Judgment for the defendant affirmed.*

JEREMIAH PRICHARD vs. DANIEL FARRAR.

Suffolk. March 18, 19. — October 1, 1874. COLT & ENDICOTT, JJ.,
absent.

A., a creditor of a corporation, made a contract with B., the trustee for the bondholders of the corporation, whereby he agreed, in consideration of the payment of \$5000, to pay B. a certain proportion of the deficiency, in case certain bonds issued by the corporation and secured by a mortgage of its property, were not paid at maturity. A proceeding in chancery was brought in another state by B. against the corporation to foreclose the mortgage. This was resisted in the name of the corporation by A. and other stockholders who contributed money for the defence. A master appointed by the court of chancery passed upon the account of the trustee, and the court ordered the property to be sold at auction. It was bought by B., who was authorized by the court to bid, for less than the mortgage debt. B. then sued A. in this Commonwealth to recover the proportion of the deficiency agreed on. *Held*, that the judgment of the court in chancery had the same effect as if the contract had in terms referred to a suit for foreclosure in that court. *Held, also*, that the foreign judgment was *prima facie* evidence against A. of the amount due under the mortgage unless the judgment was obtained by fraud or collusion. *Held, also*, that if the plaintiff charged the trust fund with the \$5000 paid the defendant, it was a false charge. *Held, also*, that if the plaintiff had other funds which were properly applicable to the mortgage debt and which were not so applied, the account should be corrected accordingly. *Held, also*, that if the plaintiff allowed the property to be out of repair for the purpose of purchasing it, and did purchase it thereby for less than its value, he should be charged with its full value. *Held, also*, that if the defendant was aggrieved by a premature termination of the hearing before the master, it was no defence in this action.

CONTRACT to recover the sum of \$3198.63, with interest, alleged to be due from the defendant to the plaintiff on the following agreement signed by the defendant :

"In consideration of the payment to me of the sum of five thousand dollars in lawful money of the United States by J. Prichard, trustee for the bondholders of the Vermont Iron Com-

pany, in settlement of my claim for an equal amount (less interest) against the said company, I hereby promise and agree that in case a certain number of mortgage bonds issued by said company, amounting in all to thirty thousand dollars, becoming due and payable on the twelfth day of April next, are not paid by said company at maturity, and the property, real and personal, mortgaged to said J. Prichard, trustee, as security for the full payment of said bonds and interest, prove insufficient, after paying all lawful charges and expenses, to satisfy and pay said bonds in full, such deficiency from this or any other cause, to the extent of one seventh part of the whole amount of such deficiency, shall be paid by me to said J. Prichard, trustee, as soon as such deficiency shall be ascertained."

The amended declaration alleged the incorporation in Vermont of the Vermont Iron Company ; that it authorized the defendant, its president, by a vote passed March 9, 1866, to issue bonds of the corporation to the amount of \$30,000, and, to secure the payment thereof, conveyed all its real and personal property in mortgage to the plaintiff as trustee ; that the bonds were issued and were not paid when due ; and that the plaintiff as trustee instituted a suit to foreclose the mortgage in a court of chancery in Vermont ; that the case was carried to the Supreme Court of Vermont, which court decided that the mortgage and bonds were valid, that an account should be taken, and that the plaintiff should have a decree of foreclosure ; that a master was appointed to take the account ; that the parties to the suit appeared and presented their accounts, and the master made his report to the court, stating that there was due on July 12, 1870, on said bonds, as principal and interest, the sum of \$28,692.10, and that the sum of \$2730.36 was due the plaintiff for services and money expended in carrying on said trust estate above what he had received from avails of the trust property.

The amended declaration further alleged that on September 22, 1870, the court of chancery decreed that the said report be accepted, and that the property mortgaged be sold at auction under the direction of a master in chancery, unless before the sale the Vermont Iron Company should pay the plaintiff \$31,422.46, with interest and costs ; that the master should execute a deed to the purchaser, and that the sale should bar the equity of redemp-

tion of the company and of all persons claiming under it ; that on October 13, 1870, the master sold the mortgaged property to the plaintiff for \$10,000, and executed a deed of it to him ; that on October 14, 1870, the master presented his report of the sale to the court of chancery, and his report was confirmed ; that the defendant Farrar was one of the principal defendants in the cause in chancery and in the Supreme Court, and employed counsel to defend the same, and was actually and actively engaged in the defence thereof ; that on October 13, 1870, the deficiency in the assets of the said company to pay the bonds with interest amounted to \$22,357.25 ; and the defendant owed the plaintiff one seventh part thereof, to wit, \$3198.68.

The defendant's answer denied each and every allegation in the amended declaration, and alleged that the agreement if made was without consideration ; that the defendant, at the time the agreement was said to be made, held property of the Vermont Iron Company to the amount of \$10,000 as collateral security for \$5000 lent by him to the company ; that in consideration of his giving up this property the plaintiff paid this \$5000 less the interest ; that the plaintiff agreed to apply the avails of this property on the bonds of the company. The answer further denied that the defendant was a party to the litigation in Vermont, and averred that he had no notice thereof to appear and defend the same, and that he did not appear or employ counsel therein and had no knowledge of the proceedings in the cause ; that he did not appear before the master and was not notified to appear. The answer then proceeded as follows :

“ That one Fairfield was acting as the agent of the said Vermont Iron Company in collecting their testimony to prove their account against the said Prichard, trustee, and to disprove his account, and otherwise assisting in the preparation and trial of the said case ; and that in the absence of the counsel, or of any of the officers of the said company, and before the said matter of accounting had been heard, except that perhaps the said Prichard, and one other witness in his behalf, had been examined in chief but had not been cross-examined, the said Prichard, with the intent to prevent the said accounts from being examined by the said master, and thereby defraud the said company, did, unbeknown to said company, its officers or attorneys, bargain with the

said Fairfield, and for some considerations, as this defendant is informed and believes, paid to said Fairfield, and in other ways prevailed upon the said Fairfield, and the said Fairfield did agree in the absence of said company's officers and attorneys, and without any authority therefor, that no more testimony should be heard, and that the accounts of the said company should not be put in, and no arguments should be heard ; but that the master should make his report upon the matter as it then stood upon the testimony of the said Prichard and his witness uncross-examined , and that they reported the said agreement to the master, and closed the hearing, and dispersed before the counsel who had charge of the case for the company originally arrived, and the counsel for the said Prichard having agreed to hold the case open until he could arrive ; and that the master, without knowledge of the manner of the agreement, made his report, if he made one at all, in accordance with it ; whereby the said company, without any fault on its part, was deprived of its rights in the premises, and of being heard, and of presenting its account at all to the master, or having it in any way considered.

“ And the defendant further says, that the said company had a large account against the said Prichard, trustee, and much larger than the amount due on the said mortgage bonds and all accounts which said trustee had against said company which they intended to present and have allowed, but were prevented by the acts of said Prichard ; that the said plaintiff had taken the iron and property which this defendant so had as security ; and the said company had delivered to him large amounts of other property to be applied upon said mortgage bonds, which was not included in the said mortgage ; all of which property the said Prichard had, and has not accounted for the same ; and the said Prichard also took possession of all the property of the said company, and its ores and works, and deprived the company of the use of the same ; but did have the use thereof himself as said trustee for a long time, and has not accounted for the use thereof, and has disposed of large amounts of the property of the said company, and has wasted and destroyed large amounts of the property of the said company, which he has so in possession, by his carelessness and negligence in the care of the same, and suffered the same which was not wasted or destroyed or disposed of to be run down and

depreciated in value ; all of which he should render an account of and apply on the said indebtedness of the said company to him as trustee as between this plaintiff and defendant, and before this defendant can be made liable in this suit.

“ And the defendant further says, if the said mortgaged property was sold as alleged in said declaration, that it was sold at very much less than its actual value ; that it had been in the possession of the said Prichard for a long time before the sale, and up to the time of the sale ; and for the purpose of purchasing the same himself at very much less than its value, he had permitted the said property to become run down, out of repair, and not in proper condition to bring its value, and thereby did bid the property off himself, and now has the same ; which said property then was and now is of sufficient value to pay and satisfy the full amount that said pretended report found due the said Prichard, trustee as aforesaid, from said company ; and that said Prichard, trustee, should account for the full value of said property ; and there is and was no deficiency of property to pay the said claims in justice and equity or law as contemplated in the said supposed contract declared upon ; and this defendant does not owe the plaintiff anything.”

Trial before *Wells, J.*, who reported the case to the full court as follows :

“ The incorporation of the Vermont Iron Company, under an act of the legislature of Vermont, the execution of the mortgages and mortgage bonds or notes, and of the agreement declared on, and the demand by the plaintiff upon the defendant before action brought, were not denied ; and it appeared that the defendant, from January, 1866, until after the termination of the litigation in Vermont referred to in the declaration and answer, was a stockholder (owning 1000 shares) and director and the president of said company.

“ The plaintiff put in evidence the record of the said proceedings in the courts of Vermont, consisting of a suit in equity for the foreclosure of said mortgage, and a cross-bill ; a decree being rendered declaring said mortgage valid, and ordering an account of the trust under the same to be taken by a master ; and afterwards confirming the report of the master, and ordering a sale of the property ; and finally confirming said sale.

"The defendant, Farrar, was not made a party to these proceedings, either by the form of the proceedings or by any process or notice issued to him to appear; and he did not become a party to them or take any action therein in his own name. George A. Fairfield was appointed as agent to act for the corporation in the defence of the suit, at a meeting of the directors at which Farrar was not present; but he knew of the intention to appoint Fairfield, and acquiesced therein.

"After the commencement of the litigation in Vermont, an assessment of twenty cents a share was made upon each share of the capital stock of the company (30,000 shares in all) for the purpose of providing funds for carrying on the litigation; but, no money being paid in on this assessment, an arrangement was made by which certain stockholders associated together to defend said suit in the name of the corporation, for the benefit of such stockholders as should contribute to the expense thereof. Farrar was knowing to, acquiesced in and participated in this arrangement, and contributed money towards the same, amounting to one hundred and thirty-eight dollars; the whole amount so contributed being about \$900, which was received by the treasurer and paid over by him partly to the agent, Fairfield, who continued to have charge of said litigation, and partly to the legal counsel employed to conduct the litigation. No meeting of the corporation or of the directors was held after this arrangement was made.

"Upon these facts, the plaintiff contended that the defendant was bound in the present suit by the decree rendered in Vermont, settling the accounts of the plaintiff as trustee, fixing the amount due on the mortgage notes or bonds, and confirming the sale of the property; and thus showing the insufficiency of the mortgaged property to satisfy and pay said notes or bonds, and the deficiency which existed; one seventh part of which he claims to recover.

"The defendant denied the conclusiveness and competency of the decree for this purpose, and contended that the plaintiff must show by other evidence that the property was insufficient to pay said bonds. The defendant also relied on the averments contained in the answer, of other property received by Prichard in part payment of said bonds or notes, not contained in said mort

gages, and not applied, &c. ; and also the averments in said answer as to collusion or fraud in the litigation in Vermont. No testimony was offered at the hearing in support of these averments ; but if, in the opinion of the whole court, the decree in Vermont is conclusive ; and if the defendant cannot be allowed to introduce evidence in support of said averments, then judgment is to be rendered for the plaintiff accordingly for the amount claimed. Otherwise, the case is to be sent to an assessor, with such directions as to the mode of making up the account and as to the effect, if any, to be given to the Vermont decree, as the court may deem proper. If the question of collusion or of the purchase of said property by the plaintiff are open and competent to affect the result, the facts relating thereto are to be heard and found by said assessor." The record of the proceedings in Vermont were made part of the report.

C. Allen & E. S. Mansfield, for the plaintiff.

A. A. Ranney & R. Lund, for the defendant.

AMES, J. The agreement which the defendant signed evidently looks forward to a default on the part of the corporation as an event not unlikely to happen. He was a creditor presenting his claim and receiving his pay, before the bonds which were secured by a mortgage of corporate property had been paid, and while it was uncertain whether the property so mortgaged would prove sufficient to pay them in full. The terms of the agreement imply that this payment to the defendant would diminish the funds applicable to those bonds, and that for that reason the defendant was to refund out of the money so paid to him a certain agreed proportion of the ultimate deficiency, if there should be a deficiency. The defendant must have understood that a process of foreclosure, and a sale of the mortgaged property, furnished the only mode, or at least an appropriate and suitable mode, in which the question whether the mortgaged property would prove sufficient to pay the mortgage debt could be effectually determined. He made the agreement therefore with the knowledge that it would be the duty of the plaintiff, whenever it became necessary, to enforce the mortgage for the benefit of the bondholders, by such legal process for foreclosure as was allowable and proper under the laws of Vermont, and that under such process the validity of the mortgage and the amount due upon it would be

judicially inquired into and determined. This mode of proceeding must have been contemplated when the agreement was made as the mode in which it was to be ascertained whether the apprehended deficiency really existed, and the judgment of the court in Vermont must have the same effect between these parties as if the contract had in terms referred to a suit for foreclosure in that court. *Rapelye v. Prince*, 4 Hill, 119. *Brown v. Sprague*, 5 Denio, 545. *Burke v. Miller*, 4 Gray, 114. 1 Greenl. Ev. § 523.

We must assume, from the defendant's position in the corporation, not only as a large holder of stock, but also as president and director, that he could not have been ignorant of the existence of the suit for foreclosure, or of its nature and importance. It is stated in the report that he was one of several stockholders who associated to defend against that suit in the name of the corporation, and who raised funds and employed counsel for that purpose. It was a suit in which his personal interests were directly involved, and if, as must be inferred, the corporation was wholly insolvent, the question as to the amount due upon the mortgage must have been much more important to him, under his liability to contribute towards making up the deficiency, than it was to the corporation itself. He was in court by his counsel, using the name of the corporation, litigating a question directly affecting his own interest, in a position to take part at every stage of the trial, with ample opportunity to call and examine witnesses, to cross-examine the plaintiff's witnesses, and to appeal from the decision. His contract with the plaintiff as the representative of the bondholders was in substance a contract of indemnity against any loss that might result from the previous application of a portion of the trust funds. He had made himself responsible that the mortgage should produce an amount sufficient to pay the mortgage debt. According to the decision in *Lowell v. Parker*, 10 Met. 309, the consequence of becoming responsible for the performance of the duty of another would be that "a judgment against that other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence, in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by coun-

tervailing proofs." The position of the defendant in this respect is somewhat like that of a surety upon a bond ; as to which description of liability it has been held, in relation to a surety on an administrator's bond, that he, as well as the administrator, is estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator, unless the judgment were suffered collusively by him. *Heard v. Lodge*, 20 Pick. 53. *Tracy v. Maloney*, 105 Mass. 90. *Cutter v. Evans*, 115 Mass. 27. In *Tracy v. Goodwin*, 5 Allen, 409, it was held that the obligation of a surety upon a constable's bond was a guarantee to a plaintiff for such amount as he has legally established to be due to himself from the constable ; and, in the absence of fraud or collusion, the judgment against him settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the amount of the damages. In *Littleton v. Richardson*, 34 N. H. 179, the law is thus laid down by Bell, J. : " When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit and requested to take upon him the defence of it, he is no longer regarded as a stranger." In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not. This view of the law is fully sanctioned in *Boston v. Worthington*, 10 Gray, 496, and in *Chamberlain v. Preble*, 11 Allen, 370 ; *Elliott v. Hayden*, 104 Mass. 180. In the case of a party having actual notice, and in fact participating in the defence, the service of formal notice upon him is unnecessary. *Lovejoy v. Murray*, 3 Wall. 1, 18.

The particulars of the plaintiff's account as mortgagee in trust for the bondholders are not before us, and we have no means of knowing in what way the balance alleged to be due to him for services, and money expended in carrying on the trust, was arrived at, or for what reason the defendant's share of the ultimate deficiency should have been fixed at one seventh. If, as intimated in the argument, the plaintiff has charged the trust fund with the \$5000 payment to the defendant, or has reckoned that payment as a part of the mortgage debt, and has thereby increased the deficit contemplated by the contract, it is a false charge which the plaintiff cannot avail himself of, except in fraud of the defendant's

rights. The payment to the defendant was provisional, and in computing the deficit, should not be reckoned as a part of the mortgage debt. The problem to be solved required that the amount of the debt should be first ascertained, exactly as if no such payment had been made to the defendant. Then a deduction of the proceeds of the property from that amount would show the deficit to be ascertained. If, in addition to the proceeds of the sale, it should be found that there were other funds in the plaintiff's hands unaccounted for, properly applicable to the mortgage debt, then good faith on the part of the plaintiff requires that he should be charged with such additional funds also.

Our conclusion therefore is that the case must be sent to an assessor according to the terms of the reservation, with instructions that the decree of the Vermont court, if not shown to be collusive or fraudulent, is competent and also conclusive evidence of the validity of the mortgage, and the amount due upon it; that if he finds that the \$5000 payment to the defendant has been charged by the plaintiff as if it were a part of the mortgage debt, in such a manner as to increase the amount of the deficit contemplated by the agreement, it is to be considered as a fraudulent charge and the account is to be corrected accordingly; and that if he finds other funds applicable to the mortgage debt, which the plaintiff should have so applied, and which he has concealed or withheld, the same should be applied accordingly by the assessor in the account. The assessor is also to inquire and report whether, as alleged in the answer, the plaintiff, for the purpose of purchasing the mortgaged property for less than its value, "did permit it to become run down, out of repair, and not in proper condition to bring its value," and did thereby bid off the property himself for less than its value; and if so, to correct the account by charging him with the full value at the time of the sale.

So far as the defendant professes to have been aggrieved by the premature termination of the hearing, his remedy was a motion to recommit the report of the master, with such order as to further hearing as the case might require. We are bound to presume that such a motion would have received all proper consideration.

Case to be sent to an assessor.

LAWRENCE J. RILEY vs. GEORGE B. FARNSWORTH.

Suffolk. March 31, 1874. AMES & DEVENS, JJ., absent.

June 15. — Oct. 22, 1874. COLT & ENDICOTT, JJ., absent.

A judgment in an action for breach of contract, rendered by the Superior Court for the plaintiff without assessing damages, is not a final judgment, and an appeal does not lie to this court.

A memorandum in writing of an auction sale of land, signed by the auctioneer authorized by the vendor to conduct the sale, contained a description of the premises sold, the names of both parties to the agreement, the price agreed upon, an acknowledgment of the receipt of a sum of money in part payment, and a clause in which the auctioneer agreed that "the vendor shall in all respects fulfil the conditions of sale," but did not set forth what were these "conditions of sale." *Held*, that this was not a sufficient memorandum within the statute of frauds.

CONTRACT by a vendee of real estate against the vendor to recover damages for non-performance of a contract of sale. The case was submitted to the Superior Court and on appeal to this court on an agreed statement of facts in substance as follows :

The defendant, the assignee of a mortgage on an estate, No. 23 Pine Street, Boston, on December 31, 1870, sold the estate at auction, for an alleged breach of condition, to the plaintiff, by his agents, G. F. Hunting and C. D. Leavitt, auctioneers, as stated in the following agreements in writing: "December 31, 1870. We hereby acknowledge that Lawrence J. Riley has been this day declared the highest bidder and purchaser of house 23 Pine Street, for the sum of \$3850, and that he has paid into our hands the sum of \$300, as a deposit, and in part payment of the purchase money; and we hereby agree that the vendor shall in all respects fulfil the conditions of sale. Vendor's name, Geo. B. Farnsworth, Mortgages. G. F. Hunting & Leavitt, Auctioneers." "December 31, 1870. I hereby acknowledge that I have purchased by public auction the above described property, 23 Pine Street, for the sum of \$3850, and have paid into the hands of G. F. Hunting & Leavitt, Auctioneers, the sum of \$300 as a deposit, and in part payment of the purchase money, and I hereby agree to pay the remaining sum of \$3850 into the vendor, on or before the 15th day of January, and in all respects, on my part, to fulfil the conditions of sale. Witness my hand this 31st day of December, 1870. Lawrence J. Riley."

The plaintiff and the defendant were both at the sale, and the plaintiff made a payment of \$300 at the time he received the contract; he attended the sale at the request of the auctioneer, and did not see the advertisement until some time after the sale. The terms of sale were that the purchaser should pay three hundred dollars at the time of the sale, and the balance on or before January 15, 1871, when the deed was to be given.

The owners of the equity in the estate, Francis Roche and Daniel A. Finnegan, brought a bill in equity against the defendant and the plaintiff, on January 2, 1871, in the Supreme Judicial Court, to redeem said estate from the mortgage thereon held by the defendant, and to restrain the defendant from conveying and the plaintiff from receiving a conveyance of the same in pursuance of said sale; and an injunction was granted as prayed for, which was served on these parties on January 3, before any conveyance was made, and while the plaintiff Riley was having the title examined. The plaintiff and the defendant made answers to said bill, and were heard on the trial of the case, and the court finally decreed therein as follows: "That plaintiffs may redeem on payment of sum due on the mortgage; plaintiffs to pay costs to time of appeal to both defendants, and to recover costs against Farnsworth since that time." The rescript, in its brief statement of the grounds and reasons of the decision, contained the following language, viz.: "The advertisement of the sale was insufficient." The opinion of the court as reported in 106 Mass. 509, 513, may be referred to at the hearing on these facts.

The Supreme Court, on the application of the plaintiff, so modified the injunction as to allow the plaintiff to make tender to the defendant of the balance of the purchase money for said estate, and to demand a conveyance thereof; and on January 14 he made a tender of said balance, and demanded a deed of said estate in pursuance of said sale and said contract; but the tender was declined and a conveyance refused. No conveyance was ever made by the defendant to the plaintiff. On September 23, 1871, after this action was commenced, the defendant tendered to the attorney of the plaintiff \$305.50 in settlement of the suit for debt and costs, and the attorney refused to receive it in full; and on September 26, the defendant made a further tender of \$12.75, which sums were received by said attorney without prejudice to

the rights of the plaintiff to recover more in the suit at law. These sums were for the \$300 paid by the plaintiff at the time of purchase, together with interest thereon and costs to time of tender.

The plaintiff never saw the mortgage till long after the auction. A default had been made in the performance of the condition. The proceedings or records of the Supreme Judicial Court in the case of *Roche v. Farnsworth*, and the advertisement, given in 106 Mass. 511, may be referred to.

"If, on these facts, the plaintiff is entitled to recover damages of the defendant for breach of said contract of sale, the case is to stand for assessment of damages before the Superior Court, trial by jury being waived; otherwise judgment is to be entered for the defendant."

On the above facts the Superior Court ordered judgment for the plaintiff, and the defendant appealed.

H. C. Hutchins, for the plaintiff.

C. Allen & E. S. Mansfield, for the defendant.

GRAY, C. J. This court has no jurisdiction on appeal from the the Superior Court under the Gen. Sts. c. 114, § 10, until after a final judgment disposing of the whole case in the court below. The judgment for the plaintiff in the present case is not final, because it leaves the question of damages open. Upon the hearing of that question, it may appear that the plaintiff in fact sustained no damages, or that they were so trifling in amount that the defendant may not choose to appeal from the final judgment for the plaintiff, or an appeal may be taken by either party upon matters of law involved in the assessment of damages. *Bennett v. Clemence*, 3 Allen, 431. *Commonwealth v. Gloucester*, 110 Mass. 491. *The Palmyra*, 10 Wheat. 502.

Appeal dismissed.

The case was then re-submitted to the Superior Court on the above facts; judgment was rendered for the defendant, and the plaintiff appealed.

H. C. Hutchins, for the plaintiff.

E. S. Mansfield, (*C. Allen* with him,) for the defendant.

MORTON, J. The memorandum in writing required by the statute of frauds must contain all the essential terms of the con-

tract, so that the court can ascertain the rights of the parties from the writing itself without resorting to oral testimony. Tested by this rule it is clear that the memorandum signed by the defendant through his agents, the auctioneers, is not a compliance with the statute. It does not purport to give all the terms of the contract. It states that the plaintiff was the highest bidder and purchaser of house 23 Pine Street for the sum of \$3850; that he had paid to the auctioneers \$300 as a deposit, and in part payment of the purchase money, and that the defendant agrees to "fulfil the conditions of sale." These conditions were stated orally by the auctioneers at the sale, and it cannot be known except by recourse to oral testimony what they were. It is impossible to ascertain from the writing itself what the defendant has promised to do.

But the plaintiff contends that the "purchaser's agreement" signed by him should be construed together with the writing signed by the defendant, and the two be regarded as constituting one memorandum. We have not deemed it necessary to consider this question, because we are of opinion that if the two writings can be construed together the same difficulty remains. Both writings refer to the oral conditions of sale as a part of the contract, and we cannot ascertain what conditions are to be performed by both parties without resorting to parol proof. The two together do not purport to, and do not in fact, state all the conditions. The present plaintiff, in his answer in the case of *Roche v. Farnsworth*, the record of which is made part of this case, alleges that one of the conditions stated at the sale was that fifteen days were to be allowed to the purchaser "to make examination of the title to said estate and to ascertain if the same was good when a deed of said estate was to be made to the purchaser." What this condition was, or what other conditions there were, can only be ascertained by parol proof. Whether they amounted to an unconditional agreement by the defendant, either expressly or by implication, that he would give a deed which would convey a good title, cannot be determined from the writings. It would be competent for the defendant to show by parol, without controlling or varying the written memorandum, that the conditions of sale did not import such a contract. The difficulty is that the contract of the parties was partly in writing and partly by parol and the court cannot determine whether the defendant is liable,

or if liable to what extent, without resorting to parol testimony to ascertain what were the conditions orally stated by the auctioneers at the sale. We are therefore of opinion that the memorandum is not sufficient within the statute of frauds.

As this is decisive against the plaintiff's right to maintain this action, it is not necessary to consider the other questions raised.

Judgment for the defendant.

JANE MONTGOMERY vs. ISAAC H. PICKERING & wife.

Suffolk. March 24, 25. — Oct. 23, 1874. AMES & DEVENS, JJ., absent.

A decree of a single justice of this court sitting in equity, in a cause heard before him on oral evidence, and which is heard in this court on appeal upon a report of the same evidence only, will not be reversed on a question of fact unless it clearly appears to be erroneous.

A. by fraud obtained a bond for a deed of land from B., who afterwards with full knowledge of the facts, and after taking legal advice, executed and delivered the deed. *Held*, that the deed did not operate as a confirmation of the previous transaction, unless it was given with that intent.

Where A. by fraud obtains from B. a bond for a deed of land, and a sum of money which has been awarded B. by a city for a portion of the land taken before the bond is executed, which sum is greater than the amount A. is to pay for the land, and B. conveys the land to A. and receives the price agreed upon, it is not necessary for B. to restore or to offer to restore the money to A. in order to maintain a bill in equity to rescind the sale.

A party, who testifies himself and who calls as a witness one who has been his legal counsel and who is not examined or cross-examined as to conversations with his client, may object, when the counsel is called as a witness by the other party, to his testifying in regard to such conversations.

BILL IN EQUITY, filed June 18, 1873, against Isaac H. Pickering and his wife, Sarah A., to compel the reconveyance of a parcel of land on Summer Street, Boston, and also the repayment of a sum of money obtained by the defendants from the city of Boston for land taken to widen Summer Street. The bill alleged fraud on the part of the defendant Isaac, and also that if there was no fraud the prayer of the bill should be granted on the ground of mutual mistake.

The case was heard on oral evidence before *Endicott, J.*, who ordered a decree for the plaintiff, and the defendants appealed.

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The case came before this court on the pleadings and a report of the evidence. There appeared to be no controversy in regard to the following facts :

On January 2, 1873, the plaintiff owned on Summer Street, Boston, a lot of land with the remains of a building thereon which had been destroyed by the great fire of the preceding November ; and on that day the city passed an order taking 424 feet of the land to widen the street, and awarded her as damages at the rate of \$20 a square foot for the land, and \$500 for the buildings taken, amounting in all to \$8980. There was then remaining 127 square feet. In February, 1873, the plaintiff agreed to sell the land to Isaac, and at his request, on the 12th of the month, executed a bond to the defendant Sarah for the conveyance to her, within two months, of the entire lot on Summer Street, for \$13 a square foot, "subject to any change in the streets the city may make." On the next day the parties executed a supplementary agreement by which it was provided "that in the event of the city taking any part of said land for the purpose of widening or changing streets, within the period named in said bond for a deed, and before the deed be given," Sarah should receive the damages therefor from the city. On February 25, 1873, the plaintiff gave to Isaac the following order, signed by her, on the city treasurer : "Please pay to Isaac H. Pickering \$8980, the same being the amount awarded to me by the city for land taken to widen Summer Street by resolve of the board of street commissioners passed January 2, 1873 ;" and on the next day executed a deed to the city of the land taken and a release of all claim to damages, the consideration stated in the deed being \$8980. The order and the deed were delivered to the city by Isaac, and on March 4, 1873, he was paid by the city the sum of \$8980. After this and before April 15, following, Isaac caused a deed from the plaintiff to the defendant Sarah of the remaining land to be drawn, and called upon the plaintiff to execute it, tendering her at the same time the amount due for the entire lot at \$13 a foot. The plaintiff at first refused to execute this deed, but subsequently notified the defendants that she was ready to do so, and on April 15, 1873, executed and delivered the deed to the defendant Sarah, and received the price agreed upon \$7008. On the same day she brought an action of tort against the defendants for the same

cause of action set forth in the bill in this case ; but subsequently discontinued the action. At the time the bond and agreement, dated February 12, 1873, were made, the plaintiff was ignorant that the city had then taken the land. When the deed of April 15, 1873, was executed, she knew the facts and had taken legal advice as to her rights and obligations.

The principal questions of fact in controversy were whether the plaintiff, at the time she signed the order and deed to the city, knew that the city had taken the land before the bond and agreement were given ; and whether the defendant Isaac knew that the city had taken the land when the bond and the agreement were given. The defendant Isaac contended that at the time the agreement of sale was made, and when the bond was executed, it was supposed by him and the plaintiff that the city would take the land, but that it was not known what would be paid, and that he bought it on speculation ; and that the plaintiff was desirous of selling at the price agreed on in order to be sure of getting so much for the land.

J. P. Treadwell, for the plaintiff.

R. M. Morse, Jr., for the defendants, to the point that if the contract was induced by fraud it was afterwards confirmed, cited *De Montmorency v. Devereux*, 7 Cl. & F. 188 ; *Farnam v. Brooks*, 9 Pick. 212, 224 ; *Bradley v. Chase*, 22 Maine, 511 ; *Pearsoll v. Chapin*, 44 Penn. St. 9 ; *Hanson v. Field*, 41 Missis. 712. And to the point that the plaintiff had waived the privilege of her counsel not testifying, cited *Commonwealth v. Mullen*, 97 Mass. 545 ; *Woburn v. Henshaw*, 101 Mass. 193.

COLT, J. The plaintiff seeks to set aside a deed of land made by her, through the procurement of Isaac H. Pickering, to his wife, the other defendant, and to recover a sum of money paid by the city of Boston as damages for land of the plaintiff taken for streets. Both the deed and the money paid by the city to Pickering are alleged to have been obtained by fraud, and upon mutual mistake of fact affecting alike the consideration of the deed and the payment of the money.

The case was heard by a justice of this court upon pleadings and oral evidence, and comes up with a report of all the evidence upon appeal from his final decree in favor of the plaintiff.

It is not contended, upon the case thus presented, that the decree does not follow the frame of the bill, and is not justified by the pleadings. There is no report of the facts on which it is based found by the court; no question of law is reserved by the judge. The principal question open is whether the evidence before the court supports the judgment below.

On appeal from the decree of a single judge upon oral evidence duly reported, the case is heard upon the same evidence, unless leave to exhibit further proof has been granted. Gen. Sts. c. 113, §§ 8, 21. Upon such appeal, great weight is allowed to the decision of the court below. The judge who sees and hears the witnesses, and observes their conduct on the stand, can best judge of the weight to be given to their statements. The original decree must stand unless it clearly appears to be erroneous. *Reed v. Reed*, 114 Mass.

Upon a careful revision of the evidence, we cannot declare the decree in this case erroneous. The fraud alleged is wholly a question of fact. It is not necessary or profitable to discuss in detail the evidence by which it is established. It is enough that it sufficiently proves the fraud with which Isaac H. is charged in obtaining the original agreement to convey and the subsequent order on the city. The judge must have found that this original fraud was not cured or waived by the subsequent conduct of the plaintiff, and there is nothing to show such finding erroneous. Mrs. Pickering's title, it is conceded, is no better than her husband's, and therefore cannot prevail against this proceeding.

But the defendants contend, that, as the subsequent deed to Mrs. Pickering appears to have been given under legal advice, with full knowledge of the original fraud and of the plaintiff's legal rights, it must be treated as ratifying and confirming the previous transactions with the defendants.

The deed in question does not expressly confirm the validity of the previous contract. It was not founded on any new consideration, or given in settlement of a disputed claim. It was required by the terms of the original contract, and there is nothing to show an intention to forgive the fraud. To have effect as a confirmation, such deed must appear to have been given with that intention by one who was not under the influence of the previous transaction. When relied on as a defence in a case where fraud

is clearly established, it is said that it must stand upon the clearest evidence, because the act is so inconsistent with justice and so likely to be connected with the fraud. *Morse v. Royal*, 12 Ves. 355, 373. The deed must be so disconnected with the previous dealings as to leave the grantor the complete power of determining, as upon an original act, whether he will do it or not. *Crowe v. Ballard*, 1 Ves. Jr. 215. Or, as it is said in the more recent case of *Moxon v. Payne*, L. R. 8 Ch. 881, the parties must be at arms' length and stand on equal terms. In the case at bar, the money of the plaintiff, wrongfully obtained from the city, was in the hands of the defendants. The deed appears to have been delivered as a means of recovering the money and saving the plaintiff from further loss, without any evidence of a purpose to give up whatever remedy she might have at law or in equity against them, and cannot, by the rules stated, be treated as conclusive against her.

Nor was there any necessity, upon the facts disclosed, for the plaintiff to restore or offer to restore the defendants to the position in which they were before the deed was executed. By the payment made to her upon delivery of the deed the plaintiff took nothing from the defendants that she was not entitled to, and there was nothing, therefore, on her part to be restored.

At the hearing before a single justice, the plaintiff herself testified and called as a witness one who had been her legal adviser in reference to the transactions in question. He was not then asked as to his communications with his client, but he was cross-examined by the defendants' counsel as to all matters of fact which came to her knowledge before the execution of the deed. After the evidence was all in, he was recalled and asked by the defendants what conversations he had as counsel with the plaintiff in reference to making the deed and giving the receipt, and for what reason he advised the delivery of the deed. But it was ruled that what passed between counsel and client was not admissible, and the evidence was excluded.

It is contended that this ruling was wrong, because the exclusion of the evidence offered is a privilege which the client may waive, and in this case has waived by becoming a witness in her own behalf. But this alone, in the opinion of the court, does not amount to such waiver. *Decree for the plaintiff, with costs.*

CYNTHIA P. LYON *vs.* CHARLES M. MARSH.

Worcester. November 10. — 16, 1874. WELLS & DEVENS, JJ., absent.

A testator devised all of his estate, both real and personal, to his wife, "to her sole and separate use and benefit forever," and if there should be any part thereof left at her decease, "it is my wish and desire that it should be disposed of as follows," &c. *Held*, that the wife took either an estate in fee, or an estate for life with power to convey in fee; and that she could maintain a bill in equity for specific performance against one who had agreed to buy the land devised, and to whom she had agreed to, convey "a good and clear title to the same in fee simple, free from all incumbrances."

BILL IN EQUITY for the specific performance of a written agreement by which the defendant agreed to purchase a farm in Leicester, and the plaintiff agreed to sell and convey it to him "by a good and sufficient warranty deed, conveying a good and clear title to the same in fee simple, free from all incumbrances."

The only defence set up in the answer was that the defendant was not satisfied that the plaintiff took an estate in fee by the will of her husband, which was the only source of her title, and the whole of which, after a direction to pay debts and funeral charges, was as follows :

"I give and bequeath all the remainder of my estate, both real and personal, to my beloved wife, Cynthia Lyon, to her sole and separate use and benefit forever; and at her decease, if there should be any part thereof left, it is my wish and desire that it should be disposed of as follows, namely :

"First. I give and bequeath to my son, Frederick A. Lyon, five hundred dollars.

"Second. The remainder, if there should be anything left after paying the above legacy, I direct that it shall be equally divided between my three children, namely, Frederick A. Lyon, Hannah S. Thurston, wife of Lyman D. Thurston, and Elizabeth E. Marsh, wife of Charles C. Marsh, or their heirs forever.

"And I hereby appoint my wife, Cynthia Lyon, and my son, Frederick A. Lyon, of said Leicester, to be the executors of this my last will and testament, authorizing them to sell and dispose of and convey all of my estate in such a manner as in their opinion they shall deem expedient and proper."

The cause was heard on bill and answer by *Gray, C. J.*, who entered a decree for the plaintiff, and the defendant appealed to the full court.

H. L. Parker, for the plaintiff.

W. S. B. Hopkins, for the defendant.

BY THE COURT. The plaintiff took by the will of her husband either an estate in fee, or at least an estate for life with power to convey in fee. *Bowen v. Dean*, 110 Mass. 438. *Kimball v. Sullivan*, 113 Mass. *Decree affirmed.*

NAHUM WASHBURN vs. CHRISTOPHER D. COPELAND.

Plymouth. Oct. 20. — Nov. 2, 1874. AMES & MORTON, JJ., absent.

A. agreed with B. by an instrument under seal that B. should have the right of unobstructed passage over all that part of A.'s land south of a line ranging with the side of A.'s house then standing upon the land, reserving to A. "the right to eight feet in width on the southerly side of said house for the purpose of enlarging the same or of building a new one." A. built a new house on the site of the former one, covering by its greater width a portion of the land on the south side reserved for that purpose, and then built a fence ranging with the south side of the new house and extending from the house to the highway. *Held*, that A.'s grant of unobstructed passage over the specified portion of his land was absolute, and that his reservation applied only to the erection of a house, and not of a fence upon the land over which the right of way was granted.

TORT for obstructing a right of way by a fence. The case was submitted to the Superior Court, and, on appeal, to this court, on a statement of facts in substance as follows:

In 1852, the plaintiff was the owner of a lot of land in Bridge water, in the rear of a lot of land owned by the Trinitarian Congregational Church. On the church lot a church was built in 1836, the front line of which was fifty-nine and a half feet from the highway, and there was a space between the southerly line of the church and the adjoining lot owned by Daniel Mitchell, where the persons attending church had been accustomed to hitch their horses, and over which the plaintiff and his tenants passed and repassed. The horse sheds on the church lot in 1852 were in the rear of the church, and extended to the westerly line of the lot, and from the north side to within the length of an ordinary pair of bars of the southerly line of said lot.

On October 30, 1852, the plaintiff and the church society executed an agreement under seal, the material portions of which are as follows:

"The said Nahum Washburn hereby grants and conveys to said Trinitarian Congregational Church, their successors and assigns, the right and privilege of occupying and improving, by placing and keeping horse sheds thereon, and allowing horses and carriages to stand upon the same, a piece of land adjoining the land now owned by said corporation, fifty-two feet in length, and eighteen feet in width at the northerly end, and seventeen feet in width at the southerly end, the southerly end of said piece of land being on a line ranging with the southerly side of the meeting-house of said corporation, and extending northerly fifty-two feet in the line of their land. *And said Washburn hereby agrees that said corporation may erect and keep posts within two feet of the southerly line of their land adjoining the land of Daniel Mitchell, and allow horses, with or without carriages attached, to be hitched thereto at all times. Provided that there shall always be a sufficient unobstructed passage way from his land to the highway on the southerly side of their meeting-house."

"And the said Trinitarian Congregational Church in Bridgewater, in their corporate capacity, in consideration aforesaid, do hereby covenant and agree with said Washburn that they will remove so much of the horse sheds, now standing on their land the back side of their meeting-house, as are southerly of a line ranging with the southerly side of said meeting-house, and will keep the land which lies southerly of said meeting-house and a line ranging with the southerly side of said house from the highway to said Washburn's land, and owned by said corporation, free from all obstructions, excepting the right of erecting posts and permitting horses and carriages to stand thereon as aforesaid, and reserving the right to eight feet in width on the southerly side of said meeting-house for the purpose of enlarging the same or of building a new one."

Shortly after the agreement was made, the horse sheds were moved on to the plaintiff's land, as agreed. In 1861 a new church was built, occupying in part the ground on which the old church had stood, and the southerly line of the building was five feet and six inches nearer Mitchell's land than the southerly line

of the old church, and extended about eight feet further westerly. This was done with the knowledge of the plaintiff and without his objecting thereto. In 1873, the defendant, acting in behalf of the church, built the fence complained of, from the southeasterly corner of the new church to the highway, in continuation of the southerly line of the church.

"There remains between the fence and the southerly line of the church lot and between the southerly line of the present church and said southerly line of the church lot, the space of twenty-five feet and four inches, which is a sufficient passage way. If judgment is entered for the plaintiff it shall be for nominal damages."

On these facts the Superior Court ordered judgment for the defendant, and the plaintiff appealed.

H. Kingman, for the plaintiff.

P. E. Tucker, for the defendant. The object of the agreement of October 30, 1852, was twofold; to enable the church to occupy a portion of the plaintiff's land for its horse sheds, and to grant a way to the plaintiff, easterly from his rear lot to the highway, or to fix and define its limits. In settling the latter point, it was the intent of the agreement to give the plaintiff the right to use all the land between the meeting-house and a line ranging with its southerly line as it then stood, and the hitching posts near the southerly fence, until a new meeting-house should be built or the old one enlarged, and then to give for a way all the land between the southerly line of the new or enlarged meeting-house, and its extension east and west, and said hitching posts; and eight feet southerly from the south line of the meeting-house as it then stood, and from its extension east and west, were reserved for such erection or enlargement. The construction contended for by the plaintiff would be onerous upon the church, as depriving it of the right to build or extend southerly, except upon the depth from front to rear of the church as it then stood; and useless to the plaintiff, as the eight feet in the front or rear of the new or extended meeting-house would be of no practical advantage to him as a way, since he had no right of way at all across the church lot, either in the front or rear of the church. A construction, harsh to one party and valueless to the other, should not be given to this instrument unless imperatively

demanded by its language. The construction contended for by the defendant is that in effect given by the parties to the agreement at the time the new meeting-house was built. As the church had a right to extend its new building on its new southerly line to the front or rear, as seems to have been then assumed and admitted, and did extend it further westerly, without objection, it had a right, on the principle that the greater covers the less, to erect a fence on the extension of said line. A fence connecting the building with the street is a convenient and reasonable appendage to the building, to prevent or protect approach to it from the street, and a part of it, within the meaning of this agreement.

WELLS, J. The agreement of the society, under which the defendant justifies, to "keep the land which lies southerly of said meeting-house and a line ranging with the southerly side of said house, from the highway to said Washburn's land," "free from all obstructions," with the exceptions named in the agreement, is absolute and not to be limited by or construed with reference to the necessities of any supposed purpose or use for which the space was to be kept open. The line thus defined is fixed by the location of the house as it stood at that time. The reservation or exception of "the right to eight feet in width on the southerly side of said meeting-house for the purpose of enlarging the same or of building a new one," must be measured and limited by the purpose so declared.

The defendant contends that this reservation or exception is of eight feet in width, not only "on the southerly side of said meeting-house," as far as it should extend when enlarged or rebuilt, but along the whole line described in the agreement; and that when the new building was erected the stipulations of the agreement applied to "a line ranging with the southerly side of said" new meeting-house. There may be no reason why the plaintiff should require or the society concede a wider space between the building and the highway than there was left on the southerly side of the building. It is enough that such is the stipulation of the agreement. The line in question was established, as appears from the agreement, not merely to define an open passage way, but to determine the southern limit of the right granted to the society to erect horse sheds upon the plaintiff's land and also

that to which the sheds already upon the land of the society were to be removed. Construing the reservation or exception in view of this feature of the agreement, the words setting forth the purpose become more significant that no change of the line was intended beyond that required for that purpose.

The fence complained of was erected within the space so agreed to be kept open; and, according to the agreement of the parties, the plaintiff is entitled to judgment for nominal damages.

Judgment for the plaintiff.



ERASTUS M. NASH & others, executors, vs. HENRY HUNT.

Plymouth. Oct. 20. — Nov. 10, 1874. AMES & MORTON, JJ., absent.

On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the heir contended as one ground for inferring unsoundness of mind that the will was unreasonable, and introduced evidence tending to show that he had been in partnership with the testator and other persons, and that, upon closing up the partnership affairs, his interest amounted to a large sum which he had transferred to the testator upon the assurance that upon the testator's death the estate would become his; that the fact and amount of his interest had been established by the report of a master in a suit in equity, to which he and the testator were co-defendants, and that the final settlement of the partnership affairs had been made in accordance with that report. He then offered in evidence a duly certified copy of the record in that case, and of the master's report. This evidence was excluded. *Held*, that he had no ground of exception.

The report of a master in chancery is not evidence as an adjudication between the parties until it has been accepted and a decree rendered accordingly.

If one party to a suit contends that a transfer of property was made by a certain instrument in writing, and testifies as to the circumstances attending it, the other party may show that the transfer was made by a later instrument; and the evidence of a witness, who prepared the instrument and attended to the execution of it, that there was no such consideration or understanding as had been testified to, is competent; and the witness may also be asked as to the circumstances attending the execution of the second instrument, and why it was executed.

An exception to evidence, admitted at the trial under a general objection, will not be sustained in this court, because the witness testified in regard to a privileged communication, if the evidence is otherwise competent.

On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the evidence of a witness who had had an interview with the testator three weeks before the date of the will, that he

"observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition," is competent.

On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the answer of a witness, who is admitted to be an expert in mental diseases, to a question as to his opinion of the testator's insanity, based upon various hypotheses, is not rendered incompetent because the witness has already testified that he was ignorant of the effect of a certain disease upon a person's mental condition, and the fact that the testator had this disease was included in the facts assumed in the question.

At the trial of an issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, a subscribing witness who had testified in chief as to the execution of the will and the sanity of the testator at that time, and also as to the facts connected with the preparation of the will, and interviews with the testator in relation thereto, was recalled in rebuttal, and examined anew without restriction upon the points in controversy. *Held*, that the objecting party had no ground of exception.

At the trial of an issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, a witness was allowed to add to his negative answers to certain questions put to him in regard to whether he had made certain statements about the mental condition of the testator, the following reasons for such denial: in one case, "because I never thought of such a thing as his not being sane," and in the other, "because it was not true." *Held*, that the objecting party had no ground of exception.

On the issue whether two instruments offered for probate as a will and codicil were procured by undue influence, it appeared that the alleged will recited that the testator was a partner in a firm, and recommended his trustees, after making certain payments, to leave the residue of the estate in the hands of the firm, "leaving it to said firm to pay to my son such share of the net profits of their business, as to said firm may seem fair and just, and according to our verbal understanding." There was no other evidence than the will of any verbal understanding on the subject. The son was not a partner in the firm, and the testator had, after the will was made and just before signing the codicil, endeavored to have the firm employ his son. The partners refused to make any definite agreement, but said perhaps they would give the son a certain sum a year. This answer was reported to the testator, who said, "Well, we will leave it as it is." The codicil was then signed. *Held*, that the will did not indicate an agreement that the son should have an interest in the firm, or be paid any definite share of the net profits, and that in the absence of evidence showing that the expectation of the testator was encouraged by the partners, the party contesting the will was not entitled to have the jury instructed that if the will was made upon an understanding with the partners, or either of them, that a share of the net profits of their business should be paid to the son, and if they denied any interest of the son under the will, the jury would be authorized to find that the will was made under undue influence.

APPEAL by the son and sole heir at law of Thomas J. Hunt, late of Abington, from the allowance by the judge of probate of two instruments, one as his last will, and the other as a codicil thereto, the execution of which the appellant contended was pro-

cured by undue influence, and while the testator was not of sound and disposing mind.

At the trial, before *Ames, J.*, of issues framed on each allegation, the jury found in favor of the will and codicil, and a bill of exceptions, in substance as follows, was allowed :

The will of the testator, dated December 31, 1872, after providing for the payment of his debts and certain legacies, contained the following provisions :

“ All the residue and remainder of my property and estate in possession or action, remainder or reversion, and wherever situate, real, personal or mixed, I devise and bequeath to Erastus M. Nash and Gilman Osgood, both of said Abington, and Peter Semonin, of Evansville, Indiana, and to the survivor of them, and to the heirs of such survivor. In trust, however, and for the uses and purposes following, namely, 1st. To permit my wife Sarah, and my son Henry, to occupy and improve and take the rent and profits of all my real estate, keeping the same in repair, and paying all taxes and insurance during the lifetime of my said wife and son and the survivor of them, and to collect and receive all my personal estate, and the same to convert into money, (except such portions as may be required for the use of my said wife and son,) and said moneys according to their best judgment safely to invest, and the same from time to time to reinvest, and the net income thereof, and so much of the principal as may be necessary to apply to the liberal support, maintenance and comfort of my said wife so long as she may live, all to be in lieu of her dower; and after said provision for my said wife, the residue of said income to pay over to my said son so long as he may live; and upon the decease of the survivor of my said wife and son, to pay over and convey all the real and personal of said trust estate to the heirs at law of my said son, according to the statutes of descent and distribution of this Commonwealth.

“ And my will is that said trustees have power, upon the request in writing of my said son, if said trustees deem it for the best interest of my estate, from time to time to sell and convey any portion of my real estate, and the proceeds thereof to invest, and hold with the other personal estate, using the income as above set forth.

" And my will further is that said trustees have power, if they deem it for the best interest of my said son, at any time during the lifetime of his said mother, to furnish my son with money to invest in his business, not exceeding ten thousand dollars. And after the decease of his said mother, with a further sum not exceeding ten thousand dollars.

" And my will further is that said trustees expend a sum not exceeding five thousand dollars for the improvement of the burial lot belonging to myself and my deceased brother Joseph, in the Mount Vernon Cemetery in said Abington.

" And whereas I am a member of the firms of Hunt, Semonin & Co., and Semonin, Dixon & Co., and have an equal third part of the profits of each firm, and have full confidence in the integrity and ability of my said copartners; therefore my will is that my said trustees have full power after providing for the foregoing payments out of my personal estate and out of funds due me from said copartnership, to allow the residue of the amount due my estate out of said firms to remain in the hands of said Semonin & Dixon on their note on interest, not to exceed seven per cent. per annum for such time, and I recommend to said trustees so to do, as to my said trustees may seem safe and judicious, leaving it to said Semonin & Dixon to pay to my said son such share of the net profits of their business as to said Semonin & Dixon may seem to be fair and just, and according to our verbal understanding.

" And I do hereby nominate said Erastus M. Nash, Gilman Osgood and Peter Semonin, to be executors of this my will, and I request that they shall be exempt from giving a surety or sureties on their official bonds both as executors and as trustees."

The codicil dated December 31, 1872, contained the following provision: " If the executors and trustees named in my said will, after collecting from the firms of Hunt, Semonin & Co., Semonin, Dixon & Co., the sums first named in my will, amounting to thirty-four thousand dollars, shall decide to collect from said firms the balance due my estate as soon as may be, then my will is that said Semonin & Dixon, my surviving partners, shall not be compelled to pay such balance faster than in the following proportions: \$15,000 in four and one half years, \$15,000 in five years, and \$20,000 in five and one half years, all after said first

named collection, and such further reasonable time as with reasonable diligence may be necessary for the collection of outstanding copartnership claims; said payments of \$15,000 and \$20,000 being increased or diminished in proportion to the amount found due my estate from said copartnership assets."

The appellees presented the written instrument purporting to be the last will of the deceased, with the codicil. The three attesting witnesses were called, and were asked the usual questions concerning the execution of the will and codicil, and the condition and sanity of mind of the testator at the time.

Perez Simmons, a counsellor at law, was one of these witnesses. He testified that he was frequently consulted by the testator professionally; that he received a note from the testator, in consequence of which he went to see him, and was instructed as to the will; and that a rough draft of the proposed will was made, containing various erasures and interlineations. He was fully examined and cross-examined as to all the circumstances attending this draft and as to the erasures, &c., and also as to the execution of the will and the codicil. And upon intimation from the judge that the appellees might give further evidence upon the question of sanity, in reply to such as should be given on the part of the appellant, they rested their case.

The appellant testified without objection, that he had an interest as a partner in the firm of Varney & Harvey of the value of from \$33,000 to \$34,000; that the firm consisted of A. B. Harvey, William H. Varney, John Lane, the testator, and himself; and also stated that the partnership affairs were adjusted by a suit in equity in this court, brought by one of the partners for that purpose, and were finally settled by the several partners in accordance with the report of a master in chancery to whom the account had been referred for a statement by the court, who found the appellant's interest as above stated.

The appellant then offered a duly certified copy of the record of that case, with the report of the master in chancery, but upon objection the judge excluded the evidence.

The appellant also testified that while said suit was in progress, his father requested him to go to the office of Hutchins & Wheeler, who were the attorneys of the testator in said suit; that he went accordingly in company with his father; that he

there had an interview with Hutchins alone, while his father was in another room; that then the three had an interview together, in which Hutchins urged him to assign his interest in the concern of Varney & Harvey to his father, in order to enable the father to negotiate a settlement; that Hutchins further urged the appellant to do this, and said in substance that he would have all his father's property at his death, and it would make no difference to him if the father should hold his property; that soon after this interview, the appellant had an interview with his father at Abington upon this subject, in which he stated to his father that he did not like to make such an assignment, but that under the circumstances he should do so, and that he did execute an assignment under seal, which, after his father's death, was found among his papers. The assignment was produced, and bore date October 24, 1867, and is as follows: "Know all men by these presents, that I, Henry Hunt, of Abington, in the county of Plymouth, in consideration of one dollar to me paid by Thomas J. Hunt, my father, of said Abington, receipt of which is hereby acknowledged, hereby sell, assign and transfer and set over to the said Thomas J. all my right, title, claim and interest as a partner in the copartnership of Varney & Harvey, or claim upon John Lane, arising out of any partnership with him under the style of Varney & Harvey, or claim upon said Varney & Harvey, or the said Thomas J. Hunt arising out of said copartnership. To have and to hold to him, the said Thomas J. Hunt, his executors, administrators and assigns, with power to demand and secure the same, using my name if necessary in any and all process."

The appellees in rebuttal called Henry C. Hutchins, who testified that he was of counsel for the defendants in the suit of Harvey v. Hunt and Lane & others; that the above assignment was in his handwriting, but that he did not recollect where it was executed nor the circumstances under which it was made, nor did he recollect that Henry Hunt had any conversation with him in regard to its execution. The witness then produced the following instrument, signed and sealed by the appellant, and dated February 19, 1870: "Whereas a suit in equity for the settlement of the partnership affairs of Varney & Harvey is now pending in the Supreme Judicial Court for the county of Suffolk, wherein A. B. Harvey is complainant, and Thomas J. Hunt and John

Lane, and William H. Varney and Henry Hunt are defendants, which said suit has been referred to Henry W. Paine, Esq., as master, to state the accounts of the parties therein. Now know all men by these presents, that I, the said Henry Hunt, in consideration of one dollar to me paid by the said Thomas J. Hunt, the receipt of which is hereby acknowledged, do hereby sell, assign and transfer to the said Thomas J. Hunt all claim which I now or may hereafter have by virtue of said suit, or any judgment or decree therein, upon the said Thomas J. Hunt, or John Lane, or either of them, or any of the parties to said suit, and I do hereby authorize the said Thomas J. Hunt to prosecute said suit to final judgment for his own benefit, and the proceeds to enjoy to his own use. And I do further sell, assign and transfer to the said Thomas J. Hunt all claims which I have upon the said John Lane, or the said Thomas J. Hunt, or any of the parties to said suit as a member of the firm of Varney & Harvey."

Hutchins also testified that there never was any conversation in his presence in which, as an inducement to Henry to sign that or any other release, anything was said about his having the father's estate after the decease of the latter. The witness was then asked what were the circumstances attending the execution of the paper dated February 19, 1870, and why it was executed. This question was objected to by the appellant, but the judge ruled that, as the witness was counsel in litigation in which the deceased and the appellant were more or less concerned, and as the paper was drawn up at the witness's office and under his direction, the question might be put. To this ruling the appellant excepted. The witness then testified that the purpose with which that paper was prepared and its execution obtained was to put the father's interest where it belonged; treating and assuming Henry's interest in it as nominal; "to restore the estate to the father. A portion of it had been put in the son, and the paper was made to restore it to the father. This was well understood. I considered the son's interest in it as merely nominal. I know that I was directed to prepare these papers, and I knew what the object was. They were prepared and here they are, and that is all I know about it." He did not testify that Henry said it was nominal or anything to that effect, or that he, Henry, was present or was consulted about the preparation of that paper. He also

testified that this took place before any attempt had been made to compromise the suit, but that there was a series of papers, of which this was one, for the purpose of making an adjustment; there was an arrangement with Harvey, and, as part of that arrangement, there was a subsequent one with Hunt and Lane. "I arranged it for them and got all settled, and this was one of the papers of adjustment that was necessary to be executed." The paper was admitted in evidence, and to its admission the appellant excepted. The witness was also asked whether, at the time that the paper of February 19, 1870, was executed at his office, anything was said in regard to the consideration, in connection with the final disposition of the father's estate. On objection the question was allowed, to which ruling the appellant excepted. The answer was in the negative.

The appellees called Gridley Beal in rebuttal, who had been long and well acquainted with the testator, and inquired of him as to certain conversations with the testator, one of which he said took place in the spring of 1872, concerning the views of the testator as to the length of time it would require to settle the testator's business in the West. Under the objection of the appellant, the conversation was admitted, and the witness testified that the testator said it would require four or five years to withdraw his capital from the West so as not to injure his partners there. The judge admitted this testimony, the appellant's counsel having stated in his opening that the provisions contained in the will on that subject, and the fact that no security was required of his partners by its terms, were so unreasonable as to be evidence tending to prove unsoundness of mind or undue influence. The witness, under objection from the appellant, was also permitted to give an account of a conversation on December 12, 1872, in which the testator spoke of retiring from business, but said he could not do so, if living, in less than five or six years, without injury to his partners; and that he had opportunity to know them, and they were fair and honorable men. He also testified that the testator named all his sisters, spoke about the circumstances of one of them, and said that she and her husband were growing old and could not pay for their place; and on being told by the witness, in answer to a question, that the incumbrance on their place was about one thousand dollars, expressed a purpose

to provide for discharging it. The appellant had offered evidence which he claimed showed insanity of the testator in November 1872, and afterwards till the execution of the will and codicil. The witness also said, under objection, that during this interview he observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition.

No evidence had been offered by the appellant respecting either of these conversations, or that the testator had ever said anything inconsistent with what had been attributed to him by the witness Beal on these occasions.

It was admitted that the testator died of Bright's disease of the kidneys. The appellant had called experts in insanity, who had testified that in their opinion a person dying of this disease, whose kidneys, heart, arteries and other internal organs were diseased in the manner in which the testator's were found to be by the autopsy, must in their judgment have been of unsound mind, as long prior to his death as December 21, the date of the execution of the will; that they were familiar with Bright's disease of the kidneys, and that in a large proportion of cases it impaired the mental faculties; that sometimes this was the case where a common observer would not detect the fact; that a patient suffering from this disease might secretly cherish feelings of hostility to his friends, wholly at variance with those which he entertained when in a normal condition.

In rebuttal, the appellees called a physician admitted to be an expert in the treatment of insane patients and in mental diseases, and asked this witness if he knew the effect of Bright's disease of the kidneys upon the mind. He answered that he did not. He was then asked by appellees if Bright's disease necessarily produced insanity, to which he answered that he did not know enough about Bright's disease to say whether or not it necessarily produced insanity. He was then asked by the appellees this question: "Suppose a person dying on the 9th day of January, of Bright's disease of the kidneys, who had been ill since the last of the November next previous, and had during that period been visited daily by his family physician, who, till within two or three days of the patient's death, discovered no indication of mental unsoundness, had had several protracted conversations with his legal adviser concerning the disposition of a large estate, and had

dictated the terms of a will wherein he made bequests to numerous members of his family, designated his trustees and executors, provided for the settlement of his partnership affairs, had several conversations with his partner in relation to the partnership business, conversed with several of his friends in regard to business matters, gave his pocket-book with its valuable contents to his executor, and told him to take charge of it, and throughout all, till within two or three days of his death, evinced no lack of comprehension or intelligence, what would be your inference of the patient's mental condition at the time of these several transactions?" The question was objected to by the appellant, but was permitted to be put by the judge, and the witness answered that he should consider him of sound mind.

The appellees called in rebuttal the person who wrote the will and codicil and who had been called as one of the subscribing witnesses to them, and had testified fully as to the circumstances under which they were written and executed, and that in his opinion the testator was of sound mind when both were executed; also that he had been the legal adviser of the testator for many years, and had been consulted fully by him on many important matters. The counsel for the appellant objected to the witness giving any testimony in rebuttal bearing upon the question of the testator's sanity, apart from the question of undue influence, but he was permitted without restriction to give in detail an account of interviews with the testator on December 16, 21 and 31, 1872; and he was also allowed, under objection, to state that in none of these interviews did he perceive anything in the testator indicating want of comprehension, lack of intelligence or understanding. The witness was also asked whether he had said to the appellant, as the latter had testified, "Do you think your father was sane when he made his will?" and he answered, "I never did, because" — Objection was made to his giving a reason in that form, but he was allowed to do so, and continued, "because I never thought of such a thing as his not being sane." The witness was also allowed to state under objection, in contradiction of testimony given by the appellant, that he did not tell the latter "your father after he had made his will seemed to lose all comprehension of what he had been doing, and said, 'Where has Henry been all this time; what have I done for Henry?'" because it was not true.

The appellees offered evidence tending to show that the testator, at, about and just before the time of the execution of the codicil, made frequent efforts with Dixon, a member of the firm of Semonin, Dixon & Company, to prevail upon him to admit Henry Hunt into the employment of that firm, with the understanding that he should remain in Massachusetts, and take care of his mother, but to do what he could to aid the firm in their purchases here. It did not appear that anything definite was assented to by Dixon on this subject, or that he went any further than to say that perhaps they could give Henry a compensation of \$600 a year, "work or play," to be increased if his services should prove more valuable. This answer was reported to the testator, who then said "Well, we will leave it as it is." There was no evidence, other than the will itself, of the existence of any verbal understanding on that subject. This attempt at negotiation was carried on through a third person, at the time of the execution of the codicil. There was also evidence to show that Dixon was frequently at the house of the testator, and had several interviews with him just previous to the making of the will.

The appellant testified that some months after the testator's death he had a conversation with Semonin in the presence of Dixon, in which Semonin expressly denied that the appellant was entitled to any interest in their business, and upon being told by the appellant that the will gave him an interest in the business, said, "I don't know anything about your will."

Neither Semonin nor Dixon had ever in any way recognized any right of the appellant to an interest in their business or to any share of the profits of the same, though at the trial more than sixteen months had elapsed since the death of the testator.

The appellant requested the judge to instruct the jury that if the will was made upon an understanding with Semonin and Dixon, or either of them, and to which they or either of them were parties, that a "share of the net profits" of their business should be paid to Henry Hunt; and if Semonin and Dixon denied any interest of the son under the will, the jury would be authorized to find that the will was made under undue influence.

The judge declined so to instruct the jury, there being nothing in the oral evidence which required this instruction. The evidence tended to show that the business of the firm of Semonin,

Dixon & Company could not be wound up without serious loss in less than three or four years; and that the Western partners were solvent, and were men of considerable property over and above all their debts.

To all of which rulings, and to the refusal of the judge to rule and instruct the jury as requested, the appellant alleged exceptions.

E. Avery & E. P. Brown, for the appellant.

G. Marston & J. M. Keith, for the executors.

WELLS, J. To show that the will was unreasonable in its provisions for the appellant, who was the son and sole heir of the testator, as one ground for inferring unsoundness of mind, the appellant testified that he had been partner with his father in the firm of Varney & Harvey, and that his share, upon closing up that firm, amounting to \$33,000 or \$34,000, had been transferred by him to his father for the purpose of facilitating the settlement of the partnership affairs, with the understanding and assurance that all his father's estate would become his upon his father's decease. He also testified that the fact and amount of his interest had been established in a suit in equity, by the report of a master, to whom the case had been referred by the court; and that the final settlement of the partnership affairs had been made in accordance with that report. The appellant then offered in evidence "a duly certified copy of the record of that case, with the report of the master in chancery." The exclusion of this record forms the ground of the first exception.

The reasons for its admission, now urged upon the court, are
1st. "Because it contained the answer of the testator, which did set forth that the appellant was a partner in said firm, and was entitled to a portion of the profits." But the relations of the testator and the appellant, as co-defendants in the suit, were not such as to make the answer competent evidence in favor of one against the other, as matter of pleading merely. As an admission in writing, the original and not the copy of record was the proper means of proof. Beyond that, the offer of the record was general, as of a record of adjudication; and did not indicate the special ground upon which it is now claimed to be competent.
2d. "Because it showed a conclusive determination of the rights of the testator and the appellant under the copartnership, and

the interest of each in the assets of the copartnership." 3d. "Because it was a final adjudication, conclusive upon both the testator and the appellant, and was the best evidence known to the law."

The record is not made a part of the bill of exceptions, nor referred to. We can know its character only by the statements in regard to it in the exceptions themselves. From these we think it is to be inferred that the suit in equity did not proceed to final judgment, but was settled by the parties upon the basis of the report of the master without further adjudication thereon. If so, the record would not be competent to establish the amount of the appellant's interest. The master's report is not evidence as an adjudication between the parties until it has been accepted, and judgment rendered upon it.

It might have been competent for the court to have admitted the master's report in connection with the testimony of the appellant that the settlement was made in accordance with it, as aiding in showing more definitely the amount actually received by the testator on account of the appellant's share; but whether the circumstances were such as to make it properly admissible for that purpose, is a matter to be determined very much in the discretion of the judge at the trial. It not being competent as independent evidence, we cannot see upon the exceptions that there was any error in excluding it for the purpose suggested.

It might perhaps be reasonably inferred that the interlocutory decree, by which the case was referred to a master to state the account, did adjudge the appellant to be a partner; though such is not the necessary inference.

To this, as well as to the whole offer of the record, it is answered by the executor that neither the fact that the appellant was a partner, nor the amount of his interest, nominally, was at all in controversy. And, upon examining the entire bill of exceptions, it appears to us that this position is sustained. Not only did the appellant put in evidence an instrument transferring to the testator his interest as a partner in the firm, but another instrument of like import of a later date was put in evidence on the part of the executors. The controversy appears to have been entirely in regard to the time and purpose of the transfer, and not at all as to the existence of the partnership relation.

Upon the whole we are satisfied, from these various considerations, that the appellant has shown no sufficient and reasonable ground of exception to the ruling by which the offer of the copy of record, as made by him, was excluded.

The appellant also alleges exceptions to the introduction by the executors of the second instrument of transfer, above referred to, and to the inquiries put to Mr. Hutchins, who prepared the instrument, in regard to it. As to the instrument, we think it was clearly admissible. The appellant had introduced one of similar import of an earlier date, and testified in regard to the circumstances and purpose of its preparation, and the inducements under which he executed it; connecting Mr. Hutchins therewith. The testimony of Mr. Hutchins tended to show that whatever transfer had been made was effected by the second and later instrument. If it was of any consequence whether it was effected by one rather than the other, the executors were entitled to show that it was by the later one, and to introduce the instrument by which such a transfer appeared to have been made at the later date.

It was competent for the witness, who testified that he arranged the whole matter for the two parties and prepared and procured the execution of the instrument, to testify further that at the time of its execution no such consideration or understanding, as the appellant had sworn to, was mentioned in regard to it. It was a question for the jury to determine whether this or the paper of earlier date was the real instrument of transfer, and to apply the evidence accordingly.

The inquiry of this witness, in regard to the circumstances attending the execution of the paper dated February 19, 1870, and why it was executed, was properly allowed to be put. It was an open question whether the second assignment was not the real instrument by which the transfer was effected, of which the appellant testified. If it was, the answer might contradict or explain that testimony. It might also have a tendency to connect the transactions of which the appellant had testified with those testified to by Hutchins, and with the second assignment. If Mr. Hutchins made the whole arrangement between and for the parties, as he testified, he might fairly be supposed to be able properly to answer the question "why it was executed." It was

in reply to the account which the appellant had given of what might be found to be the same transaction.

The objection and the exception are limited to the inquiry. The statements, which the witness proceeded to make in answering the inquiry, are objectionable in form, and some of them in substance. They might have justified the court in interfering, of its own motion. But it does not appear that the party made any objection to the mode of answering, and no request was made to the court to strike out any part of the answers, either as not responsive, or as improper in form or substance. It is not for us now to consider objections that might have been made at the trial, but were not made.

The last remark applies also to the objection, now made, that the relation of Mr. Hutchins to the parties was that of attorney and client; and that his testimony was a breach of the privileges of that relation. That the objections to his testimony could not have been based upon that ground, at the trial, is manifest from the reason assigned by the court for considering his testimony competent in another aspect; to wit, that "the witness was counsel in litigation in which the deceased and the appellant were more or less concerned," and "the paper was drawn up at his office and under his direction." Whether communications, of which a witness is asked to testify, are privileged, depends upon various considerations of fact, to be first investigated by the judge who is called upon to rule; and his finding upon those facts may be such as to make his ruling upon the point conclusive. In this case, the point not having been presented at the trial, there is no proper finding of the facts upon which it can be decided, and, in reality, no ruling upon the point to be revised; and it cannot be considered as involved in the ruling permitting the witness to testify.

Objection is made to the testimony of the witness Beal, who had conversations with the testator, and who was allowed to state that at the last interview before the date of the will, he "observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition." We do not understand this to be the giving of an opinion as to the condition of the mind itself, but only of its manifestations in conversation with the witness. So far as his mental condition was

manifested to the witness by that interview, in conversation, looks or demeanor, he could properly state, as a matter of observation, whether it was in the usual and natural manner of the testator or otherwise. "Incoherence of thought" has reference to the ideas expressed or conveyed to the hearer, rather than to the condition of the mind of the speaker. There is no essential difference between these answers and those allowed in *Barker v. Comins*, 110 Mass. 477. The other objections to the testimony of Beal touch its effect and not its competency.

The witness called by the executors as an expert to prove the soundness of the mind of the testator at the date of the will, admitted that he had no knowledge of the effect of Bright's disease of the kidneys upon the mind. He was admitted to be an expert in mental diseases. From the numerous hypothetical facts included in the question put to him he might be able to pronounce with certainty that the person of whom those facts were true must have been sane, whatever influence might be attributed or expected ordinarily to follow from the disease of which the testator died within less than a month from the date of the will. The effect of his answer was not an opinion as to the influence of Bright's disease upon the mental condition, but merely that the other facts assumed in the question, if true, would show conclusively that the testator was sane at the time of which they were predicated. If there was thought to be danger of any misapprehension as to the bearing of his testimony upon the effect of Bright's disease, from including that among the facts assumed in the question, a little cross-examination would have corrected the difficulty. The testimony was not rendered incompetent because the inquiry included one fact from which the witness professed to be able to draw no inference.

An objection is also urged because, after the appellant had introduced his evidence, the executors were allowed not merely to meet that evidence, but also to introduce further affirmative testimony in support of the will; and especially because one who had been previously called as a subscribing witness and had testified not only as to the execution of the will, and the sanity of the testator at that time, but also as to the facts connected with the preparation of the will and interviews with the testator in relation thereto, and "that he had been the legal adviser of the testator

for many years, and had been consulted fully by him on many important matters," was allowed to be recalled and examined anew without restriction, upon the points in controversy.

It is perhaps a sufficient answer to this objection, that the order in which the testimony shall be introduced is, in the main, subject to the discretion of the presiding judge, and not a matter of exception. But further, the order followed at the trial of this case is that which is generally found most convenient for the trial of issues of this nature, and is in accordance with well established practice. On the issue of sanity, the burden rests upon those who offer the will for probate. It is to establish the sanity of the testator at the very time when the will was executed. Ordinarily the direct evidence of the subscribing witnesses is sufficient for this purpose in chief, making a *prima facie* case. It would doubtless be competent to strengthen this direct testimony by the inferences to be drawn from proof of sanity before and after the date of the will, within a limited range of time. But, until the evidence of the contestants is produced, it is difficult to determine the proper limits of that range. Simplicity in presentation of the question, as well as practical convenience in conducting the investigation, favors the order of trial adopted in this case.

The subscribing witness, who wrote the will, was allowed to add to his negative answer to certain questions, put to him in regard to what he had said about the mental condition of the testator, his reasons for such denial. In one case, "because I never thought of such a thing as his not being sane;" in the other, "because it was not true." So far as the objection to these answers rests upon the point that they were not responsive, or rather, that they went beyond what was requisite for a sufficient and proper answer to the question, it is a matter within the discretion of the presiding justice at the trial. The nature of the inquiries, being intended to discredit the direct testimony of the witness, was such as might make it reasonable that he should be allowed, not merely to negative the particular fact or expression suggested, but to repel the imputation that he had any knowledge or had ever entertained an opinion contrary to what he had testified to. The first answer went no farther than that, and we do not see that it had any bearing as affirmative evidence which could make

it open to exception in point of substance. The second, so far as it had any bearing as affirmative evidence, was competent in itself.

The refusal of the instruction prayed for, on the ground that there was "nothing in the oral evidence which required" it, was proper. Giving to the language of the will its fullest effect, it does not indicate any agreement or promise that Henry Hunt should have an interest in the copartnership of Semonin and Dixon, or be paid any definite share of the profits; but at most only an expectation that in consideration of the provision by which his capital was allowed to remain in the firm, Semonin and Dixon might be disposed to pay to his son some portion of their profits, in addition to interest; it being left wholly to them to do so or not, as it should to them "seem to be fair and just." There was not only no evidence that this expectation was encouraged by Semonin and Dixon to influence the provisions of his will, but the communications upon the subject between the testator and Dixon, after the date of the will, and before the execution of the codicil, and the explicit conclusion of the testator to "leave it as it is," notwithstanding Dixon's refusal to give any definite promise or distinct assurance upon the subject, show that there was no ground for requiring such an instruction arising from the terms of the will and codicil, and the circumstances of their execution.

Exceptions overruled.

116 264
148 583
116 254
151 563
116 264
152 551

CITY OF TAUNTON vs. ADDISON TAYLOR.

Bristol. October 28. — November 9, 1874. COLT & AMES, JJ., absent.

An ordinance of a city constituted two members of the board of mayor and aldermen and three members of the common council "a board of health of the city;" but neither the ordinance nor the joint rules and orders of the city council contained any provision as to the mode of appointment. The orders of each branch provided that all committees should be appointed by the mayor and president of the common council respectively. A board of health, consisting of two aldermen and three members of the common council, was jointly appointed by the presiding officer of each branch. *Held*, that the board was legally organized.

The provisions of the Gen. Sts. c. 26, §§ 52, 57, giving a board of health the power to forbid the exercise within the limits of a city of any trade which is a nuisance

or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates, and providing that during the pendency of an appeal to a jury the trade shall not be exercised, are constitutional.

The order of the board of health of a city under the Gen. Sts. c. 26, forbidding the exercise of an offensive trade in a city, is a quasi judicial act, and can be revised only in the manner provided in the statute; and it is not competent for the defendant, in a suit in equity brought by the board of health to enjoin him from continuing an offensive trade, to prove that the trade is not a nuisance.

An order of the board of health of a city forbidding the exercise of an offensive trade is to be construed liberally; and although it does not state expressly that the prohibited trade is a nuisance, it is sufficient, if it clearly shows that in the opinion of the board the exercise of such trade will be hurtful to the inhabitants or injurious to the public health, or be attended by noisome and injurious odors.

A board of health of a city passed the following order: "Ordered, that the exercise of the trade or employment of preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and trying of bones, hoofs, heads, refuse and partially decayed animal matter, and, as part of such trade or employment, the storing about the premises, where such business is carried on, of putrid meats, bones, heads, legs and the various other materials from which offensive smells emanate, which are used in such trade or employment, be and the same hereby is forbidden within the limits of the city." *Held*, that the order was a valid exercise of the power conferred upon the board of health by the Gen. Sts. c. 26.

The board of health of a city passed a general order forbidding the exercise of an offensive trade within the limits of the city, and notified the defendant to abate the nuisance caused by his carrying on the forbidden trade. The defendant appealed from this order, and applied for a jury, which jury "decided that the order of the board of health should be altered as follows: That the defendant, having selected a suitable locality within the limits of the city, shall confer with the board of health after having obtained in writing the unanimous consent of the residents within a radius of one half mile of the same." The verdict was accepted by the Superior Court, and no further proceedings were had upon it. *Held*, that whether the verdict was valid or invalid, the order of the board of health remained in force, and that on a bill in equity by the city, the continuance of the trade should be enjoined.

The board of health of a city has authority to bring in the name of the city a bill in equity to restrain the exercise of an offensive trade or employment which it has prohibited, and such bill may properly be signed by the mayor.

If a general replication is filed by a plaintiff to a bill in equity, and the parties afterwards submit the case to the decision of the court upon an agreed statement of facts, and the case is reserved for this court upon the bill, answer and agreed statement of facts, the allegations in the answer are to be taken as true only so far as they are supported by the facts agreed.

If the board of health of a city, in the exercise of the powers conferred upon it by law, has brought a bill in equity to restrain the exercise of an offensive trade, and the defendant has had full notice and opportunity to be heard before a jury and in the Superior Court, and has not lost such opportunity by any mistake as to his rights, and no error is shown in any stage of the proceedings, the temporary injunction granted upon the filing of the bill will be made perpetual.

BILL IN EQUITY in the name of the city of Taunton, and signed by Daniel L. Mitchell as mayor thereof, filed August 20, 1872, and containing the following allegations :

That by an ordinance of said city it is provided that "two members of the board of mayor and aldermen, and three members of the common council, are hereby constituted a board of health of the city of Taunton, with all the powers vested in boards of health by the general laws of the Commonwealth ; " and that two members of the board of aldermen, and three members of the common council, named in the bill, constituted the board of health of Taunton for this year :

That on August 15, 1872, an order was passed by said board of health, and recorded in the records of the city, as follows : " Ordered, that the exercise of the trade or employment of preparing tripe, manufacturing neat's-foot oil, tallow, and glue stock, and the boiling and trying of bones, hoofs, heads, refuse and partially decayed animal matter, and, as a part of such trade or employment, the storing about the premises where such business is carried on of putrid meats, bones, heads, legs and the various other materials from which offensive smells emanate, which are used in such trade or employment, be and the same hereby is forbidden within the limits of the city of Taunton : "

That the defendant was carrying on in Taunton the trade or employment prohibited in said order, and on August 17 was served with a notice in writing, signed by all the members of the board of health, of the passage of the order, and that it would be enforced if not complied with within seven days ; that on August 28 said board of health passed another order, instructing the city marshal to visit the defendant's manufactory and take such means as were necessary to enforce the former order of the board ; and that the defendant declined to comply with the order of the board, and threatened to resist with force every attempt to enforce it.

The bill prayed for a subpoena, and an injunction to the defendant, his servants, workmen and agents, commanding them to desist and refrain from exercising, within the limits of the city of Taunton, the trade or employment set forth in the order of the board of health. Upon the filing of the bill a temporary injunction was granted.

The answer of the defendant contained a demurrer to the bill, because it did not appear thereby that the plaintiff corporation was a party to the suit, or entitled to the relief prayed for, or had any right in equity to proceed against the defendant as set forth in the bill ; and also the following allegations :

“ That the bill is brought without the authority or direction of the city of Taunton, or of the city council thereof, or of any person or persons duly authorized to act for the city of Taunton or the city council thereof, and that Daniel L. Mitchell had no authority to institute these proceedings in equity against this defendant, either as mayor of said city of Taunton, or as the agent of said city of Taunton, or as an individual citizen thereof, and that his signature to the bill is made without authority in law or equity : ”

That the persons named in the bill were never appointed a board of health of the city of Taunton ; and that the only board of health existing in the city of Taunton for the year 1872 was the city council of said city for that year :

That the order set forth in the bill was unreasonable, illegal and void ; and that the board of health of the city of Taunton had no authority to pass or enact it :

That the defendant, believing and relying on the representations of the persons named that they were the legally appointed and constituted board of health of the city, did on September 12, 1872, appeal from said order, and applied to the Superior Court for a jury, which was duly empanelled, and on October 17, after a trial and a view of the premises, returned a verdict by which they “ decided that the order of the board of health should be altered as follows : That Mr. A. Taylor, having selected a suitable locality within the limits of the city of Taunton, shall confer with the board of health after having obtained in writing the unanimous consent of the residents within a radius of one half a mile of the same ; ” and that the proceedings before the jury were null and void by reason of the verdict being unintelligible and plainly erroneous and beyond the authority of the jury, and by reason of the order of prohibition being unauthorized and void as before set forth :

That the trade or employment of preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and

trying of bones, hoofs and heads, were divers and distinct branches of business, and were none of them nuisances or hurtful to the inhabitants of the city of Taunton, or dangerous to the public health, or attended with noisome and injurious odors, or injurious to the estates of the citizens of Taunton, but contrariwise were necessary and useful branches of business ; nor was the preparing of tripe or the manufacture of neat's-foot oil, tallow and glue stock, or the boiling and trying of bones, carried on by this defendant so as to be a nuisance, or hurtful, or dangerous, or injurious as above set forth.

The plaintiff filed a general replication. The parties afterwards agreed to submit the case to the court upon the bill and answer and a statement of facts in substance as follows :

On May 31, 1865, the city council of the city of Taunton passed an ordinance concerning the public health, which has ever since been and now is in force, the first section of which is as set forth in the bill. The city council for the municipal year 1872 adopted joint rules and orders providing that at the commencement of the municipal year, joint standing committees on several specified subjects should be appointed by the respective boards, unless otherwise ordered. One of the rules and orders of the mayor and aldermen is that "all committees shall be appointed by the mayor, unless the board otherwise determine." One of the rules and orders of the common council is that "all committees shall be appointed and announced by the president, unless otherwise provided for, or specially directed by the council." No committee relating to a board of health is mentioned in any of said rules and orders.

It is admitted, if the facts are competent as testimony, that every year since the year 1865 until the year 1872, and including the year 1872, the mayor of the city of Taunton has designated or appointed two persons, members of the board of aldermen of that year, and the president of the common council has designated or appointed three persons, members of the common council of that year, and that those five persons so designated or appointed have each year met together, organized themselves as a board of health of the city of Taunton, and performed duties such as are incidental to a board of health ; and that in this way during the year 1872 the mayor and the president of the common council respectively

designated or appointed the persons named in the bill, and that they met and organized as a board of health, and discharged the duties of the board of health of the city of Taunton for the year 1872. The plaintiff contends that they were legally appointed a board of health for the city of Taunton. The defendant denies that they were so legally appointed.

The verdict set out in the answer has been accepted by the Superior Court, and no further action has been taken by that court thereon.

It is further agreed that the rights of the parties, if they have any, to submit an issue of fact to a jury as to whether the business, as carried on by the defendant, was an offensive business within the meaning of the statute, are hereby waived, and that the parties expressly reserve all objections to the form of proceedings.

The case was reserved by *Morton, J.*, upon the bill, answer and agreed statement of facts for the consideration of the full court.

G. E. Williams, for the plaintiff.

C. A. Reed, for the defendant.

GRAY, C. J. This is a bill in equity to restrain the exercise by the defendant of an offensive trade in violation of an order of the board of health of the city of Taunton. Various objections are made to the granting of the relief prayed for, but we are of opinion that none of them can be sustained.

1. By the Gen. Sts. c. 26, § 2, no different provision being made by law, the city council might appoint a joint committee of their body a board of health. By an ordinance of the city of Taunton, two members of the board of mayor and aldermen and three members of the common council were constituted such a board. No provision as to the mode of appointment was made by the ordinances of the city, or by the joint rules and orders of the city council. But the orders of each branch provided that all committees should be appointed by the mayor and the president of the common council respectively. It follows that the members of the joint committee, constituted by the ordinance a board of health, were duly appointed by the presiding officers of each branch, and that the board so constituted and appointed was legally organized.

2. By the same statute, the board of health may forbid the exercise, within the limits of the city, or in any particular locality thereof, of "any trade or employment which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates." §§ 52, 60. Any such order of prohibition is to be served upon the occupant or person having charge of the premises where such trade or employment is exercised, and if he refuses or neglects for twenty-four hours to obey it, "the board shall take all necessary measures to prevent such exercise." § 55. Any person aggrieved by such order may appeal therefrom, and, upon application to the Superior Court, or a justice thereof in vacation, within three days from the service thereof, may obtain a warrant for a jury, to be empanelled as in the case of the laying out of highways. § 56. The order is to be obeyed pending the appeal. § 57. "The verdict of the jury, which may either alter the order, or affirm or annul it in full, shall be returned to the court for acceptance, as in case of highways; and said verdict, when accepted, shall have the authority and effect of an original order from which no appeal had been taken." § 58.

The authority of the legislature to confer powers of this character, for the protection of the public health and the suppression of nuisances, upon municipal boards or officers, is well settled. Such powers must be summarily exercised, in order to accomplish their object. To allow the offensive trade to be carried on until it had been decided by a jury to be a nuisance, and the questions of law arising upon such a trial had been determined by the court, would defeat the purpose of the statute. It is a case in which private rights must be held subordinate to the public welfare, and falls within the strictest interpretation of the maxim, *Salus populi suprema lex*. The rights of any person to be affected by the order of prohibition are reasonably secured by requiring the order to be served upon him or the person in charge of his business, and by allowing him an appeal to a jury, to be empanelled immediately, without waiting for a regular term of court, and by whose verdict the order may be altered, annulled or affirmed. *Belcher v. Farrar*, 8 Allen, 325.

The determination of the board of health is not a merely ministerial act ; but is *quasi* judicial, in the sense that it is not to be contested or revised, except in the manner provided in the statute. The allegation in the defendant's answer, that the trade which he carried on was not a nuisance, therefore stated no defence which could have availed him at any stage of this cause.

The case of *Salem v. Eastern Railroad*, 98 Mass. 431, differed from this in being a suit to recover the expenses of removing a nuisance in accordance with a special order under the Gen. Sts. c. 26, §§ 8-10, respecting which the defendant had had no opportunity to be heard, either before the board of health or on appeal ; and the decision allowing the defendant to contest the facts found by the order was based upon that distinction.

3. But an order of the board of health, under the Gen. Sts. c. 26, § 52, is not in the nature of an adjudication of a particular case, but of a general regulation of the trade or employment mentioned therein. It is not to be construed with technical strictness, but with the same liberality as all votes and proceedings of municipal bodies or officers who are not presumed to be versed in the forms of law ; and every reasonable presumption is to be made in its favor. *Commonwealth v. Patch*, 97 Mass. 221. It need not state in direct terms that the trade which it prohibits is a nuisance. It is sufficient if the order clearly shows that in the opinion of the board of health the exercise of such trade will be hurtful to the inhabitants, or injurious to the public health, or be attended by noisome and injurious odors.

The trade or employment described in the order of prohibition now before us is a single trade or employment, which includes not only "preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and trying of bones, hoofs, heads, refuse and partially decayed animal matter," but also, "as a part of such trade or employment, the storing about the premises where such business is carried on of putrid meats, bones, heads, legs and the various other materials from which offensive smells emanate, which are used in such trade or employment." The very terms of this description sufficiently manifest and declare the opinion of the board of health that the trade or employment in question is, to say the least, attended by noisome and injurious odors. The order was therefore a valid exercise of the power conferred upon the board of health by the statute.

4. The verdict of the jury in this case did not annul the order of the board of health, or affect it otherwise than by permitting the defendant, after selecting a suitable locality, and obtaining the consent in writing of all those residing within half a mile thereof, to confer with the board of health. It is not pretended that he has obtained such consent of those residing in the neighborhood of his works; and if he had, the verdict merely permitted him to apply anew to the board of health. If the defendant was dissatisfied with the verdict, his remedy was by application to the Superior Court to set it aside, and, if aggrieved by any ruling of that court in matter of law, by bringing the question before this court on exceptions or appeal. *Taylor v. Taunton*, 113 Mass. . *Tucker v. Massachusetts Central Railroad*, ante, 124. If the verdict, as the defendant suggests, should be held so indefinite as to be a nullity, his position would not be strengthened. Whether the verdict is good or bad, the order of the board of health stands.

5. The board of health, in exercising this and like powers under the statute, acts in behalf of all the inhabitants of the city. It is expressly charged by the Gen. Sts. c. 26, § 55, to take all necessary measures to prevent the exercise of any trade in violation of its order; and for that purpose it may, without special authority, bring a suit in the name of the city. *Winthrop v. Farrar*, 11 Allen, 398. *Salem v. Eastern Railroad*, 98 Mass. 431. *Watertown v. Mayo*, 109 Mass. 315. In such a suit, as in any other lawfully brought in the name of the city, the bill may properly be signed by the mayor. *Central Bridge v. Lowell*, 15 Gray, 106, 122. *Nichols v. Boston*, 98 Mass. 39.

6. It is only when the plaintiff takes the same position as if he had demurred in an action at law, and sets down the cause for hearing upon the bill and answer, and thereby precludes the defendant from proving his allegations, that the statements in the answer are to be taken to be true. *Perkins v. Nichols*, 11 Allen, 542. But in the present case the plaintiff filed a general replication, and the parties afterwards submitted the case to the decision of the court upon an agreed statement of facts. The allegations in the answer are not therefore to be taken as true further than they are supported by the facts agreed.

7. The defendant having had full notice and opportunity to be heard before the jury and in the Superior Court, and not having lost such opportunity by any mistake as to his rights, and no error being shown in any stage of the proceedings, the injunction granted upon the filing of the bill should be made perpetual. *Winthrop v. Farrar*, 11 Allen, 898.

Decree for the plaintiff.

SARAH E. BURT vs. JAMES D. AYERS.

Essex. November 4. — 5, 1874. AMES & DEVENS, JJ., absent.

A supplementary complaint under the bastardy act, in the name of the complainant, may be signed by her attorney.

A supplementary complaint under the bastardy act set forth all the former proceedings in which the complainant alleged that the defendant begot her with child at S., on or about a time mentioned, in the kitchen of a certain dwelling-house. It further alleged that on a certain day she was delivered of a child born alive and a bastard, and that she accuses the defendant of being the father of the child, and that he did beget her with child in said S., "as was alleged in the aforesaid complaint, and is hereinbefore recited." Held, that the allegations of the supplementary complaint were sufficient.

COMPLAINT under the bastardy act, Gen. Sts. c. 72. Trial in the Superior Court, before *Dewey, J.*, on the supplementary complaint, which was as follows :

"Sarah E. Burt, singlewoman, alleges that heretofore, to wit, on the 22d day of July, A. D. 1873, before the justice of the police court, within and for the city of Salem, in said county of Essex, she made complaint that she was pregnant with a child, and that said child if born alive might be a bastard, and accused James D. Ayers, of said Salem, of being the father of said child, and alleged that he did beget her with child in said Salem, on or about the 15th day of January, A. D. 1873, at the dwelling-house of one J. Augustus Shatswell, in Lafayette Street in said Salem, in the kitchen of said dwelling-house.

"Upon which complaint a warrant issued and said defendant was arrested thereupon and brought before said police court, and after due hearing of said matter, he was adjudged guilty, and ordered to recognize to appear at the September term of the

Superior Court, in said county, held at Newburyport, to answer to said complaint, at which time and place the record of said complaint and of the proceedings and judgment of said police court thereon was duly entered in said Superior Court.

"And now said Sarah E. Burt further complains that on the thirtieth day of September, in the year eighteen hundred and seventy-three, she, the said Sarah E. Burt, was delivered of a male child, which said child was born alive, is now alive, and was born a bastard, and accuses said James D. Ayers of being the father of said child, and that he did beget her with said child in said Salem, as was alleged in the aforesaid complaint, and is hereinbefore recited.

"That as well before as after the delivery of said child, and during the time of her travail, she, the said Sarah E. Burt, accused the said James D. Ayers of being the father of said child, and that she has always been constant in said accusation.

"Wherefore she prays that said James D. Ayers may be adjudged by the court to be the father of said child, and that he stand charged with the maintenance thereof, with the assistance of said complainant, and be further dealt with according to the statutes for such cases made and provided.

"By her attorney, Thomas M. Stimpson."

Before any evidence was offered, the respondent asked the judge to rule that the supplementary complaint was not duly or legally signed by any one authorized to sign it; but the judge ruled that the supplementary complaint was properly signed.

The respondent then requested the judge to rule that the allegations in the supplementary complaint were not sufficient, in that it did not state all the facts necessary to charge the defendant as the father of the bastard child, and that it did not state all the facts necessary to sustain the proceedings under the statute; but the judge declined so to rule.

The jury returned a verdict of guilty, and the respondent alleged exceptions.

C. Sewall, for the respondent, cited *Jones v. Thompson*, 8 Allen, 334; *Smith v. Hayden*, 6 Cush. 111.

T. M. Stimpson, for the complainant, was not called upon.

BY THE COURT. The supplementary complaint in a bastardy process is not the foundation of the proceedings, but only an alle-

gation of the material facts with a view to a convenient and orderly trial. *Chapel v. White*, 3 Cush. 537. *Reed v. Haskins*, ante, 198. The objections to its form in this case are groundless. It is in the name of the complainant and signed by her attorney; and it alleges that the respondent is the father of her child, and begot her with child at a time and place which it states, and sets forth all the other facts necessary to charge him.

Exceptions overruled.

JOHN HERLIHY vs. JOSEPH SMITH & another.

Essex. November 5, 1874. AMES & DEVENS, JJ., absent.

The owner of a horse and carriage is not liable for an injury caused by the negligent driving of a borrower, to a third person, if they were not being used at the time in the owner's business.

TORT against Joseph Smith and Daniel C. Manning, who were alleged to be partners, for a personal injury sustained by the plaintiff in consequence of the negligent driving of the defendants' horse and vehicle, while in the possession of George H. Phillips, a minor. Trial in the Superior Court, before Lord, J., who allowed a bill of exceptions in substance as follows:

At the trial, the plaintiff testified that after he was run over he saw the defendants at their office, and told Manning what their driver and team had done to him, and showed his bodily bruises. Manning asked his partner, Smith, if he let that boy have the team; Smith said he did, and sent him, Phillips, on an errand to Dean Street. The plaintiff also fully described the work he was doing, paving the horse-car railroad, and standing within the track, with room on either side sufficient for one or two vehicles to pass safely, and the manner in which he was struck in the back, knocked down and run over.

The defendants also testified, Manning saying that his partner said, in the plaintiff's presence, that he lent the team to Phillips; and Smith testifying that he lent it to Phillips, for a short time, to do an errand for his mother.

On this evidence, the plaintiff contended that the defendants, as owners, were liable for any injury done by their horse and vehicle, while in the possession of Phillips; that their liability

resulted from the act of intrusting the horse and vehicle to a boy eighteen or nineteen years old, though he might not be a hired servant or agent; that by the voluntary selection by one partner of a reckless or careless driver, both defendants became liable; that such improvident selection of a driver was legal negligence on the part of the defendants, as livery stable keepers, rendering them, as owners, legally liable for such injudicious choice; that the fact, if proved, that Phillips was temporarily a mere bailee, would be no valid defence, since, during the ride, no special property vested in the driver, and the owners were not divested, even temporarily, of their general property; that there being no disclosure, before the injury, of the agreement and relation specially existing between the driver and the defendants, to the public or the plaintiff, the defendants could not now avail themselves of the defence of a bailment, as pleaded, against third persons or strangers; also that the defendants, by retaking the horse and vehicle on their return, adopted and ratified the driver's acts while in possession.

The presiding judge declined so to rule, but ruled that if the defendants merely allowed the said Phillips, for the performance of his own business, in which they had no interest, to use the horse and carriage temporarily, whether for hire or gratuitously, they would not thereby become responsible for injury done to another by negligence in the use of such horse and vehicle.

A verdict was thereupon taken for the defendants, and the plaintiff alleged exceptions to the foregoing ruling and refusal to rule.

D. Roberts, for the plaintiff. The owner of a horse and vehicle is primarily liable to the party injured by negligence in driving, whether the person selected to drive be a borrower or hirer. Story Agency, §§ 453, 453 *a*. *A fortiori*, is this true, if the owner be a keeper of a livery stable in a populous or commercial place. Such owner, licensed or not, is bound to observe good faith to the public, and not intrust his movable property to drivers wanting in care, skill, capacity or experience. If a hirer were formerly liable, the law has been settled otherwise by a long series of decided cases. *Laugher v. Pointer*, 5 B. & C. 547, and cases cited. The rulings of the presiding judge at the trial are not sustained by authority. *Sammell v. Wright*, 5 Esp. 263. *Dean v. Branthwaite*, 5 Esp. 85. *Goodman v. Kennell*, 3 C. &

P. 167. *Whatman v. Pearson*, L. R. 3 C. P. 422. *Booth v. Mister*, 7 C. & P. 66. *Joel v. Morison*, 6 C. & P. 501. *Heath v. Wilson*, 2 Mbody & Rob. 181.

W. D. Northend & C. A. Benjamin, for the defendants, were not called upon.

BY THE COURT. The ruling at the trial was correct. The case is too plain for discussion. *Exceptions overruled.*



THADDEUS BULLEN vs. NICHOLAS B. DRESSER & another.

Essex. November 4. — 6, 1874. AMES & DEVENS, JJ., absent.

In an action on a recognizance conditioned that A. should deliver himself up for examination within thirty days, judgment was entered in the court below for the defendants on agreed facts from which it appeared that A. had been arrested on execution and entered into the recognizance, and that before the expiration of the thirty days the plaintiff accepted from A. a due bill for a less sum than the execution, and gave a receipt not under seal, declaring it to be "in discharge of all proceedings under said execution, provided that A. shall pay said due bill at maturity; until said maturity of said due bill, the liability of said A. under said execution is to remain as at present." The due bill was not paid. *Held*, on appeal, that although the receipt could not operate as a present discharge of the execution, or release of the judgment or the debt, or as an accord and satisfaction, yet that the facts agreed would warrant the inference of fact that the plaintiff intended to release A. from the arrest on the execution, or that it was intended to lead A. to suppose that he was so released, and that he omitted to deliver himself up in reliance upon the supposed discharge. *Held, also*, that upon an appeal it would be presumed in favor of the judgment that such inferences were drawn, and that neither the defendant nor a surety on the recognizance was liable.

CONTRACT on a recognizance entered into by Nicholas B. Dresser as principal, and Robert P. Sargent as surety.

The case was submitted to the Superior Court, and, after judgment for the defendants, to this court on appeal, on an agreed statement of facts, the nature of which appears in the opinion. It also appeared that the due bill given by Dresser to the plaintiff was not paid, and that this action was brought after it became due.

E. C. Dubois, for the plaintiff.

J. P. Jones, for the defendants.

WELLS, J. The plaintiff, having obtained judgment against Dresser, caused him to be arrested upon the execution issued

thereon. Dresser entered into a recognizance, with the other defendant as surety, with condition to deliver himself up for examination within thirty days thereafter. A short time before the expiration of the thirty days the plaintiff accepted from Dresser an agreement for payment of a sum, slightly less than the amount due on the execution, in six months after date; and gave a receipt declaring it to be "in full discharge of all proceedings under said execution, provided the said Dresser shall pay said due bill at maturity; until said maturity of said due bill the liability of the said Dresser under said execution is to remain as at present."

The plaintiff rightly contends that this receipt, not being under seal, nor supported by any legal consideration, could not operate as a present discharge of the execution, or release of the judgment or of the debt. The new promise and receipt together do not constitute a good accord and satisfaction. But an agreed statement is always construed as a submission of the case stated to decision upon its real merits, rather than upon the pleadings, unless it is provided otherwise by the terms of the submission.

In this case the agreed facts would warrant either of two inferences, which are inferences of fact. First, that the plaintiff intended by the arrangement with Dresser to release him from arrest on the execution. Second, that it was intended to lead Dresser to suppose that he was so released, and that there would be no further occasion for him to deliver himself up for examination; and that he did omit to deliver himself up, in reliance upon the supposed "discharge of all proceedings under said execution." It is difficult to understand the object of the arrangement unless there was a purpose to effect one or the other of these results.

In support of the judgment appealed from, which is conclusive upon all facts and inferences of fact, we must presume that such inference was made by the court below. In either aspect such a release would operate not only to discharge Dresser from arrest, but also, as a consequence thereof, to discharge his surety from the recognizance. No consideration would be necessary to give it such operation. It is merely an exercise of that control over the process to enforce payment of the debt, which the plaintiff or his attorney may exercise at any time when he sees fit. The judgment of the court below for the defendant is therefore

Affirmed.

SAMUEL W. HARVEY vs. EASTERN RAILROAD COMPANY.

Essex. November 5.—6, 1874. AMES & DEVENS, JJ., absent.

A passenger, who attempts to get on a railroad train while in motion, is so wanting in ordinary care that he cannot, in the absence of evidence of any circumstances to excuse his act, maintain an action for an injury thereby received.

TORT to recover damages for a personal injury received by the plaintiff at the central depot in Lynn, on April 11, 1873.

At the trial in the Superior Court, before *Dewey, J.*, the plaintiff introduced evidence tending to show that at the time of the injury he came to the depot to take the train for Boston, and as he stepped from the platform of the depot upon a step of one of the cars, and while the train was standing still, holding in his left hand a small carpet-bag, and taking hold of the iron railing of the platform of the car with his right hand, and using due care, the train started with a sudden jerk, threw his head and body back and out from the car, his feet still remaining upon the step and his right hand holding the railing, and his head was carried against a box which surrounded a water tank used for the supply of the engines of the defendant, which stood within 18 inches of the edge of the platform and track of the road, and that he was thereby injured.

The defendant introduced testimony tending to prove that the plaintiff, at the time of the alleged injury, attempted to get upon the train after it had started from the depot, and while it was in motion.

The plaintiff requested the judge to instruct the jury, that if they found that the plaintiff at the time of the injury was in the exercise of due care and was injured by the negligent acts of the defendant, the plaintiff might recover for the injury. The judge gave this instruction, and also instructed the jury, as a matter of law, that if the plaintiff attempted to get upon the train after it had started and while in motion, he was not in the exercise of due care in so doing, and if he received an injury from such an attempt, he could not recover.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

A. F. L. Norris, for the plaintiff.

S. B. Ives, Jr., for the defendant.

GRAY, C. J. The jury, if they were governed by the instruction of the court, have found that the plaintiff attempted to get upon the train after it had started and while it was in motion. Such an attempt, in the absence of evidence of any circumstances tending to excuse it, conclusively showed, as matter of law, that the plaintiff was not in the exercise of due care.

Exceptions overruled.

JOHN RADDIN *vs.* HENRY ARNOLD.

Essex. November 5. — 9, 1874. AMES & DEVENS, JJ., absent.

An engine placed by a tenant on solid masonry, to which it is affixed by iron bolts, and connected with a mill by pipes, belts, shafting and gearing, as well as a boiler connected with the engine, and set upon solid masonry but not affixed thereto except by its weight, and which cannot be removed without tearing down brick work surrounding it, and also part of the building, are not mere chattels for which trover will lie by one deriving his title, after condition broken, from the person who sold them to the tenant by a conditional sale, in the absence of evidence that the tenant placed them upon the premises without the consent of the vendor.

TORT for the conversion of a stationary steam-engine and boiler.

At the trial in the Superior Court, before *Bacon, J.*, there was evidence tending to prove that Morse & Whyte sold the engine and boiler by a conditional sale to Wilson & Co., who had a lease of certain premises of one Blaney. They assigned their lease to the defendant. The plaintiff bought the engine and boiler of Morse & Whyte, after a breach of condition of the sale to Wilson & Co. At the time of the sale to the plaintiff, the engine and boiler were attached to the premises of Blaney in the following manner:

They were placed upon said premises by Wilson & Co., while tenants under said lease, and were upon stone foundations in a small frame building which was built over them after they were placed there. This building was adjacent to and connected by shafting and steam-pipes with a manufactory of woollen fabrics near by. The engine was affixed by large iron bolts running through the base of said engine into solid masonry beneath and

secured by melted brimstone. The engine was attached to the boiler by the ordinary connections of this kind of machinery, and was attached to the mill and the machinery in it by the ordinary pipes, bolts, shafting and gearing. The boiler was a large iron boiler, tubular in form, was set upon brick masonry which was solid except the fire holes in the same, and was surrounded most of the way upwards by solid brick masonry, but was not affixed thereto except by its own weight. It could not be removed without tearing down the brick work and removing some portion of the permanent part of the building; and the body of the engine could not have been removed from said building without tearing away some part of the same.

There was also evidence tending to prove that after the defendant took the assignment of said lease, and after the plaintiff became purchaser from Morse & Whyte, the plaintiff made a demand upon the defendant for said engine and boiler with which the defendant refused to comply.

The plaintiff asked the judge to rule, that if the engine stood upon stone foundations, to which it was attached only by its weight and bolts, and could be removed without disturbing the foundations by simply removing the nuts from the bolts, it was personal property. The judge instructed the jury upon this point, that if the engine and boiler were located and attached as hereinbefore described, then this action would not lie upon a refusal to deliver them on demand.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

S. C. Bancroft, for the plaintiff.

E. T. Burley, for the defendant, was not called upon.

GRAY, C. J. It does not appear by the bill of exceptions, and was not suggested at the argument, that there was any evidence that the engine and boiler were set upon the premises without the consent of the vendor. The only exception relied on is to the refusal of the instruction requested, and to the instruction given; and cannot be sustained. Whatever might have been the right of removal, the engine and boiler, so long as they were affixed to the realty in the manner stated in the bill of exceptions, were not mere chattels and therefore this action in

the nature of trover will not lie for them. *Richardson v. Copeland*, 6 Gray, 586. *Clary v. Owen*, 15 Gray, 522. *Guthrie v. Jones*, 108 Mass. 191. *Exceptions overruled.*

JOHN C. LOW vs. DAVID H. BLANCHARD.

Essex. November 6. — 9, 1874. AMES & DEVENS, JJ., absent.

The reenactment, without substantial alteration, of a statute already construed by this court, must receive the same construction as that statute.

Under the Gen. Sta. c. 85, § 2, a person who has lost money at gaming can recover from the owner, tenant or occupant of the house wherein it was lost, only such sums as are sued for within three months after their loss.

CONTRACT on the Gen. Sta. c. 85, § 2, against the defendant, as owner, tenant and occupant of a house, for the recovery of money lost therein by the plaintiff in gaming. Trial in the Superior Court, before *Lord, J.*, who reported the case, after verdict, for the consideration of this court, in substance as follows:

The plaintiff upon the trial offered in evidence the report of an auditor, which found that the plaintiff had, at various times within a year before the date of the writ, lost at gaming in a certain house various sums of money; and also evidence tending to prove that the defendant was the tenant and occupant of the house named.

The defendant requested the judge to instruct the jury that the plaintiff could in this action recover only the amount or amounts sued for within three months after the loss, but the judge declined so to instruct the jury, and admitted the evidence, but instructed the jury if they found for the plaintiff, to assess damages for the whole amount lost within one year, and also to find the amount lost by the plaintiff within three months before the date of his writ, to wit, the amount lost after January 13, 1872, the date of the writ being April 13, 1872. The jury found for the plaintiff, and assessed damages for the whole amount lost within one year as above in the sum of \$4750.19; and found the sum lost after January 13, 1872, as above, to be \$750.03.

If the court shall be of opinion that the plaintiff can recover for losses made within one year preceding the commencement of the

action, judgment is to be entered for the plaintiff for \$4750.19, with interest from date of the verdict ; but if the court shall be of opinion that the plaintiff can recover only the amount lost within three months before the same was sued for, then judgment is to be entered for the plaintiff in the sum of \$750.08, with interest as aforesaid ; and the case is reported to the Supreme Judicial Court for its determination, for which of said sums judgment shall be entered.

S. B. Ives, Jr., for the plaintiff.

W. D. Northend, for the defendant.

GRAY, C. J. This action could not be maintained at common law, and depends entirely upon the statutes of the Commonwealth. *Babcock v. Thompson*, 3 Pick. 446.

By the earlier statutes of Massachusetts, any person losing money at gaming might recover it back by action commenced within three months ; and if he did not sue within that time, any other person might sue for and recover treble the value thereof, one half to his own use, and one half to the use of the poor of the town in which the offence was committed. Prov. St. 1742 (16 Geo. II.) Anc. Chart. 542. St. 1785, c. 58.

The Revised Statutes of 1836 omitted the express limitation of three months in the clause permitting the loser to sue for the money lost ; but still provided that, if he did not sue within three months, any other person might sue for and recover treble the value, one half to his own use, and the other to the use of the Commonwealth. Rev. Sts. c. 50, § 12.

The alteration in the terms of the statute raised a question of the effect of the omission of the express limitation ; whether, on the one hand, the legislature had thereby repealed the special limitation of an action by the loser ; or whether, on the other hand, such a limitation was still to be implied from the retaining of the provision that, if the loser did not sue within three months for the amount lost, any other person might sue for threefold that amount. The latter construction was adjudged to be the true one in *Plummer v. Gray*, 8 Gray, 243.

The legislature, in the subsequent revision and codification of the General Statutes, reenacted the provisions of the Revised Statutes, with no substantial alteration, except in one particular — which has no tendency to extend the right of the loser — of not

giving to the public a moiety of the treble value, when recovered by a third person. Gen. Sts. c. 85, § 1. And no further change in the statutes has since been made.

The legislature, by thus substantially reënacting, without material alteration, a statute which had been judicially expounded by this court, must be presumed to have intended that the same words should receive the same exposition and have the same meaning in the new statute as in the old one. *Grace v. McElroy*, 1 Allen, 563, 566. *Cronan v. Cotting*, 104 Mass. 245, 249.

As this view of the case is decisive, it is unimportant to consider how far it would be appropriate to say, with Chief Justice Shaw, in 8 Gray, 244, that the statute must be strictly followed; or, with Mr. Justice Dewey, in 1 Allen, 565, 566, that it should be construed liberally; or what interpretation of it we should adopt, if it were a new question.

The present action is not indeed brought against the winner, but against the owner, tenant and occupant of the house in which the money was lost by gaming. But the St. of 1837, c. 179, (which first made such a person liable, and was passed long before the decision in *Plummer v. Gray*,) as well as the reënactment thereof in the Gen. Sts. c. 85, § 2, expressly provides that he shall be liable to an action "in the same manner and to the same extent as the winner thereof is liable by the provisions of" the Rev. Sts. c. 50, § 12, and the Gen. Sts. c. 85, § 1, respectively.

It follows that the plaintiff is entitled to recover only so much of the money sued for as was lost within three months before the bringing of this action, and that, according to the terms of the report upon which the case has been reserved for our determination, there must be

Judgment for the plaintiff for the smaller sum.

AMOS P. TAPLEY vs. LUCRETIA W. MARTIN.

Essex. November 9. — 11, 1874. AMES, J., absent. ENDICOTT, J., did not sit.

If, after a verdict for the plaintiff, the defendant dies, the court has power to pass upon the exceptions alleged by him, and if justice requires, to enter judgment *aunc pro tunc* as of the term when the verdict was rendered, although no administrator has been appointed in this state.

If, at the time a suit is brought, both parties to it are citizens of this state, one party by becoming a citizen of another state is not entitled to have the suit removed to the United States Circuit Court, under the U. S. St. of 1867, c. 196.

Under the U. S. St. of 1864, c. 106, § 6, a copy of the certificate of organization of an United States National Bank, which is certified by the comptroller of the currency and authenticated by his seal of office, is competent evidence in a state court.

A surety on the bond of the cashier of a bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them.

In an action by a surety on the bond of an officer of a bank to recover an amount paid on the bond without suit, against one who had agreed to save him harmless from all loss which he might suffer as surety, the court instructed the jury that if the plaintiff made the payment without the assent of the defendant, he must show that he was legally liable, but if he procured the assent in good faith he could recover. *Held*, that the defendant had no ground of exception.

CONTRACT on an agreement made by the defendant to indemnify the plaintiff for any loss or damage sustained by him as surety on the bond of James D. Martin, as cashier of the Hide and Leather National Bank; Boston. At the trial, before Wells, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The nature of the case appears in the opinion.

A. A. Ranney, as *amicus curiæ*, in support of the exceptions.

G. O. Shattuck & O. W. Holmes, Jr., for the plaintiff.

MORTON, J. After the exceptions were allowed in this case the defendant died. At the time of her death she was a resident of Baltimore in the State of Maryland. It does not appear that she left any estate in this Commonwealth, and no administration has been taken out here. But the court has power, notwithstanding the death of the defendant, to render judgment on the verdict, as of a preceding day or term, if justice requires it. Gen. Sts. c. 115, § 14; c. 183, § 7. The decision in the case of *Kelley v. Riley*, 106 Mass. 339, and the reasons upon which that de-

cision is based, apply to and govern the case at bar, and we therefore proceed to consider the exceptions alleged by the defendant at the trial.

1. The first exception is to the ruling of the court that the defendant was not entitled to remove the suit to the Circuit Court of the United States. At the time the suit was brought both parties were citizens of this state. The defendant afterwards removed to Maryland. The statute provides that where a suit "may hereafter be brought in any state court, in which there is controversy between a citizen of the state in which the suit is brought and a citizen of another state," such citizen of another state may, at any time before the final hearing or trial of the suit, remove the suit to the Circuit Court of the United States, in the manner pointed out in the statute. U. S. St. of 1867, c. 196. We are of opinion that this statute applies only to cases where, at the time the suit is brought, one of the parties is a citizen of another state than that in which it is brought. Any other construction would enable either party to all suits in the state courts to defeat the jurisdiction of the court, at his own option, by removing into another state. This was not the purpose or intention of the statute, and the fair construction of its language does not lead to such a result. We are therefore of opinion that the ruling excepted to was correct.

2. The copy of the certificate of organization of the Hide and Leather National Bank, certified by the comptroller of the currency, was properly admitted in evidence. The act of Congress provides that copies of such certificates duly certified by the comptroller, and authenticated by his seal of office, shall be evidence "in all courts and places within the United States." U. S. St. 1864, c. 106, § 6. And, independently of this provision, such certificates, when filed, are a part of the public records, and may be proved by duly authenticated copies. *Stetson v. Gulliver*, 2 Cush. 494. *Oakes v. Hill*, 14 Pick. 442.

3. The court ruled "that there was no evidence in the case, as tendered, which showed such knowledge by the officers of the bank, of frauds or defalcations by Martin before the date of his bond as cashier, that the failure to communicate the information to the sureties would discharge them from the obligation of their bonds;" and the defendant excepted.

To understand this question it is necessary to state the facts bearing upon it. James D. Martin, a son of the defendant, was appointed cashier of the Hide and Leather National Bank, in January, 1867. The plaintiff, at the request of the defendant, became one of his sureties, and the defendant gave the bond in suit to indemnify him against any loss by reason of his so becoming surety. Martin had been a book-keeper in the bank before he was appointed cashier, and the defendant introduced evidence tending to show that while he was book-keeper he was guilty of frauds and defalcations similar to those of which he was guilty after he became cashier, and for which the plaintiff, as his surety, was liable. She also introduced evidence tending to show that while Martin was book-keeper, the attention of the directors was called to the fact that there were errors and inaccuracies in his books. But there was no evidence that the officers of the bank had knowledge that Martin, while book-keeper, was guilty of frauds or defalcations.

The defendant contended at the trial that the officers were guilty of gross negligence in not examining the books, and that the sureties were thereby discharged. But the court ruled, that unless the defendant proved actual knowledge by the officers of previous fraud, the sureties would not be discharged; that negligence in failing to examine, however gross, would not discharge the sureties, and, as before stated, that there was no evidence of such knowledge by the officers of the bank.

We are of opinion that these rulings were sufficiently favorable to the defendant.

Upon examining the evidence reported in the bill of exceptions, it is clear that there is no evidence which would justify the jury in finding that the officers of the bank had actual knowledge of Martin's frauds while he was book-keeper. We are not therefore called upon to decide whether, if they had such knowledge and failed to communicate it to the sureties on Martin's bond as cashier, the bond would be thereby avoided as to the sureties. The only question is, whether their negligence in failing to examine the books discharges the obligations of the sureties. We can see no principle upon which it can be held to have this effect. The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obliga-

tions are not affected by the negligence of the other officers or agents of the bank, and such negligence does not discharge his sureties. In *Amherst Bank v. Root*, 2 Met. 522, which was similar to the case at bar, Chief Justice Shaw says: "The idea that the cashier is excused by the act or negligence of the directors arises from considering the board of directors as the corporation, and then applying a very equitable principle, that one ought not to recover of a surety damages caused by himself. We think the principle does not apply." In the case at bar the plaintiff was not induced to sign the bond by any fraud of the directors, and the court correctly ruled that he would not be released from his obligations as surety by their alleged negligence in failing to examine the books and affairs of the bank. *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46. *United States v. Kirkpatrick*, 9 Wheat. 720. *Franklin Bank v. Stevens*, 39 Me. 532. *Farmington v. Stanley*, 60 Me. 472.

4. It appeared that the plaintiff paid the amount of his bond to the bank without a suit; and the court instructed the jury that if he made this payment without the assent of the defendant, he must show that he was legally liable; but if he procured her assent, and made the payment in good faith upon that assent, she could not put the plaintiff to proof that he was legally liable; to which the defendant excepted. This ruling was correct, accompanied, as it was, with the further instruction, that good faith, in the sense intended in the ruling, required that the plaintiff should inform the defendant of all facts known to himself bearing upon his liability. The plaintiff had only a nominal interest in the question of his liability on the bond. The defendant was the real party interested in this question. It was her right and duty to judge whether any defence should be made to the claim of the bank. After she had requested him to pay, or assented to his paying, he could not properly defend against the claim. If he did so, it would be at his own risk and expense, and he could not recover of the defendant any of the expenses of such unauthorized defence; he had the right to act upon her assent, and pay the claim without a suit; such payment was made at her request, and she is liable for the amount paid, and cannot defend upon the ground that there was a defence to the claim of the bank which she neglected to make before the payment.

We have considered all the questions raised by this bill of exceptions, although some of them have become immaterial by the special finding of the jury in the case. In answer to a special question submitted to them, they have found that the plaintiff made the payment to the bank with the assent of the defendant and in good faith. It was within the discretion of the court to submit this question to them, and their finding upon it is conclusive, and renders immaterial all questions as to the liability of the plaintiff on his bond.

Exceptions overruled.

OTIS STONE vs. THOMAS STONE.

Essex. November 9. — 17, 1874. AMES & ENDICOTT, JJ., absent.

A. conveyed to B. a certain dwelling-house in S., measuring twenty-two feet by seventeen, with all the privileges and appurtenances to the same belonging, or in anywise appertaining. After the death of B. her husband C. occupied the house, and her heirs conveyed by a quitclaim deed to D. a certain piece of land with the building thereon at S., meaning to describe and quitclaim the same premises now occupied by C., and the same premises that were conveyed by A. to B. *Held*, that the deed from A. to B. did not include a parcel of land adjoining, on one side, land in front of the building, and could not be made to include it by evidence of subsequent occupation. *Held, also*, that the deed to D. described only one parcel of land and did not include the lot on the side, although it was at the time in the occupation of C.; and that D. could not maintain a writ of entry to recover possession of it.

WRIT OF ENTRY, dated November 4, 1867, to recover a parcel of land on Humphrey Street in Swampscott. Plea, *nul disseisin*. At the trial in the Superior Court, before *Wilkinson, J.*, the following facts appeared:

The demanded premises were a parcel of land thirty feet by thirty-three feet, lying immediately west of the dwelling-house of Mary Stone hereafter referred to, and between certain boat-houses and Humphrey Street, in Swampscott. The demanded premises, together with the dwelling-house of Mary Stone and other premises in the immediate vicinity, were originally sea-beach lying between Humphrey Street and the sea. The title to property on this beach was acquired by possession within a comparatively recent period.

The demandant put into the case a deed from Mark Graves and others to Mary Stone, wife of Thomas Stone, Senior, dated July 17, 1826, which contained the following description: "A certain dwelling-house at Swampscott, so called, in said Lynn; said dwelling-house measures twenty-two feet by seventeen feet, and is one story high and a half, and is now standing on the ridge of the beach in said Swampscott, with all the privileges and appurtenances to the same belonging, or in anywise appertaining."

Mary Stone, the wife of Thomas Stone, Senior, died in January, 1852, intestate, and her husband, Thomas Stone, Senior, died in September, 1857. Both the demandant and the tenant were children of Mary Stone and her husband, Thomas Stone, Senior.

The demandant also put into the case a deed signed by the tenant, and all the other children of Mary Stone and Thomas Stone, Senior, to the demandant, dated March 29, 1854, and acknowledged July 10, 1854. The description of the land conveyed by this deed is as follows: "All our right, title, interest and estate in and to a piece of land with the building thereon, situate at Swampscott aforesaid, meaning to describe and quitclaim the same premises now occupied by Thomas Stone, Senior, and the same premises that were conveyed to Mary Stone, wife of Thomas Stone, by Mark Graves and others as by their deed of the same, bearing date July 17, 1826, and recorded in the Essex Registry of Deeds, book 243, to which reference may be had."

The demandant contended that a title to the demanded premises passed to him by this deed of Thomas Stone, Jr., and others, and to prove that the demanded premises were embraced in the description of the land conveyed by the deed of Mark Graves and others to Mary Stone, and by the deed of Thomas Stone, Jr., and others, to the demandant, he put in testimony, tending to prove that Mary Stone, by herself and her husband and agents, took possession of the demanded premises at the same time that she took possession of the dwelling-house upon the ridge of the beach, and that she used and occupied them in connection with her said dwelling-house continuously down to the time of her death, and that Thomas Stone, Senior, after her death continued in the occupation of said dwelling-house and of the demanded premises as tenant by the curtesy, down to the date of the deed of Thomas Stone Jr., and others to the demandant.

The tenant in reply put in testimony tending to prove that he was the first to take possession of the demanded premises, that he fenced the same, and continued in the exclusive and continuous use and occupation of the same down to the date of the writ in this case, and that Mary Stone, neither by herself nor by her husband or agents, ever had any possession, use or occupation of the same in connection with the dwelling-house, and that said demanded premises were no part of the premises described in said deed, and that Thomas Stone, Senior, was not in the occupation of the demanded premises as tenant by the curtesy, after the death of his wife Mary Stone, and down to the date of the deed from Thomas Stone, Jr., and others to the demandant. The counsel for the demandant, in the cross-examination of the tenant, asked him to produce a deed made to him by Thomas Stone, Senior, of the demanded premises, dated January 12, 1853, and recorded in 1867, just before the date of the writ in this case. The tenant produced the deed, which was a quitclaim deed of the demanded premises, and the demandant put it into the case.

The tenant further offered to prove by a daughter of Thomas Stone, Senior, and Mary Stone, that her father said to her in the said dwelling-house conveyed to the said Mary Stone, and while he was occupying the same as tenant by the curtesy, after the death of his wife, and before either of the deeds in this case signed by him or the children were delivered, that his son Thomas Stone, Jr., always owned the land between the boat-houses and the street, (referring to the demanded premises,) but to save all trouble and dispute about it he should give him a deed. This testimony was offered to show the extent of the occupation of the said Thomas Stone, Senior. But the judge ruled that it was incompetent and excluded it.

The demandant's counsel contended and argued to the jury, that at the time of the deed of Thomas Stone, Jr., and others to the demandant, Thomas Stone, Senior, owned and occupied a life estate in said demanded premises, in connection with the said dwelling-house conveyed by Mark Graves and others to Mary Stone.

The counsel for the tenant asked the judge to instruct the jury as follows :

1. That the deed of Mark Graves and others to Mary Stone did not cover the land in question.

2. That the deed of Mark Graves and others only conveyed the land actually described, with perhaps the right of passage to and from the house.

The judge declined to give the instructions prayed for, and instructed the jury, with other instructions not excepted to, that all the evidence in the case was to be considered as bearing upon the question whether the demanded premises were appurtenant to and parcel of the dwelling-house lot or not; if they were so appurtenant and parcel of the dwelling-house lot, the demandant was entitled to a verdict; if they were not, he was not entitled to a verdict.

The jury returned a verdict for the demandant, and the tenant alleged exceptions.

J. W. Perry & A. L. Huntington, for the tenant.

S. B. Ives, Jr., for the demandant. 1. It was competent for the jury to find that the deed of Mark Graves and others to Mary Stone covered the demanded premises, either as parcel or appurtenant. *Ammidown v. Ball*, 8 Allen, 293.

2. The description in the deed to the demandant is not merely cumulative; but it is sufficient to include any land in the occupation of the father, which was adjacent to that conveyed by Graves to Mary Stone, even though not strictly within the description in that deed to Mary Stone. The words indicate that the two descriptions are not intended to be identical, but that one is designed to supply any deficiencies in the other. If, therefore, the demanded premises were occupied by Thomas Stone, either as his own, or as his wife's, they passed by this conveyance. If he occupied them as tenant by the curtesy, the defendant might well convey; if he occupied them as his own, then the conveyance of the defendant will operate by way of estoppel, and he cannot now deny the title which his deed purports to convey.

WELLS, J. The deed to the demandant does not describe two parcels of land; but one parcel to which both descriptions are applicable. "The same premises now occupied by Thomas Stone, Senior," when further defined, as also the same premises "conveyed to Mary Stone, wife of Thomas Stone, by Mark Graves and others, as by their deed of the same bearing date of July 17, 1826," must be limited by the deed so referred to.

That deed conveyed "a certain dwelling-house at Swampscott, so called, in said Lynn; said dwelling-house measures twenty-two feet by seventeen feet, and is one story high and a half, and is now standing on the ridge of the beach," with all privileges and appurtenances. The demanded premises are not under said dwelling-house, nor in front or rear of it, nor in any way so connected with or having relations to it as to warrant a construction that would make them pass as parcel of the land on which the house stands, or by any implication of grant. The land demanded adjoins the land in front of the dwelling-house, but is itself wholly between certain boat-houses, belonging to other parties, and Humphrey Street. We do not think that the deed from Mark Graves and others to Mary Stone, can be made to include such a parcel of land by any evidence of subsequent occupation. The instructions, given to the jury on this point, are applicable only where the boundaries and description of the land, ascertained by the proof of occupation, are such that the terms of the deed will apply to and be answered by them; or at least be consistent with them. Applied to this case we think the instructions erroneous.

As this point must apparently be decisive, we do not deem it necessary to consider the other questions argued.

Exceptions sustained.

WILLIAM LOONEY vs. JOHN LOONEY.

Essex. November 4. — 17, 1874. AMES & DEVENS, JJ., absent.

A case was sent to an auditor to state the accounts between the parties. Upon the return of his report, an amended declaration which was relied on before the auditor, the defendant's answer and declaration in set-off, and the plaintiff's answer thereto, were all filed in court on the same day. The case was then recommitted to the auditor to find whether the questions raised by the answer to the declaration in set-off had been passed upon in the former report. *Held*, that it was to be inferred that the amended declaration was filed by leave of court.

Where a case was heard by an auditor upon an amended declaration, and at the trial a motion of the plaintiff to amend his declaration by adding a new count was refused, it was *held* that the plaintiff had no ground of exception.

An item in a declaration on an account annexed was for amount paid on land.

The case was sent to an auditor, who reported that the plaintiff offered evidence

tending to prove a settlement between the parties whereby it was agreed that the defendant owed the plaintiff a certain sum on the house and land, but the auditor found that no such settlement was made. In the Superior Court the plaintiff moved to amend by adding a count as for a balance found due on accounting together. The amendment was not allowed. The plaintiff then offered evidence of the facts set forth in the amendment as evidence under the first item. *Held*, that the evidence was rightly rejected.

On the coming in of an auditor's report, an amended declaration which was relied on before the auditor, the defendant's answer and declaration in set-off, and the plaintiff's answer thereto, were filed together. At the trial the plaintiff asked the court to rule that the declaration in set-off was not filed in season. *Held*, that this request was rightly refused.

Under the Gen. Sta. c. 130, § 17, a set-off is a matter of pleading, and is governed by the rules relating thereto.

A. having an insurable interest in a house owned by B. took out a policy of insurance on it against fire in B.'s name, and as agent for B. received the money from the insurance company on the destruction of the house by fire. *Held*, that an action would lie by B. to recover this sum of A. without a previous demand, and that the testimony of A. was not admissible in defence to show that he intended the insurance to apply to his own interest.

CONTRACT on an account annexed, the first item of which was, "To amount paid on land, \$407."

At the trial in the Superior Court, before *Wilkinson, J.*, the plaintiff put in the report of an auditor, from which the following facts appeared: In August, 1864, the defendant, who is the son of the plaintiff, purchased one half of a house, with the land under and adjoining the same, on Broad Street in Salem, for \$400, (the plaintiff owning and occupying the other half,) and took a deed thereof in his own name. The plaintiff paid \$30 of the purchase money, and \$7 for stamps and recording the deed, and the defendant paid the rest. The defendant, at that time, was employed in another state, and it was agreed between the parties that the plaintiff should take charge and have the use of the house, make the necessary repairs, pay the necessary expenses, and take the rents, until the defendant should wish to occupy it. Under the agreement the plaintiff took charge, made certain repairs, paid the taxes, let the house and received the rents. About the time of his taking charge, he took out a policy of insurance in the name of the defendant for \$500, and paid the premium. The house was destroyed by fire in 1865, and the plaintiff received on the policy, as the defendant's agent, the sum of \$500.

The auditor found that there was due the plaintiff, on the first item, the sum of \$37, and that the plaintiff owed the defendant the sum of \$500, less the premium, and that there was a certain sum due the defendant on his declaration in set-off.

The auditor also reported that it was contended by the plaintiff, and he offered evidence tending to prove, that there was a settlement between the parties in the spring of 1865, whereby it was agreed by them that the defendant owed the plaintiff \$277 on the house and land purchased in 1864; and that he found that there was no settlement as claimed, and that the defendant did not agree that the sum of \$277 was due on the house from him to the plaintiff. At the request of the plaintiff's counsel, the auditor stated the account, as it would stand if such settlement had been made; the first item of which was, "To amount paid on land, \$277."

The plaintiff at the trial moved for leave to amend his declaration by adding a count for \$277, as for a balance found due to the plaintiff, upon accounting together; but the judge refused to allow the amendment. The plaintiff then offered himself as a witness to testify to the facts set forth in the amendment, and offered this evidence under the first item in his bill of particulars; but the judge refused to allow him so to testify, in the absence of such amendment.

Other facts and the rulings of the judge appear in the opinion. The jury returned a verdict for the defendant on his declaration in set-off, and the plaintiff alleged exceptions.

C. Sewall, for the plaintiff.

S. B. Ives, Jr., for the defendant.

WELLS, J. The case had been submitted to an auditor. Upon the coming in of his report, an amended declaration, which appears to have been relied on before the auditor, was placed on file. At the same time the defendant's declaration in set-off, and the plaintiff's answer thereto, were also filed. The report was then recommitted to the auditor "to find if the questions raised by the answer to the declaration in set-off were passed upon in his former report;" who reported that they were so passed upon.

From this statement we think it is to be inferred that the amended declaration was filed by leave of court; although it does not so appear upon the copies brought up to us. The whole trial

proceeded upon that declaration, and there is no exception on the ground that it was not properly before the jury.

At the trial the plaintiff moved for leave again to amend his declaration by adding a count "as for a balance found due to the plaintiff upon accounting together." This was refused; and we think rightly, at that stage of the case. Besides, it was a matter of discretion with the court below, and not open to exception.

That count being disallowed, the evidence of facts to support it would of course be inadmissible. There was no allegation to which it would apply. It could not properly be received to sustain the declaration upon an account annexed for the item, "amount paid on land." It would have been a variance.

The auditor's report having been put in, the plaintiff asked the court to rule that the set-off was not filed in season. The court ruled that the objection was not then open to him. This ruling was right. Further than that, as the set-off was pleaded in answer to the plaintiff's amended declaration, and was filed at the same time, it was in strict compliance with Gen. Sts. c. 130, § 16; St. 1852, c. 312, § 37. At the time of the decision in *Adams v. Butts*, 16 Pick. 343, cited by the plaintiff, the law required the set-off to be filed seven days before the trial, and then allowed it to be given in evidence on the general issue pleaded to the plaintiff's declaration. No other pleading was required, and the objection that the set-off was not seasonably filed could be made only when the evidence in support of it was offered. Sts. 1784, c. 28, § 12; 1793, c. 75, § 4. It is now a matter of pleading, and governed by the rules relating to pleading. Gen. Sts. c. 130, §§ 17, 18.

The court ruled, in accordance with the request of the plaintiff, that his expenditures for his own benefit, upon the house of the defendant, with his approval, while the plaintiff occupied and had charge of it under his agreement with the defendant, gave the plaintiff an insurable interest in it, although he did not own the property; but refused to permit him to prove, by his own testimony, that his purpose, in obtaining insurance in the name of the defendant, was to secure himself for money so expended. This refusal was right. Such a policy of insurance would cover and apply to the interest of the defendant only, and would not cover the plaintiff's interest, whatever may have been his own purpose in obtaining it.

The plaintiff asked the court to rule :

1. That the defendant's set-off is not upon a contract express or implied.

2. That there was no such mutuality or privity, either in law or fact, between the plaintiff and defendant in relation to the matter of insurance, as to enable the defendant to recover of the plaintiff the amount received by him upon the policy.

As a proposition of law, neither of these can be maintained, if there was any evidence proper to go to the jury to show that the plaintiff took out the policy in behalf of the defendant with his authority or subsequent approval, or received the money as his agent. The auditor's report alone is sufficient for this purpose. It is *prima facie* evidence, and nothing appears to control it. The receipt and possession of money belonging to another is itself sufficient for an action for money had and received upon the promise to repay it implied by law, and creates sufficient privity.

The objection that the defendant could not maintain his set-off without first making demand is equally unfounded. Demand was not necessary. It does not appear to have been other than an ordinary claim for "money had and received."

Exceptions overruled.

WILLIAM O. DODD vs. ABRAHAM TARR.

Essex. November 6. — 17, 1874. AMES & DEVENS, JJ., absent.

A declaration on an account annexed contained two items, each for one month's labor of certain persons. The evidence showed that while the plaintiff and defendant were in partnership, the latter agreed that if the plaintiff should employ his sons to work for the partnership, the defendant would employ some one to offset those services; that the sons worked four months, and the defendant did not employ any one. *Held*, that although the partnership was dissolved before suit brought, and there were no other debts, the action could not be maintained upon the declaration.

CONTRACT on a promissory note. At the trial in the Superior Court, before Lord, J., the defendant admitted the plaintiff's case, and the issue was on a declaration in set-off, the first two items of which were, "1. November 6, 1869. To one month's

labor of Frank Tarr, \$40." "2. To one month's labor at \$50 a month, \$50."

The defendant testified that he and the plaintiff formed a copartnership in the fall of 1869, which continued until March 1, 1871, when it was dissolved. At that time the copartnership owned a certain building, with some fixtures therein, and the plaintiff sold his interest in the same to the defendant for the amount of the note in suit.

The defendant further testified, under the plaintiff's objection, in support of the first two items in his bill of particulars, that while the copartnership was in existence the plaintiff agreed with him, that in case the defendant should employ one or both of his sons to perform services for the copartnership, the plaintiff would employ some one to offset those services; that his sons thereupon performed services for the copartnership without any agreement as to price, their united services being for the space of four months; and that the plaintiff did not employ any one to offset those services. Evidence was also put in tending to show that the charges claimed in the defendant's bill of particulars were fair charges for services rendered.

The plaintiff contended that the defendant could not under his declaration in set-off recover for these two items of company indebtedness. But the judge ruled that if the copartnership, composed of the plaintiff and the defendant, had been dissolved, and had no property at the time of its dissolution other than the building and fixtures testified to, and owned no other debts except these two items in question, which the defendant claimed of the plaintiff as the amount due him for his half of services furnished, and if it was agreed between the parties that the plaintiff should pay the defendant said amounts, then the defendant might recover the same under his set-off against the plaintiff.

The jury found for the defendant; and the plaintiff alleged exceptions.

C. Sewall, for the plaintiff.

C. P. Thompson, for the defendant.

WELLS, J. The ruling by the court below was correct as a proposition of law. But it did not meet the objection raised by the plaintiff. That objection was "that the defendant could not, under his declaration in set-off, recover for these two items of company indebtedness."

The declaration in set-off was in form of a count on an account annexed. The two items in question were "November 6, 1869. To one month's labor of Frank Tarr, \$40. February 15, 1871. To one month's labor at \$50 per month, \$50."

It is manifest that this is not good as a statement of a claim for a partnership balance. It was not demurrable, because it is good as a statement of account for work and labor, and it does not disclose any purpose to rely upon it as a partnership matter.

The objection goes further than the mere point of pleading. There was a variance in the proof. The evidence discloses no such promise to "pay the defendant said amounts," as the ruling assumes. The agreement of the plaintiff was "that in case the defendant should employ one or both of his sons to perform services for the copartnership, the plaintiff would employ some one to off-set those services." If, upon breach of that agreement, the defendant might properly charge the value of the services of his sons to the copartnership, such charges would not be good as items of account against the plaintiff individually, either as a copartnership balance, or under the special agreement recited. His liability at the best would be for only one half the amount so chargeable for the services. Proof of such liability, either under the special agreement or for the balance that would result from those charges without offset, in partnership account, would not sustain the claim made under the declaration in set-off.

We are apprehensive that the objection may not have been pointed out at the trial as explicitly as it should have been. But it is distinctly presented upon the bill of exceptions, which must therefore be

Sustained.

PETER F. KEEGAN vs. PATRICK COX.

Essex. November 24. — 28, 1874. AMES & DEVENS, JJ., absent.

The judgment of the Superior Court on a case stated is conclusive upon all facts and inferences of facts involved in it, and no appeal lies therefrom to this court.

If a mortgage of partnership property is made by two partners who are minors, and after one of them comes of age part of the consideration is received by the mortgagors, and a part payment is made by them on the mortgage, the ratification by

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the one who is of age may be inferred as a fact, and replevin will not lie against the mortgagee in possession by the partner who is still a minor, to whom the interest of the other partner has been transferred on the dissolution of the firm.

REPLEVIN. Writ dated July 11, 1873. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on a case stated, in substance as follows :

On March 29, 1873, the plaintiff, and James W. Keegan his brother, were partners in the retail provision business in Lawrence ; and owned and used in their business the goods replevied in this action. On that day they, with the knowledge and advice of their parents, executed and delivered to the defendant, a personal mortgage of the goods replevied, conditioned to pay to the defendant three notes of even date, for \$100 each in six months, from March 29, 1873, which notes were signed by both partners.

The consideration for these notes and the mortgage was an outstanding account of \$130 in favor of the defendant, for meat sold and delivered to the firm ; and also the payment for meat thereafter to be delivered by the defendant to the firm at the current market prices to the extent of \$170 in value. Within a month thereafter, and in pursuance of the agreement, the defendant at different times delivered meat to the firm to the amount of \$168.59 in value. The defendant was ready and willing to deliver the remaining value of \$1.41 according to agreement, but the business of the partners was interrupted by attaching creditors, and they were not ready to receive it. All of the meat so delivered by the defendant, before and after the date of said mortgage, was resold by the firm to its customers.

Most of the meat sold and delivered after the date of the mortgage, was sold and delivered after James W. Keegan became of age. On May 23, 1873, the firm paid the defendant \$50, in part payment of the mortgage notes.

On March 29, 1873, the day the mortgage was delivered, both of the partners were minors, and were living with their parents. The plaintiff was then nineteen years old, and his brother James became of age April 10, 1873. At the time said notes and mortgage were being executed, the father of the partners, in their presence and upon inquiry made by the defendant, told the de-

fendant that James W. Keegan was twenty-one years of age in April, 1872. Neither of said partners made any denial of this statement.

On July 9, 1873, the defendant took possession, for breach of the conditions, under the provisions of said mortgage, of the goods mortgaged and now replevied. No tender of performance of the conditions of the mortgage was ever made by the mortgagors, or either of them, or by any one in their behalf, and the only payment or offer of payment was the \$50, above stated.

On July 1, 1873, the partnership was dissolved by agreement, and James W. Keegan then sold all his interest in the goods replevied to the plaintiff.

If upon these facts the plaintiff is entitled to recover the goods replevied, judgment is to be entered for the plaintiff for nominal damages. Otherwise judgment for the defendant for a return with nominal damages.

W. H. P. Wright, for the plaintiff.

E. T. Burley, for the defendant.

WELLS, J. The facts stated would warrant the inference that James W. Keegan, after he came of age, ratified and affirmed the mortgage given by him and the plaintiff, while both were minors. A part of the consideration, which was executory when the mortgage was delivered, was received after James W. Keegan arrived at full age; and a payment of \$50 was made upon the debt. This being an inference of fact, and being necessarily involved in the judgment for the defendant in the court below, it must be presumed to have been so found there. That judgment is conclusive upon all facts and all inferences of fact involved in it. Only questions of law can be brought up on appeal.

As one copartner could make a valid mortgage of the personal property of the firm, his affirmance of a voidable mortgage was sufficient to give it validity, at least to the extent of his interest in the property; and that is sufficient to defeat this action of replevin.

Judgment for the defendant affirmed.

EDWARD W. FOX vs. ADAMS EXPRESS COMPANY.

Suffolk. November 11, 1874. WELLS & DEVENS, JJ., absent.

In an action against a common carrier for the loss of a trunk, the case was submitted to the Superior Court on an agreed statement of facts, from which it appeared that a flood carried away a railroad bridge; that the cars on which was the trunk went through the opening in the bridge, and were with the trunk destroyed by fire, through no fault of the carrier; that the carrier, to avoid trouble and litigation in settling losses connected with the disaster, adopted a rule to pay \$50 to all claimants, where no value was declared at the time of shipment; that no value was declared in this case, and the agent of the company wrote a letter to the plaintiff declining to pay more than \$50, on the ground that the value was not declared at the time of shipment, and offering to pay this amount. It was also agreed that if the plaintiff was entitled to recover, judgment for \$175 was to be entered for him. The Superior Court entered judgment for the plaintiff. *Held*, on appeal to this court, that the facts would warrant a finding that the judgment below proceeded upon the inference of fact that the letter of the agent admitted a liability to some extent, and that the judgment should be affirmed.

CONTRACT to recover the value of a trunk and its contents belonging to the plaintiff, and destroyed in April, 1873, while in the possession of the defendant company, in the course of transportation from Newark, New Jersey, to Boston. The case was submitted to the Superior Court, on an agreed statement of facts in substance as follows:

It is admitted for the purposes of this statement, that the defendant company, at the time of the loss in April, 1873, was a corporation capable of being sued, and doing the business of a common carrier between New York and Boston. On April 17, 1873, the plaintiff then residing in Newark, and being about to remove to Jamaica Plain, in Massachusetts, left an order at the office of the New Jersey Express Company in Newark, to call at his boarding-house in Newark, take the trunk and transport the same to Jamaica Plain. The plaintiff directed a servant at his boarding-house to deliver the trunk when called for, and take a receipt for it. The plaintiff then took the cars and went directly to Boston.

The trunk was taken by the New Jersey Express Company and carried by it to New York, and was there delivered to the defendant company on April 18, 1873, for transportation to Boston; and while the said defendant company was so transporting

the same from New York to Boston, on the cars of the Stonington line of railroad, on the morning of April 19, a bridge on the line of the railroad, at Richmond Switch, was suddenly swept away by a flood, the cars fell through the opening in the bridge and accidentally took fire, and the trunk and its contents were thereby burned and destroyed, without any fault or negligence on the part of the defendant company or its servants, or of the railroad. Shortly afterwards the plaintiff called at the office of the defendant company in Boston, and inquired of one of the clerks if the company had lost anything at the Richmond Switch disaster; the clerk replied that it had, on referring to the books of the company, and said there was an entry of "Edward W. Fox," and asked the plaintiff if it was a trunk; the plaintiff replied that it was. The plaintiff was then referred to R. P. Reed, assistant superintendent of the defendant company, who had in charge the settlement of all claims for losses arising out of the disaster.

Reed gave to the plaintiff two blank affidavits relating to the shipment and loss, to be filled out and sworn to by the plaintiff, as the shipper and consignor of said trunk. These affidavits were such as the company always require of the shipper and consignor in cases of lost property. Reed also requested the plaintiff to give him the original receipt given by the New Jersey Express Company. The plaintiff said he had no receipt himself, but supposed there was one at his boarding-house in Newark, where the trunk was taken by the New Jersey Express Company, and inquired if it was necessary to have it, and Reed answered that they wanted it on account of their insurance business. The plaintiff then told Reed that he would go to Newark and see if a receipt had been left there, which he did. At Newark, the plaintiff called at the office of the New Jersey Express Company, asked for a receipt, and stated that Reed wanted the receipt on account of insurance. The New Jersey Express Company thereupon gave to the plaintiff a receipt, marked "Duplicate," a copy of which is in the margin.*

* "New Jersey Express Company, Express Forwarders. Newark, N. J., April 17, 1873. Received of E. W. Fox, 1 Trunk, marked E. W. Fox, Jamaica Plain, Mass., which it is mutually agreed is to be forwarded to our

It is also agreed, if the same be competent, that the plaintiff stated to the New Jersey Express Company, at the time of taking

agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation.

"It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company intrusted, or arising from the dangers of railroads, ocean or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor, in any event, shall the holder hereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured by them, and so specified in this receipt, which insurance shall constitute the limit of the liability of the New Jersey Express Company. And if the same is intrusted or delivered to any other express company or agent, (which said New Jersey Express Company are hereby authorized to do,) such company or person so selected shall be regarded exclusively as the agent of the shipper or owner, and as such alone liable, and the New Jersey Express Company shall not be, in any event, responsible for the negligence or non-performance of any such company or person, and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and enure to the benefit of each and every company or person to whom the New Jersey Express Company may intrust or deliver the above described property for transportation, and shall define and limit the liability thereof of such other company or person. In no event shall the New Jersey Express Company be liable for any loss or damage, unless the claim therefor shall be presented to them in writing at this office, within thirty days after this date, in a statement to which this receipt shall be annexed. All articles of glass, or contained in glass, or any of a fragile nature, will be taken at shipper's risk only, and the shipper agrees that the company shall not be held responsible for any injury by breakage or otherwise, nor for damage to goods not properly packed and secured for transportation. It is further agreed that said company shall not, in any event, be liable for any loss, damage or detention caused by the acts of God, civil or military authority, or by rebellion, piracy, insurrection or riot, or the dangers incident to a time of war, or by any riotous or armed assemblage. If any sum of money, besides the charge for transportation, is to be collected from the consignee on delivery of the above described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purposes of making such collection, shall be that of warehousemen only."

the duplicate receipt, that no receipt was left at his boarding-house in Newark, to his knowledge, and that he also so stated to the agent of the defendant company, after inquiry upon the subject, and after his visit to Newark.

The plaintiff, after receiving the duplicate receipt, returned to Boston, and on May 5, 1873, delivered to Reed his affidavits and statement of loss, to which was attached the duplicate receipt. Reed examined the papers and told the plaintiff they were such as were necessary, and that he would write and let him know about the matter. The plaintiff afterwards received from Reed a letter, in which the company declined to pay more than \$50 on the plaintiff's claim for his trunk, on the ground that the value was not declared at the time of shipment, and stating that this amount was at the office, subject to his order.

It is also agreed, if competent, that the company, to avoid all trouble and litigation in settling losses connected with this disaster, adopted a rule of paying \$50 to all claimants, in all cases where no value was declared at the time of shipment. The plaintiff had no insurance on the trunk or its contents, and no value was declared by him at the time of shipment.

Upon the foregoing statement of facts, if the court is of opinion that the plaintiff can maintain his action, judgment is to be entered for him in the sum of \$175; otherwise, judgment for the defendant.

The Superior Court rendered judgment for the plaintiff for \$175, and the defendant appealed.

H. C. Hutchins & H. H. Currier, for the defendant, were first called upon.

A. Russ, for the plaintiff, was stopped by the court.

BY THE COURT. It does not appear that there was any error of law in the judgment of the court below. That judgment may have been founded on an inference of fact (which the letter of the defendant's agent, taken in connection with the circumstances of the case, would justify) that the defendants had admitted their liability to some extent. And the parties agreed, in the case stated, upon the sum for which judgment should be rendered, if the plaintiff could recover at all.

Judgment for the plaintiff affirmed.

JOHN H. SHATTUCK *vs.* EDMUND TRAIN.

Suffolk. November 11. — 12, 1874. WELLS & DEVENS, JJ., absent.

A witness called as an expert upon the value of the plaintiff's services as a book-keeper for the defendant, testified in his preliminary examination that he had been twenty-five years an accountant; that he knew the plaintiff fifteen years before, and knew him to be an able book-keeper, but that he had not known of him for eight or nine years; that he himself had been employed as a book-keeper for three firms whose business was from \$1,000,000 to \$1,500,000 a year, but was a different kind of business from that of the defendant; that twenty years before he had sold goods to the defendant, and had then a general knowledge of the character and extent of his business; and that he had acted as an expert accountant. No objection was made to the testimony as relating to a subject on which the opinions of witnesses were inadmissible. *Held*, that no exception lay to the rulings of the presiding judge that the witness was an expert, and allowing him to answer the question what was a fair compensation for the services of a competent accountant in keeping the books in a business of the character of the defendant's amounting to about \$160,000 a year, and to state, after an examination of the defendant's books in court, what was a fair compensation for keeping books of that character, and the usual charge per day for the services of an accountant in fixing up complicated accounts.

CONTRACT to recover for services rendered to the defendant by the plaintiff, as a book-keeper, from September, 1871, to February, 1872. There was a count upon a special contract, and one upon a *quantum meruit*.

At the trial in the Superior Court, before *Rockwell, J.*, it appeared that the defendant was a wholesale and retail trader in flour, grain and groceries, in East Cambridge. The only evidence respecting the amount of his business during the time of the plaintiff's employment was given by the plaintiff, who said he supposed it was about \$150,000 to \$160,000 per annum, and by the defendant, who said it did not exceed \$60,000 per annum. The plaintiff called Orin E. Downing, who testified that his occupation was that of an accountant, and had been for twenty-five years or more; that he knew the plaintiff fifteen or sixteen years ago, and knew him to be an able book-keeper, but had not known of him for eight or nine years; that he, the witness, had been in the employ of Snow & Rich, Isaac Rich & Co., and Franklin Snow & Co.; that all these firms were engaged in the wholesale fish and shipping business in Boston, and that the annual business of each of them was from \$1,000,000 to \$1,500,000; that he had never been in the defendant's place of business, but sold him

goods about twenty years ago, and at that time had a general knowledge of the extent and character of his business; that he was never employed as book-keeper by any other parties, but had latterly acted as expert accountant. This was the only evidence of his qualifications as an expert. The plaintiff then asked the witness what, in his judgment, was a fair compensation for the services of a competent accountant in keeping the books in a business of the character of the defendant's, amounting to about \$160,000 a year. To this question the defendant objected, on the ground that the witness was not qualified; but the question was admitted. The witness was further asked, against the plaintiff's objection, to examine the defendant's books kept by the plaintiff, which were produced in court, and state what was a fair compensation for keeping books of that character, and also what was a reasonable and usual charge per day for the services of an accountant in fixing up complicated accounts. These questions were admitted. The jury found for the plaintiff, and the defendant alleged exceptions to the above rulings.

R. M. Morse, Jr., for the defendant, cited *Lawton v. Chase*, 108 Mass. 238; *Lincoln v. Barre*, 5 Cush. 590.

J. W. Hubbard, for the plaintiff.

BY THE COURT. The only objection which appears by the bill of exceptions to have been made at the trial was to the qualifications of the witness as an expert, (assuming the matter inquired of to be a subject on which the opinions of witnesses were admissible,) and his testimony on the preliminary examination warranted the presiding judge in deciding that he was so qualified. It does not appear that any of the questions admitted were inapplicable to the facts before the jury.

Exceptions overruled.

ANDREW J. WHEELER vs. H. M. A. WHEELER.

Suffolk. November 12, 1874. WELLS & DEVENS, JJ., absent.

On the issue whether the defendant made the contract sued upon, the plaintiff rested his case on an auditor's report in his favor; the defendant denied making the contract; the plaintiff then offered evidence as to what was said and done by the parties at the time when he contended the contract was made. *Held*, that this evidence was part of the plaintiff's case, and that it was within the discretion of the judge at the trial to exclude it.

CONTRACT on an oral agreement.

At the trial in the Superior Court, before *Brigham, C. J.*, the plaintiff offered in evidence the report of an auditor, who found that there was an implied agreement on the part of the defendant to abide by and perform the contract set forth in the declaration. The plaintiff's counsel stated to the presiding judge, before resting his case on the report alone, that the plaintiff had other evidence of the contract relied on, which he might wish to put in after the defendant's case was closed; to which the judge replied that a plaintiff, having an auditor's report in his favor, had his election to put in his whole case, or to stand on the report alone in the first instance, and run the risk of being able to control the defendant's case in rebuttal; that such a course had its advantages and its disadvantages, and the counsel must elect which course to pursue, as it was within the discretion of the judge how far in such a case the plaintiff should be allowed to put in evidence to sustain the auditor's report not strictly in rebuttal of the defendant's testimony, and which would be competent for the plaintiff in the beginning. The plaintiff then rested his case.

The defendant testified that she never made, consented to, or had any knowledge of, the alleged contract. After her evidence was all in, the plaintiff offered to put in evidence as to what was said and done between the parties at the time of making the alleged contract; but the judge refused to admit it, stating to the counsel for the plaintiff that this evidence made a part of his original proof which it was competent for him to put in in the first instance; and that, not having elected to put it in then, it was afterwards within the discretion of the judge to permit him to put it in or not; that under the circumstances of the case he should decline to admit any testimony not strictly in rebuttal, and as the testimony offered was not of that class he should reject it.

The jury found for the defendant; and the plaintiff alleged exceptions.

C. P. Hinds, for the plaintiff.

P. E. Tucker, for the defendant, was not called upon.

BY THE COURT. The evidence rejected was part of the plaintiff's case, and it was within the discretion of the judge to admit or reject it when offered in rebuttal. *Lowe v. Pimental*, 115 Mass. 44.
Exceptions overruled.

SAMUEL TRYON vs. OTIS C. MERRILL.

Suffolk. November 13. — 14, 1874. WELLS & DEVENS, JJ., absent.

In *scire facias* against a trustee, his answers, in the absence of any allegation of fact not stated or denied by him, are to be taken as true, and the questions arising thereon are to be decided by the court.

The submission to the jury of an issue which ought to be decided by the judge does not enable the Superior Court to refer questions of law to this court by report under the Gen. Sts. c. 115, § 6.

SCIRE FACIAS on a judgment against one Chamberlin and the defendant as trustee.

At the trial in the Superior Court, before *Dewey, J.*, the defendant contended upon his answers that he was not liable as trustee. The judge ordered a verdict for the defendant, and reported the questions of law for the determination of this court.

T. S. Dame, for the plaintiff.

W. Hobson, for the defendant.

GRAY, C. J. No allegation of facts not stated or denied by the trustee having been filed, his answers to the *scire facias*, like the answers of a trustee in the original suit, were to be considered as true, the questions arising thereon were to be decided by the court, and there was no issue which could lawfully be submitted to a jury. Gen. Sts. c. 142, §§ 11, 12, 42. *Thompson v. Lowell Machine Shop*, 4 Cush. 431. *Winsted Bank v. Adams*, 97 Mass. 110. *Cardany v. New England Furniture Co.* 107 Mass. 116. *Fay v. Sears*, 111 Mass. 154.

There was therefore nothing in the case which could be brought to this court by report. *Bearce v. Bowker*, 115 Mass. 129. *Commonwealth v. Dowdican's Bail*, Ib. 133. *Hubner v. Hoffmann*, 106 Mass. 346. The submission to the jury of an issue which was by law triable by the court only could not enable the court below to refer questions of law to this court in a mode limited by the statutes to cases triable by a jury. *Haas v. Harrington*, ante, 185. Report dismissed.

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CHARLES BLAKE *vs.* H. R. DARLING.

Suffolk. November 18. — 16, 1874. WELLS & DEVENS, JJ., absent.

The value of goods replevied need not be alleged in the writ.

REPLEVIN of a black walnut desk, commenced in the Municipal Court of the city of Boston. At the trial in the Superior Court on appeal, the defendant moved to dismiss the action, because the writ did not allege the value of the property, and therefore it did not appear that it was of the value of more than \$20 and less than \$300. *Dewey, J.*, refused the motion. On the trial it appeared that the desk was of the value of \$80. The verdict was for the plaintiff, and the defendant alleged exceptions.

S. J. Ross, for the defendant.*L. M. Child*, for the plaintiff.

GRAY, C. J. The value of goods replevied need not be alleged in the writ. The jurisdiction depends upon the actual value as proved at the trial, not upon the plaintiff's allegation or the appraisers' certificate. *King v. Dewey*, 11 Cush. 218. *Pomeroy v. Trimper*, 8 Allen, 898. *Davenport v. Burke*, 9 Allen, 116. *Leonard v. Hannon*, 105 Mass. 113. *Exceptions overruled.*

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MARTIN HAYES *vs.* THOMAS KELLEY.

Suffolk. November 13. — 16, 1874. WELLS & DEVENS, JJ., absent.

Where the plaintiff introduces an auditor's report in evidence, to the admission of which the defendant objects, it is within the discretion of the presiding judge to allow the plaintiff afterwards to withdraw the report from the consideration of the jury.

Where evidence is put in under an objection, and the judge permits the party putting in the evidence to withdraw it, a refusal to give instructions which are only appropriate on the theory that the evidence is in the case is not a ground of exception.

Where a bill of goods sold is presented to a purchaser, his conduct may be such as to warrant the jury in drawing the inference of an admission that the bill is accurate and actually due, although he says nothing to that effect.

CONTRACT on an account annexed, for lime, sand and hair furnished the defendant.

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At the trial in the Superior Court, before *Brigham*, C. J., the plaintiff's counsel offered the report of an auditor in evidence. The defendant objected to the reading of the report to the jury; but the judge overruled the objection and permitted it to be read to the jury, to which the defendant excepted. The defendant, who was called by the plaintiff as a witness, testified that he told the plaintiff that the bills which had been rendered to him were incorrect, and that he had handed some of them back to the plaintiff's clerk and book-keeper for correction; that he had no means of telling what amount of materials, as charged by the plaintiff, had been actually delivered to him, as the plaintiff dealt with others who worked on the same streets with himself, and in similar business, some of whom bore the name of Kelley. The plaintiff's book-keeper testified that he made the entries on the books, but knew nothing of the delivery of any portion of the items charged in the account, and that the only means of information he had was that obtained from the several teamsters who delivered articles during the day. The plaintiff's books of account were not put in evidence before the jury, although it appeared from the auditor's report that they were introduced before him, and that by them the account was, in some material respects, different from the account in suit.

At the close of the plaintiff's evidence, the plaintiff's counsel said he should not rely upon the auditor's report, but desired to withdraw it; and its withdrawal was allowed by the judge, to which the defendant excepted.

There was evidence tending to show that these bills had, from time to time, been rendered to the defendant; to one of which he objected that he had not credits upon it for all his payments; and in another instance he told the person presenting the bill to leave it in a closet there, and when he got ready he would see about it, and that he never returned that bill. The judge instructed the jury that when a bill of particulars was presented to a party, his conduct might be such, without his using any language to that effect, as to warrant the jury in finding such conduct to be an admission that the bill was accurate and was actually due.

The defendant asked the judge to give the following instructions to the jury:

"1. The proof of the entries on the plaintiff's books, by the clerk who made them, is not sufficient proof of a sale and delivery of the items so charged. But where others delivered articles so entered, the persons so delivering them should be called to prove the delivery."

"2. If a book was used on which the items were entered originally and then copied upon the day-book, such book containing the original entries must be produced. The fact that bills were rendered cannot be considered as proof of the sale and delivery of the articles charged, and has no tendency to prove a sale and delivery, the burden of proof being upon the plaintiff to prove the sale and delivery."

The judge declined to give these instructions. The jury found a verdict for the plaintiff for the full amount of his bill and interest thereon, and the defendant alleged exceptions.

H. L. Hazelton, for the defendant.

S. J. Thomas, for the plaintiff.

GRAY, C. J. The defendant not having offered the auditor's report in evidence, but having objected and excepted to its admission when offered by the plaintiff, it was within the discretion of the presiding judge to allow the plaintiff to withdraw it from the consideration of the jury. *Eldridge v. Hawley*, 115 Mass. 410. The auditor's report being withdrawn, and the plaintiff's books of account not having been introduced, the instructions requested by the defendant were immaterial. The evidence as to the defendant's conduct in regard to the bills rendered to him by the plaintiff was submitted to the jury with appropriate instructions. *Exceptions overruled.*

MICHAEL FREEMAN vs. JOHN GRIGGS.

Suffolk. November 17, 1874. WELLS & DEVENS, JJ., absent.

If the party seeking to establish the truth of his exceptions neglects without excuse for sixteen months to apply to the commissioner, appointed by the court, to have a day fixed for a hearing, this is good ground for dismissing the petition to prove the exceptions.

PETITION, filed May 2, 1873, to establish the truth of exceptions disallowed by the Superior Court. On June 23, 1873, the

petition was referred to a commissioner to hear the parties and report the facts to the court. The respondent now moved to dismiss the petition for want of prosecution.

J. M. Keith, for the respondent.

F. A. Perry, (*E. Avery* with him,) for the petitioner.

BY THE COURT. It was the petitioner's duty to apply to the commissioner to have a day appointed for a hearing. It appears that this has not been done, although sixteen months have elapsed. No excuse for such gross delay is shown. The petition to establish the truth of the exceptions must therefore be

Dismissed.

RUFUS ESTABROOK & others vs. GEORGE W. SWETT.

Suffolk. November 17, 1874. WELLS & DEVENS, JJ., absent.

Where the seller of goods is induced by the fraud of the buyer to receive in payment thereof the note of a third party, he cannot, without proving that the note is absolutely worthless, maintain an action on the original contract until he has returned or offered to return the note to the buyer.

CONTRACT upon an account annexed. At the trial in the Superior Court, without a jury, before *Pitman*, J., the following facts appeared :

The plaintiffs sold the defendant the goods described in the account on a credit of thirty days; and at the end of this time the plaintiffs received of the defendant a promissory note of J. G. Robinson in payment, and receipted the bill for the goods. There was evidence tending to show that the defendant made false and fraudulent representations to induce the plaintiffs to take the note. Before the note became due the plaintiffs discovered that the representations were false and notified the defendant, who said that if the note was not paid at maturity he would see it paid. The note was not paid at maturity, and Robinson was then and has since been in Canada insolvent. The plaintiffs have the note still in their possession.

"The judge, not being satisfied as a matter of fact that the note was absolutely worthless, ruled that the plaintiffs could not recover of the defendant on the original cause of action, while the plaintiffs held the note in their possession, or until they had

made a tender thereof; and accordingly found for the defendant." The plaintiffs alleged exceptions.

D. B. Gove, for the plaintiffs.

W. E. L. Dillaway, for the defendant, was not called upon.

GRAY, C. J. The plaintiffs in this case seek to recover on the original account, on the ground that they were induced to take the note of a third person in payment, through the fraud of the defendant. The plaintiffs have not proved that the note was absolutely worthless. They cannot therefore maintain this action without surrendering the note to the defendant. *Coolidge v. Brigham*, 1 Met. 547.

116 304
156 386

WILLIAM W. WARREN & another, administrators, vs. SOPHROLIA C. GREGG & others.

Suffolk. November 18. — 19, 1874. WELLS & DEVENS, JJ., absent.

A testator made the following bequest: "I give and bequeath to my beloved wife, S. C., \$1200 annually, from the proceeds of my estate, real and personal, (except what may be hereinafter mentioned as reserve,) as her dower. The said property to be held in trust, and said annuity to be paid to said wife in semi-annual instalments, so long as she remains my widow, and no longer. When such intrusted property shall be distributed as follows, viz.: Reserved, all notes, drafts or evidences of debts due to my estate from each or either of my sons-in-law, shall be held in reserve without interest until a final settlement of my estate, and that the annual income of my estate, (if any,) after reserving the said \$1200 as above mentioned, be equally distributed among my heirs annually; and when at a final settlement of my estate, I devise that my remaining estate shall be equally divided among my five daughters." Held, that the widow was entitled to receive a clear annual sum of \$1200 out of his estate, whether the income of his property, excluding what he directed to be reserved, should be sufficient, or it should become necessary to apply part of the principal for that purpose.

A testator by will authorized his wife to "select or reserve for her own use and occupancy one bed, and suitable bedding for the same, and what other furniture, pictures, or miscellaneous library she may wish to use and occupy." The will further provided: "The rest of my miscellaneous library and furniture to be equally distributed, either by sale or otherwise, among my legal heirs." Held, that the wife was authorized to use so much of the furniture of any description and to any extent as she might select.

Oral declarations of a testator are inadmissible to control the construction of his will.

BILL IN EQUITY by the trustees, who were also administrators with the will annexed, of Samuel Gregg, against the widow and

heirs at law of the testator, to obtain the instructions of the court. The will of the testator, which was dated October 27, 1871, after declaring that his lawful debts should be paid, provided as follows :

"Second. I give and bequeath to my beloved wife, Sophronia Carter, \$1200 annually, from the proceeds of my estate, real and personal, (except what may be hereinafter mentioned as reserve,) as her dower. The said property to be held in trust, and said annuity to be paid to said wife in semi-annual instalments, so long as she remains my widow, and no longer. When such intrusted property shall be distributed as follows, viz. : Reserved, all notes, drafts, or evidences of debts due to my estate from each or either of my sons-in-law, E. G. Tileston, W. R. Stockbridge, Jas. Howard, Jr., J. B. Wooster, or J. W. Dolliver, shall be held in reserve without interest until a final settlement of my estate, and that the annual income of my estate, (if any,) after reserving the said \$1200 as above mentioned, be equally distributed among my heirs annually ; and when at a final settlement of my estate, I devise that my remaining estate shall be equally divided among my five daughters, Martha D. Tileston, Caroline A. Stockbridge, Anna S. Howard, Abby T. Wooster, and Josephine M. Dolliver, after the following restrictions and reservations have been made, viz. : The amount of each and all dues to my estate, from each or either of my sons-in-law above named, respectively, shall be deducted from that portion of my estate otherwise allotted to his wife at the final settlement of my estate.

"Third. My wife, Sophronia Carter, may select or reserve for her own use and occupancy as above, one bed, and suitable bedding for the same, and what other furniture, pictures, or miscellaneous library she may wish to use and occupy, as above stated. She may also retain, in fee simple, all her marriage presents ; also, her wardrobe of every description, for herself or her heirs. The rest of my miscellaneous library and furniture to be equally distributed, either by sale or otherwise, among my legal heirs. My desire is that my medical library, and apparatus pertaining to my profession, should be preserved until either of my grandsons, at the age of fifteen years, should choose to study and practise my profession, he shall have and hold, in fee simple, all my medical library and apparatus. Provided he will prepare and

furnish gratuitously, from time to time, to the other members of my family, whatever domestic medicines they may wish to keep for their own use; otherwise such property shall be distributed like the rest."

Annexed to the bill were schedules marked B, C, D, E and F, setting forth the indebtedness of his sons-in-law to the testator at the date of the will which was unpaid at his death; also schedules marked G and H, setting forth notes in the hands of third parties upon which the testator was indorser for the accommodation of his sons-in-law Tileston and Stockbridge. This liability was incurred after the date of the will.

It also appeared that the first named defendant was the second wife of the testator, and that he had had no children by her.

Hearing before *Wells, J.*, who ruled that the evidences of indebtedness in schedules marked B, C, D, E and F were intended to be reserved, as provided in the will, until the property was finally distributed, and could not be collected by the administrators; that the notes described in schedules marked G and H were not intended to be "reserved" by the will, and that the administrators should require the same to be paid by the makers thereof. At the hearing, the counsel for the heirs offered to prove that the notes described in the schedules marked G and H were renewals of notes of the same amounts which existed at the time the will was made; but the judge held that such evidence would not affect the ruling as to said notes. The counsel for the heirs also offered to prove, by the declarations of the testator just prior to his decease, that the notes described in schedules G and H were intended by him to be "reserved" under the will, and also declarations of the deceased as to the furniture to be taken for use by his wife; but the evidence was excluded.

The judge also ruled that by the terms of the will the widow had the right to take for her use such furniture of the deceased as she pleased, and that there was no limit imposed by the will upon her selection; and that it was the true intent of the testator, by the will, to give his wife an annual income of twelve hundred dollars as a charge upon both principal and income of his estate. The heirs appealed to the full court.

I. S. Morse & F. S. Heseltine, for the heirs. 1. In determining the meaning of language used by the testator in his will, the

circumstances under which he was placed, and the state and condition of his family, are fair matters of inquiry and proof.

2. The declaration of the testator, just prior to his decease, as to the debts to be held in reserve, and as to the distribution of his furniture, should be received in evidence.

3. In giving to his wife \$1200 annually "from the proceeds of my estate, real and personal," the testator could not have intended to give her the real or personal estate itself. The word "proceeds" means the "income, rent, receipts, rental" of the estate, real and personal.

4. If the construction contended for be the true one, that there is no limit to the furniture to be taken by the widow, and that she may take the whole, the following language of the will, "The rest of my miscellaneous library and furniture to be equally distributed, either by sale or otherwise, among my legal heirs," becomes of no effect.

5. The fact that the testator left a widow alone, without children or family, leads to the conclusion that when he said "My wife may select and reserve for her own use and occupancy as above, one bed, and suitable bedding for the same, and what other furniture and pictures, or miscellaneous library she may wish to use and occupy," he did not intend that she should take all the furniture and books that he left. He intended to limit her to what she needed for her individual use.

T. P. Proctor, for the widow.

GRAY, C. J. Upon a view of all the provisions of this ill drawn and obscure will, we concur in opinion with the justice by whom the cause was heard, that the testator intended that his widow should receive a clear annual sum of \$1200 out of his estate, whether the income of his property (excluding what he directed to be reserved) should be sufficient, or it should be necessary to apply part of the principal for that purpose; and that she should have the right to the use of so much of the furniture of any description as she might select. The oral declarations of the testator are clearly inadmissible to control the construction of his will.

Decree affirmed.

SAMUEL WEST *vs.* ISAAC L. PLATT & another & trustees.

Suffolk. November 17. — 20, 1874. WELLS & DEVENS, JJ., absent.

Persons having in their hands funds of a firm composed of J. R. P. and E. A. B. may be charged as trustees in an action brought originally against I. L. P. and E. A. B., and, after the trustees' answer, changed by amendment into an action against J. R. P. and E. A. B.; and, where no other party has acquired intervening rights, the liability of the trustees in such case is not affected by the fact that since the service of process upon them and before the amendment they have paid over the funds due to the defendants and taken from them a bond of indemnity.

CONTRACT against Isaac L. Platt and Edward A. Boyd, described in the writ as doing business in New York under the name and style of Platt & Boyd. John R. Sowle and Joseph Ward were summoned as trustees. At January term, 1874, of the Superior Court, at which the writ was returnable, the trustees answered that at the time of the service of the writ upon them they had no effects of Isaac L. Platt and Edward A. Boyd in their hands; but in answer to interrogatories filed by the plaintiff, admitted that they had funds of John R. Platt and Edward A. Boyd, copartners of the firm of Platt & Boyd, which funds, immediately after service of process upon them, they paid over to the firm of Platt & Boyd, taking from them a bond of indemnity. After the filing of the trustees' answers to the interrogatories, the plaintiff had leave to amend his writ and declaration by striking out "Isaac L." and inserting in place thereof "John R."

The Superior Court charged the trustees; the defendants were defaulted and execution ordered to issue against the defendants' effects in the hands of said trustees. The trustees appealed.

J. E. Hudson, for the trustees, cited *Hawes v. Waltham*, 18 Pick. 451; *Fisk v. Herrick*, 6 Mass. 271; *Nash v. Brophy*, 13 Met. 476; *Knapp v. Levanway*, 27 Vt. 298; *Willis v. Crooker*, 1 Pick. 204; *Fairfield v. Baldwin*, 12 Pick. 388; *Putnam v. Hall*, 3 Pick. 445; *Emerson v. Upton*, 9 Pick. 167; and contended that *Vermilyea v. Roberts*, 103 Mass. 410, was distinguishable, on the ground that in that case the trustee had not paid over the funds before the amendment, and because the amendment further described the same defendant and not a different person.

O. W. Holmes, Jr., for the plaintiff.

GRAY, C. J. The answer of the trustees admits that they were indebted to a firm of Platt & Boyd. Boyd was correctly named in the writ, and the error in Platt's Christian name was cured by the amendment. The payment by the trustees, after service of the writ, and before the amendment, to the principal defendant, taking a bond of indemnity from him, did not alter their condition. Judgment against the trustees will protect them against any claim of the defendant. No other party having acquired intervening rights, by attachment or otherwise, the trustees were properly charged in the court below. Gen. Sts. c. 142, § 37. *Vermilyea v. Roberts*, 103 Mass. 410.

Judgment affirmed.



116 305
153 153

KNOWLES FREEMAN & others vs. WILLIAM NICHOLS & another.

Suffolk. November 16. — 21, 1874. WELLS & DEVENS, JJ., absent.

An unconditional delivery of goods sold for cash is a waiver of any condition in the contract of sale, and the seller cannot maintain an action for the conversion of the goods against a person who has bought them of the original purchaser.

If goods sold for cash are unconditionally delivered to the purchaser, and the seller brings an action for the conversion of the goods against a person who has bought them of the purchaser, an instruction that where goods are sold for cash the title does not pass to the purchaser, notwithstanding delivery, until the money is paid, or there is a waiver of the cash payment, is erroneous.

TORT for the conversion of certain packages of fish.

At the trial in the Superior Court, before *Dewey, J.*, the evidence tended to show that on December 10, 1872, the plaintiffs, doing business in Boston under the firm name of Knowles Freeman and Co., sold to one Hall, of Lowell, a trader, a large number of packages of fish, of which the lot in question was a part, and that the same were sold for cash; that part of the goods were delivered the same day, and the rest in four or five days afterwards, at the store of Hall, in Lowell; that Hall, a few days after, sold a portion of the fish, and subsequently the plaintiffs called for payment, but no payment was made; and that on

January 1, 1873, Hall sold and delivered the fish, mentioned in the plaintiffs' writ, to the defendants, who paid for the same, knowing nothing of the terms of the trade between Hall and the plaintiffs.

The defendants asked the judge to rule that although the sale was for cash, yet, the fish having been delivered to Hall at his place of business, the plaintiffs could not recover for the value of the same in the hands of the defendants. The judge declined so to rule, but instructed the jury that in a sale of goods for cash the title did not pass to the purchaser, notwithstanding the goods had been delivered, until the money was paid for the same, or there was a waiver of the cash payment.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

G. F. Richardson, for the defendants.

J. C. Kimball, for the plaintiffs.

GRAY, C. J. An unconditional delivery of goods sold for cash is a waiver of any condition in the sale, and the seller cannot afterwards assert a title to the goods. *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446. *Goodwin v. Boston & Lowell Railroad*, Ib. 487. *Haskins v. Warren*, 115 Mass. 514. The evidence at the trial tended to prove a sale for cash, and a delivery without condition. The instruction given to the jury implied that some other evidence of waiver was necessary to prevent the maintenance of the action. *Exceptions sustained.*



ROBERT W. WOODRUFF & others vs. JAMES F. HILL & another.

Suffolk. November 11. — 23, 1874. WELLS & DEVENS, JJ., absent.

Where a negotiable promissory note, made in this Commonwealth and payable here, is indorsed in another state, the liability of the maker to the indorsee is determined by the law of this Commonwealth.

It is no defence to an action by an indorsee against the maker of a negotiable promissory note made in this state and payable here, that the indorsee received the note from the payee in satisfaction of a preëxisting debt, and that the note was delivered by the maker to the payee without consideration, and under an agreement that he should only use it to raise money by pledging it as collateral security to his own debt.

CONTRACT upon a promissory note for \$1352.70. At the trial in the Superior Court, before *Putnam, J.*, the plaintiffs offered evidence tending to prove that the defendants made the note, and that the payees indorsed it before maturity to the plaintiffs, who paid to the payees at the time of the indorsement, and as the consideration therefor, \$699.48 in cash, and credited the payees with \$629.55, in payment of a preëxisting debt due from them to the plaintiffs, the balance of said note amounting to \$23.67, being charged and allowed for interest. The payees of the note and the plaintiffs are residents of New York, and the indorsement was made in that state. The defendants are residents of Boston, in this Commonwealth, and the note was made and was payable in Boston.

The defendants offered to prove that by the law of New York the plaintiffs, upon the above evidence, were not *bonâ fide* holders for value except as to the amount of the money paid by them to the payees at the time of the indorsement; that the note was given by them without consideration to the payees, they agreeing not to use the same except as collateral to their own note, to raise money upon; and that, as between them and the payees, the transfer of the note to the plaintiffs was fraudulent. The defendants did not contend that the plaintiffs had any knowledge of the want of consideration of the note, or of the purpose for which it was given.

The judge ruled that the facts offered by the defendants would not, if proved, constitute a defence, and that the law of this Commonwealth and not the law of New York governed, and instructed the jury to return a verdict for the plaintiffs for the whole amount of the note. The defendants alleged exceptions.

A. A. Ranney, for the defendants.

H. J. Boardman & C. Blodgett, for the plaintiffs.

GRAY, C. J. The note was made in Massachusetts, and the contract of the makers with the payees and with any indorsee thereof was to be performed here, and governed by our law. Story Confli. Laws, §§ 317, 344, 345. By that law, the facts offered to be proved at the trial constituted no defence. *Blanchard v. Stevens*, 3 Cush. 162. *Exceptions overruled.*

WILLIAM B. RICE & another *vs.* CHARLES H. BARRETT & another.

Suffolk. November 21. — 23, 1874. WELLS & DEVENS, JJ., absent.

One who, by representing himself to be a partner, induces another to give credit to the supposed partnership, is liable to him as a partner, whether actually a partner or not.

CONTRACT on an account annexed, against Charles H. Barrett and William A. Barrett, as partners.

At the trial in the Superior Court, before *Bacon, J.*, the only issue was whether Charles H. was a partner with William A. Both the defendants testified that Charles H. was never a partner with William A., but that he was employed by William A. on wages. The plaintiffs' counsel stated that he should not claim to hold Charles H. as partner in fact, but on the ground that he represented himself to the plaintiffs, before the purchase of the goods, to be a partner, and that the plaintiffs sold the goods confiding in such representations; and upon this branch of the case testimony was introduced upon both sides.

The defendant, Charles H., requested the judge to instruct the jury that the plaintiffs could not recover under their declaration, in which they declared against "W. A. Barrett and C. H. Barrett, now or late traders and copartners under the name and style of Barrett & Co.," without proving actual partnership of said William A. and Charles H. Barrett. The judge declined to give this instruction, and instructed the jury that if the defendant, Charles H., represented to the plaintiffs that he was a partner with William A., and if the plaintiffs, confiding in such representations, sold their goods, they would be entitled to a verdict.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

J. S. Abbott, for the defendant.

D. F. Fitz, for the plaintiffs.

GRAY, C. J. One who, by representing himself to a third person to be a partner, induces him to give credit to the supposed partnership, is liable to him as a partner, whether actually a partner or not. Story Part. §§ 64, 65. *Exceptions overruled.*

CITY OF BOSTON vs. NATHAN ROBBINS.

Suffolk. November 23. — 24, 1874. AMES & DEVENS, JJ., absent.

It is within the discretion of the judge to whom a petition for a review is presented, if he is of opinion that the petitioner has a substantial defence to the action upon the merits, which by accident or mistake, and without fault on his part, he has had no opportunity of making, to grant a review without passing in advance upon the questions of law or fact which may be involved in the trial of the case; and to the exercise of his discretion in this respect no exception lies.

PETITION, filed in June, 1873, for the review of a judgment for \$10,208.75 and costs, obtained by the respondent against the petitioner in June, 1872, in an action in the Superior Court, — on the ground that, through mistake, an appearance had not been entered for the petitioner.

The petition recited that the respondent alleged in his declaration that he was appointed trustee by the Probate Court under the Gen. Sts. c. 43, § 77, to receive certain damages payable by the city of Boston for the taking of certain land, for the reason that the owner and tenant thereof could not agree upon their respective proportions.

The petition alleged that the Probate Court had not jurisdiction to appoint the trustee; that the appointment was null and void; and that the respondent had no claim to recover said sum or any part thereof. It also alleged that the petitioner had, prior to the bringing of the action, paid to Job A. Turner, the tenant of the estate taken, the sum of \$3200 in accordance with the award of referees under a reference entered into between Turner and the owners of the estate. By an amendment the petition set forth at length the reasons why it was contended that the Probate Court had no jurisdiction to appoint the trustee. These were in brief: 1. That Reuben S. Wade, the owner of a leasehold estate in the estate taken, was not notified and had no notice of the proceedings in the Probate Court. 2. That the notice to Turner was not served on him personally. 3. That Turner had no notice of the proceedings. 4. That Turner never refused to name a person as trustee to receive and collect damages of the city of Boston.

Hearing in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The respondent objected that the defence set up to the original action in the petition and amendment was inadmissible, and further objected that the evidence offered to sustain the defence was incompetent, upon the ground, among others, that the decree of the judge of probate was not open to impeachment by parol evidence and upon a collateral issue between these parties ; but the judge overruled these objections.

The judge found the following facts : That the respondent recovered judgment against the city of Boston, and execution issued thereupon, and was satisfied by the city of Boston ; that the solicitor of the city of Boston intended to appear, and to defend the said action in behalf of the city of Boston, and that his failure to do so was due to the facts alleged in said petition. The city of Boston had the defence to the action set forth in said original petition and its amendment ; but the judge did not find that Turner had no notice or knowledge whatever of the petition to the judge of probate for the appointment of a trustee, or of the proceedings under it as alleged in the amended petition, but did find that he never expressly refused to name a person as trustee for the purpose of receiving and collecting damages, as alleged in the amended petition ; that the arbitration was wholly without the knowledge of J. B. Simonds, the co-trustee ; that the city paid said Turner the amount of the award on April 4, 1871, taking from Turner a bond of indemnity as its security therefor. At the hearing before the Superior Court, the surviving trustee, J. B. Simonds, offered to ratify and confirm the right of Robbins to sue, and his collection of the money from the city and to protect the city therein.

Upon the foregoing facts the judge ruled that the petitioner had a substantial defence to the action of the respondent upon its merits, and that upon the facts stated, the petitioner was entitled to a review of said action and ordered that the same be granted ; and the respondent alleged exceptions.

C. R. Train, for the respondent.

J. P. Healy & J. L. Stackpole, for the petitioner.

A. A. Ranney, for Turner.

GRAY, C. J. A petition for a review, like a motion for a new trial, is addressed to the discretion of the presiding judge. His rulings upon specific points of law raised at the hearing upon the

petition, such as the power to allow an amendment, or the competency of evidence, may be revised on exceptions. *Davenport v. Holland*, 2 Cush. 1. *Gray v. Moore*, 7 Gray, 215. *Richardson v. Lloyd*, 99 Mass. 475. But if upon a petition in due form, and competent evidence, the judge is of opinion that the petitioner has a substantial defence to the action upon the merits, which by accident and mistake, and without fault on his part, he has had no opportunity of presenting to the court and jury, it is within the discretion of the judge to grant a review, without passing in advance upon the questions of law or fact which may be involved in the trial of the case; and to the exercise of his discretion in this respect no exception lies. *Brewer v. Holmes*, 1 Met. 288, 291. *Hutchinson v. Gurley*, 8 Allen, 23.

Exceptions overruled.

GEORGE SPARHAWK vs. MARY S. SPARHAWK.

Middlesex. October 31. — November 25, 1874.

AUGUSTUS J. THOMPSON vs. NANCY J. THOMPSON.

Suffolk. November 16. — 25, 1874. WELLS & DEVENS, JJ., absent.

The St. of 1874, c. 397, § 1, providing that "all divorces *nisi* heretofore decreed under and by authority of" the St. of 1870, c. 404, "shall be deemed and taken to be, and have the force and effect of, absolute divorces from the bonds of matrimony," and that the justices of this court, upon petition and notice, may authorize the party, against whom such divorce has been granted, to marry again, is unconstitutional and void.

PETITIONS under the St. of 1874, c. 397, § 1, for leave to marry again. Each petitioner alleged that his wife had obtained from him in 1872 a divorce *nisi* under the St. of 1870, c. 404, for the cause, in the first case, of extreme cruelty, and, in the second, of cruel and abusive treatment.

Upon the first petition being presented on August 13, 1874, in vacation, with a request for an order of notice by publication, *Gray*, C. J., reserved for the consideration of the full court the question of law whether upon the facts alleged the petition could be entertained. The case was submitted upon briefs.

G. Sparhawk, pro se.

H. G. Parker, as amicus curiæ, contra.

In the second case, an order of notice having been issued and returned at September term 1874, it appeared that the petitioner had been divorced as alleged and not otherwise; and *Morton, J.*, found that upon the evidence the prayer of the petitioner ought to be granted, if upon the facts above stated it was lawful so to do, and reserved that question for the determination of the full court.

J. D. Long, for the petitioner.

GRAY, C. J. The question presented by these two cases is of the validity of the St. of 1874, c. 397, § 1, by which the Legislature has enacted that "all divorces *nisi* heretofore decreed under and by authority of" the St. of 1870, c. 404, "shall be deemed and taken to be, and have the force and effect of, absolute divorces from the bonds of matrimony; and the justices of the Supreme Judicial Court, upon petition filed by the party against whom such divorce has been granted, and upon such notice as the court shall order, may authorize such party to marry again."

The question thus presented for the determination of the court is of the greatest importance, involving a consideration of the constitutional boundary between the legislative and the judicial departments in this Commonwealth, and deeply affecting the rights and duties of many of its citizens; for if this enactment is invalid, innocent persons, who, relying upon its terms, have contracted a new marriage since its passage, may find that their marriage is unlawful; and if it is valid, husbands and wives, temporarily separated, who intend to return to one another, or some even who are actually reunited, may find themselves absolutely divorced, without any petition by either, and perhaps against the wishes of both.

Owing to the importance of the question, the earliest opportunity was afforded to bring it before the full court, and one of these cases having been submitted upon briefs, the subject has been considered by all the judges.

To declare a divorce between husband and wife involves an investigation of a judicial nature. 2 Kent Com. (12th ed.) 106. *Shaw v. Gould*, L. R. 3 H. L. 55, 91. Whether such a power can be exercised by the legislative department depends upon the

Constitution of the state. The authorities elsewhere upon the subject are fully collected and classified in 1 Bishop on Marriage & Divorce, (5th ed.) c. 39, and in Cooley on Constitutional Limitations, (8d ed.) 109 *§ seq.* But it is unnecessary to consider them, because the provisions of our own Constitution are decisive.

The 30th article of the Declaration of Rights prefixed to the Constitution declares that in the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them. The third chapter of the Constitution, entitled "Judiciary Power," contains this article: "All causes of marriage, divorce and alimony, and all appeals from the judges of probate, shall be heard and determined by the Governor and Council, until the Legislature shall by law make other provision." The word "causes" is evidently here used as equivalent to "controversies" or "cases;" and the terms, as well as the position of this article in the Constitution, manifest the intention of the people, in establishing a frame of government, to commit the hearing and determination of all cases of divorce and probate appeals to the judiciary only. The reason for temporarily entrusting the jurisdiction of these matters to the Governor and Council doubtless was that it had been vested in them under the Province Charter.

The probate jurisdiction was reserved to the Governor and Council by the terms of the Charter itself. One of the earliest acts of the General Court of the Province provided that "all controversies concerning marriage and divorce shall be heard and determined by the Governor and Council;" and another act, not long after, authorized them, upon proof of long absence of a husband or wife without being heard of, to declare that the other party should be deemed single and unmarried, and to grant leave to that party to marry again. Prov. Sts. 1692-93, (4 W. & M.) c. 25, § 4; 1698, (10 W. III.) c. 19; 1 Prov. Laws, (State ed.) 15, 61, 354; Anc. Chart. 32, 248, 322. The Governor and Council having been thus constituted a Supreme Court of Probate, and a court for the decision of cases of marriage and divorce, their proceedings as such, though not according to the course of the common law, were judicial, and were determined by a vote of a majority of those present, even if the Governor was in the minority. This was settled by the Privy Council in England, after long

differences between the Governor and the Council of the Province, as appears from a message of Governor Hutchinson and the answer of the House of Representatives in 1774, the material parts of which are printed in a collection of Massachusetts State Papers, 1765-1775, published in Boston in 1818, 410, 411. See also Message of Governor Pownall to the Council in 1760, Quincy, 578; *Peters v. Peters*, 8 Cush. 529, 541.

The only instance, known to us, in which the Legislature of Massachusetts passed an act dissolving a marriage, since the Province Charter and before the adoption of the Constitution, was during the Revolutionary War, after the departure of the royal Governor and Lieutenant Governor, and while there was no court in the State authorized to grant divorces. St. March session 1780, c. 7; Mass. State Laws, 1775-1780, 287.

The Legislature, in the execution of the power conferred upon it by the Constitution of the Commonwealth, provided by the St. of 1783, c. 46, § 3, that this court should be the Supreme Court of Probate; and by the St. of 1785, c. 69, that all questions of divorce and alimony should be heard and tried by this court, and that its decrees should be final; and the same jurisdiction has remained in this court to the present day. In 1792, Governor Hancock disapproved a resolve granting a divorce, as being beyond the constitutional power of the Legislature; and although a few similar resolves or acts have been passed in recent times, they have never been recognized as valid by this court. *Shannon v. Shannon*, 2 Gray, 285, 287. *White v. White*, 105 Mass. 325.

The Legislature undoubtedly has the power by general laws to specify the grounds and regulate the forms of divorce in future cases; and even to authorize this court to entertain applications for an absolute divorce for causes already occurred, and which at the time of their occurrence were grounds for a divorce from bed and board only. *Stevens v. Stevens*, 1 Met. 279.

But the Legislature has no power under the Constitution of Massachusetts to grant divorces. Nor can it substantially alter the nature and effect of judgments or decrees already rendered by the courts, without violating the Constitution which prohibits it from exercising judicial power. *Denny v. Mattoon*, 2 Allen, 361.

The General Statutes, like the earlier statutes of the Commonwealth, provided that for certain causes this court might grant a divorce from the bond of matrimony ; for certain other causes, a divorce from bed and board, and also, after such a divorce from bed and board, and the parties had lived separately for five consecutive years, a divorce from the bond of matrimony on the petition of the party who obtained the divorce from bed and board, or, after they had lived separately for ten years, on the application of either party. Gen. Sts. c. 107, §§ 6, 7, 9, 10.

The St. of 1870, c. 404, substituted, for the decree of divorce from bed and board, a decree of divorce *nisi* under the provisions of that act, to become void if the parties should live together again at any time before it was made absolute, and to be made absolute by the court, on the application of either party, and proof that the parties had continued to live separately for five (or, at the discretion of the court, three) consecutive years next after the decree *nisi*. That statute did but change names and forms of proceeding, and shorten the time within which, after a decree of separation, an absolute and final decree of divorce might be rendered. The decree of divorce *nisi* was in substance and effect a divorce from bed and board ; it did not absolutely dissolve the marriage ; and it could be made absolute, even as regarded the innocent party, only on a further judicial hearing and determination upon a new petition by one party and notice to the other. *Bigelow v. Bigelow*, 108 Mass. 38. *Graves v. Graves*, Ib. 314. *Edgerly v. Edgerly*, 112 Mass. 53. *Garnett v. Garnett*, 114 Mass.

The St. of 1873, c. 371, expressly repealed the provisions of the St. of 1870 as to granting a divorce *nisi* and making the same absolute, and the effect of the parties living together again ; and authorized this court to grant an absolute divorce from the bonds of matrimony, either for any cause for which a divorce *nisi* might then be granted, or on the petition of any party to whom a divorce *nisi* or from bed and board had been decreed, with this limitation only, that when the cause was desertion, the desertion, in the first alternative, and the living apart since the qualified divorce, in the second alternative, must have continued three consecutive years. This statute, while it multiplied the causes which would warrant the granting of a divorce from the bonds of matri-

mony, so as to include those which had previously been grounds of divorce *nisi* or from bed and board only; and abridged the time in which a party who had obtained a divorce of the latter character might apply for an absolute one; still left the question, whether an absolute divorce should be granted, to be determined by the judicial discretion of the court, as applied to the facts of each case.

The provision of the St. of 1870, which declared that a decree of divorce *nisi* under that act should become void if the parties lived together again before it was made absolute, having been repealed by the St. of 1873, such cohabitation, after the passage of this statute, would not of itself avoid or annul the decree of divorce *nisi*; but it was a fact to be allowed such weight and effect, in connection with the other circumstances of the case, as the court, at the hearing of a petition for an absolute divorce, should adjudge it to be legally entitled to.

The provision of the St. of 1874, c. 397, § 1, that "all divorces *nisi* heretofore decreed" under the St. of 1870 "shall be deemed and taken to be and have the force and effect of absolute divorces from the bonds of matrimony," goes beyond all former statutes. Giving it effect according to its terms, husbands and wives, who, having been divorced from bed and board under the St. of 1870, had come together again since the St. of 1873 took effect, would find their marriage dissolved, and their children, born or begotten during such cohabitation, illegitimate. And, apart from such extreme cases, it would, in all to which it purports to apply, sever, without judicial process, hearing or decree, the existing bond of matrimony between the parties; make those, who were still husband and wife, no longer such; and effect this result by attributing to judicial decrees, rendered before its passage, a force and operation which they did not have when they were made. We are unanimously of opinion that this exceeds the power of the Legislature under the Constitution of the Commonwealth.

The further provision of the same section, that the court, upon petition filed by the party against whom a divorce *nisi* has been granted, may authorize such party to marry again, is so based upon and connected with the previous provision, that it cannot be deemed to have been intended by the Legislature to have any separate force. The whole section is therefore unconstitutional and

void. *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray, 84. To hold otherwise would be to impute to the Legislature the purpose that a man who was still the husband of one wife might be authorized by this court to marry another.

Petitions dismissed.

CAROLINE A. CHICKERING vs. GLOBE MUTUAL LIFE INSURANCE COMPANY.

Suffolk. March 18. — September 7, 1874. November 25. — 27, 1874.
COLT & ENDICOTT, JJ., absent.

A policy issued by an insurance company on the life of A. contained a provision that if the premiums should not be paid on or before the days when due, at the office of the company, or to agents when they produce receipts signed by an officer of the company, the policy should cease. On the issue whether a premium due on a certain day had been paid to an agent of the company, there was evidence that the agent was authorized to collect premiums, and after deducting his commissions to invest the remainder in certified checks which were to be sent with his account to the company at regular periods; that a few days before the premium became due the agent was indebted to the firm of which A. was a member, to an amount exceeding the premium; that it was the practice of the members of the firm to pay their private debts with funds of the firm, and A.'s premiums had previously been so paid; that the agent stated to A. that he would take care of the premium, and after the day when it became due stated to him that he had done so; that the agent had received the receipt signed by an officer of the company, and had so informed A., but retained it as a voucher against A.; that the agent sent the company, after the death of A., a check for an amount including this premium with his account; but the company refused to receive it, and returned him a check for the amount of the premium, and demanded the receipt. *Held*, that the evidence was sufficient to warrant the jury in finding that funds, which the assured had a right to control and apply to the payment of the premium, had come into the hands of the company's agent before the premium became due; that the assured directed that the agent should apply so much of said funds as was necessary to that payment; and that the agent did so apply it, and that the jury would be warranted in finding a verdict for the plaintiff.

CONTRACT on a policy of insurance for \$20,000, dated February 12, 1870, upon the life of Thomas E. Chickering, payable to the plaintiff, his wife. By the terms of the policy the sum of \$329.60 was to be paid on or before the 9th days of February, May, August and November, in every year during the continuance of the

policy. Among the conditions forming a part of the policy were the following :

“ 3d. If the said premiums shall not be paid on or before the days mentioned for the payment thereof, at the office of the company, in the city of New York, (unless otherwise expressly agreed in writing,) or to agents when they produce receipts signed by the president, vice-president or secretary, then, in every such case, the said company shall not be liable for the sum assured, or any part thereof, and this policy shall cease and determine.”

“ 9th. Agents of the company are not authorized to make, alter or discharge contracts, or waive forfeitures.”

Trial before *Wells, J.*, who reserved the case for the consideration of the full court upon a report in substance as follows :

Thomas E. Chickering died on February 14, 1871. The answer set up in defence the non-payment of the premium which became due on the 9th of that month. It was admitted that the premium was not paid, unless in the manner shown in the following evidence :

The plaintiff put in the deposition of Edward H. Osborne, a copy of which was made part of the report. He testified, in substance, as follows: “ I was agent of the defendant company from February 1, 1870, to December 31, 1872, and had the sole management of the business in Boston. I had previously been the agent of Chickering & Sons, and after I became an agent of the defendants I bought pianos from time to time for my friends, from Chickering & Sons, and rendered accounts to the firm of such purchases. I stated to Thomas E. Chickering that I should take care of his premium, and I did so, the payment prior to his death. I saw him on several occasions prior to the premium becoming due, and subsequently, and told him that his premium was cared for. I made such a statement to him before the premium of February 9, 1871, became due. I should say the same week. At that time I had received the signed receipt for the premium from the company ; but it was not good until countersigned by myself. I communicated the fact to Thomas E. Chickering that I had received the receipt from the company in the usual form of a notice. I had several conversations with him about it. He remarked to me that his premium was due. I said, ‘ Yes, sir, but your premium is taken care of.’ This was the sub-

stance of subsequent conversations. It was a matter of conversation from time to time. I had charge of his life policies, and I had been his adviser from time to time, and told him that he could depend upon me to take care of his premiums. Before February 9, 1871, he said to me, 'My premium is due on the 9th.' I said, 'Yes; but you need give yourself no uneasiness about it, as I'll take care of it for you.' At that time I was indebted to the firm of which he was a member, on my running account. I do not remember to what extent the balance was against me; it was for more than the amount of the premium. I had a conversation with Thomas E. Chickering as to this balance due, in connection with the payment of the premium; and I said to him that I would come in at my leisure, and we would have a settlement of our affairs. I saw him the week he died, on several occasions. I saw him on Saturday night prior to the Tuesday morning on which he died. He died at one o'clock A. M. This was the last time I saw him. He then spoke of his premium, and asked me if it was all right. I said, 'You know that I have always told you that I would take care of your premium.' I took supper with him and his family that evening at the Tremont House.

"On February 15, 1871, being in New York, I made and signed the following statement, in writing, at the request of the company: 'New York, February 15, 1871. To the officers of the Globe Mutual Life Insurance Company. I have to report to you the death of Colonel Chickering, insured under policy No. 18788. The premium became due on the 9th instant; but finding it more convenient for him to pay the premium the first of the coming week, I told him I would take care of it for him, though I did not deliver the receipt to him. The premium would have been included in my report of this date (15th) as I deemed the premium paid and myself entirely responsible therefor. Colonel Chickering died Monday night, of supposed apoplexy.'

"While in New York, I saw the second vice-president, John A. Hardenbergh, and the president of the company, Pliny Freeman. I saw them on February 15. I had a conversation in regard to Colonel Chickering's death with John A. Hardenbergh; it is embodied in a letter to the company. This letter was written on the spot, and handed to the company. The officers desired

me to embody my statement in writing, and I did so. There was other conversation with Hardenbergh. He said there was one question he would like to ask me: Had you seen, instead of the notice of the death of Colonel Chickering, that he had surreptitiously left the country, would you deem yourself responsible for the premium? I told him that I should. He asked me why. I told him because I had promised him I should pay it. I told him I hoped he understood the matter fully, and that I should insist upon sending the premium to the company. He remarked to me that he could see no objection to my doing so. I then said to him, that 'By virtue of my contract with the company my report should have been sent to them that day, but of course being in New York it would have to be delayed one day.' He said that was all right. The president was in the room, in and out of the room. Mr. Hardenbergh's and Mr. Freeman's desks were in the same room. Whether he was cognizant of conversation, I don't know. John A. Hardenbergh was then the active manager, and was the one who dealt chiefly with me. The company was supposed to be managed by a board of trustees. I did not give up the receipt to Thomas E. Chickering, because that was my voucher in settlement with his estate, that I had paid so much on his account. I made a return to the company on February 16 or 17, 1871, and it included this premium. On February 22, I received a demand from the company for the receipt, and I sent it to the company, and received from it a check for the amount of the premium."

Cross-examined. "I did not say, in my statement to the company of February 15, that Chickering said he found it more convenient to pay the premium on the first of the coming month. I said, 'I finding it,' not Colonel Chickering finding it. I found it out, because my connection with the Chickering company had been such that I knew that at the last of the week they had a great deal of money to pay. I told him not only at that time, but on several occasions, that I would take care of it, without any request of his. It was understood that I would. I did not countersign the renewal receipt, or credit Colonel Chickering with any payment for February of 1871, or before February, or do anything respecting the payment due at that date, except to say to him that I would take care of it. It was not my habit to countersign any receipts

until they were delivered. I had no agreement with Colonel Chickering to pay this premium and charge it in my account with Chickering & Sons. It was the general understanding between us. It was not any more than what was embodied in different conversations we had had together at different times. There never was any conversation in which it was agreed that it should be charged in the account with Chickering & Sons. My understanding was, that any charge I had against Colonel Chickering should be set off against any charge Chickering & Sons should have against me, and I presumed that this was Colonel Chickering's understanding. I have not settled the account between me and Chickering & Sons then due, because I've had no occasion to settle the suit. I have a receipt for moneys I paid for the Colonel previously, and no demand has been made on me, nor have I demanded a settlement from the Chickerings. I do not know how the account stands."

By the contract of this witness with the defendant, appointing him its agent, he agreed to devote his exclusive time in the work of soliciting applications, collecting premiums, and delivering policies. The contract contained the following clauses: "That he will make a correct statement on the first and fifteenth of each and every month, of all the moneys received by him or his agents, and after deducting his commissions as above mentioned, he will accompany said statement with a remittance in certified check or draft upon New York for all balances due to said company, and will as agent comply with all the rules and regulations of said company, a violation of any of which this agreement shall be null and void, at the option of the company." "The authority of said agent shall extend no further than is above stated. He shall not make, alter nor discharge any contract, nor waive forfeitures, nor receive any moneys due or to become due to said company, except on receipt signed by some officer of the company, or other written authority from some officer of the company; and shall receive no further remuneration for any service than is above stated."

The plaintiff also introduced the testimony of Charles F. Chickering, who testified that he was a brother of the deceased, and that they had been members of the firm of Chickering & Sons; that none of the partners of the firm kept private bank accounts;

that their private bills were paid by the cashier of the firm by checks signed by the firm; that debts due the firm were offset against private debts due from the partners. He also testified that he found the policy declared on immediately after his brother's decease; that he went to see Osborn early the week following, and demanded a blank for proof of loss; that Osborn said he would send on and have one the next morning; that he did not receive one from Osborn, and at his request called on the president of the company in New York; that the president told him that this was a peculiar case, and must go before the board, and that he must make his application to Osborn; that this call on the president was about four weeks after his brother's death; that he should have made a demand sooner, if Osborn had not promised to furnish blank form for proof. He also testified that he asked Osborn why he did not give his brother the receipt for the payment of the premium, and he replied that he held it as a voucher against his brother.

Joseph E. Clapp testified in behalf of the plaintiff that he had been for fifteen years a book-keeper of Chickering & Sons; that he had paid the previous premiums on this policy with the checks of Chickering & Sons; that he was accustomed to pay private debts of partners by checks of firm. He also testified that he knew Osborn; that Osborn came into the office sometime previous to February 9, 1871, and said he had some money for the firm, thirty dollars over and above the amount of said Chickering's life insurance premium. At the time of the death of Thomas E. Chickering, Osborn owed the firm about seven hundred and fifty dollars. The witness also produced the account of Osborn on the books of the firm, from which it appeared that Osborn paid five hundred dollars November 23, 1870, and one hundred and fifty dollars February 6, 1871.

Dr. John H. Wilcox testified that he met Osborn at a supper at Thomas E. Chickering's on the Saturday night before he died; that he overheard Osborn say to Chickering that the matter of the life insurance was all right, all correct; that this was said in answer to a question by Chickering.

The defendant and the plaintiff, by agreement, reserved the right to object to the competency of any of the evidence. After the plaintiff's evidence was all in, the defendant asked the judge to instruct the jury as follows:

"1. That the evidence offered and produced by plaintiff, so far as legally admissible, in relation to the conversations and transactions between the witness Osborn and Thomas E. Chickering, does not in law, if taken to be true, establish a payment to the defendant of the premium due on the policy February 9, 1871, pursuant to the terms and conditions thereof.

"2. That the evidence of the plaintiff, so far as legally admissible, does not in law show or establish a waiver by the defendant of the non-performance in regard to the payment of said premium at the time and in the manner required by the policy, nor a waiver of the forfeiture which resulted from such non-performance.

"3. That the plaintiff's evidence, so far as legally admissible, does not by law prove or establish a ratification by the defendant of the alleged arrangement or agreement by which the witness Osborn agreed with Thomas E. Chickering to take care of or pay said premium.

"4. That upon all the evidence offered by the plaintiff she is not in law entitled to recover in this action."

The judge decided that the second and third prayers for instructions were correct and should be given to the jury; and thereupon, by agreement and consent of parties, the case was taken from the jury and reserved for the consideration of the full court, with the agreement, that if upon so much of the evidence introduced as is competent and admissible, the jury would be warranted in finding a verdict for the plaintiff, judgment is to be entered for the plaintiff for the amount of the policy and interest from May 15, 1871; otherwise judgment is to be entered for the defendant. If, however, the court shall determine that the ruling of the presiding judge as to the second and third prayers was erroneous, the case is to be submitted on these points to a jury.

The case was argued in March, 1874, by *H. W. Paine & R. D. Smith*, for the plaintiff, and *S. Bartlett & W. A. Munroe*, for the defendants; and judgment afterwards ordered for the plaintiff. The defendants thereupon moved for a rehearing, and this motion was argued in November, 1874.

R. D. Smith, for the plaintiff, cited *Hoyt v. Mutual Benefit Insurance Co.* 98 Mass. 539; *Bridges v. Garrett*, L. R. 4 C. P. 580; *S. C. L. R.* 5 C. P. 451; *Catterall v. Hindle*, L. R. 1 C. P. 186; *S. C. L. R.* 2 C. P. 368; *Sweeting v. Pearce*, 9 C. B. N. S. 534; *Butterworth v. Cotesworth*, cited 9 C. B. N. S. 538.

S. Bartlett & G. O. Shattuck, for the defendants. 1. In the absence of usage or express contract, an agent cannot receive payment of a debt due his principal by offsetting his private debt. *Russell v. Bangley*, 4 B. & Ald. 395. *Todd v. Reid*, Ib. 210. *Bartlett v. Pentland*, 10 B. & C. 760. *Scott v. Irving*, 1 B. & Ad. 605. *Barker v. Greenwood*, 2 Y. & C. Exch. 414. *Stewart v. Aberdeen*, 4 M. & W. 211. *Young v. White*, 7 Beav. 506. *Lererson v. Lane*, 13 C. B. N. S. 278. *Piercy v. Fynney*, L. R. 12 Eq. 69.

2. The instrument creating the agency in this case guardedly provides against the collections becoming the money of the agent, and against any use of them by way of set-off or otherwise; and inasmuch as Thomas E. Chickering knew that the sum set off was the defendants' property, he was put upon inquiry as to the authority of the agent, the result of which inquiry, if made, would have negatived the authority, and if not made, he is affected by all the consequences which would have resulted from such inquiry.

3. There is no pretence that there was any evidence in the nature of the agency, or of any custom or usage, or of any transaction under the agency, from which the assent of the principal to the set-off could be inferred.

AMES, J. The question raised by this report is whether there was any evidence upon which the jury would have a right to find that the premium due from the assured on the ninth day of February, 1871, was paid according to the terms of the policy. Even upon the assumption that Osborn, as the defendants' agent, had no authority to waive or modify those terms in any respect, a seasonable payment to him was all that it was necessary for the plaintiff to prove. He was the agent of the corporation, not merely for this special transaction, but generally, for the collection of all premiums that became due to them within a certain territory; and whatever money came to his hands in this way was undoubtedly to hold in trust, as a distinct fund; but he held it as an accounting agent, and not as a clerk or messenger of the defendants. The mode of accounting, as pointed out in the contract by which he was appointed, was not by forwarding the specific and identical money which he from time to time received in that capacity; but after reserving out of it the commission which was to be the compensation for his services, by investing the re-

mainder at regular and prescribed periods, in certified checks or drafts payable in the city of New York, and remitted to the defendants with his account.

It appears from the report that he charged himself, in his return to the defendants, with the premium in question, and included it in the certified check with which, according to his regular practice, he had undertaken to pay the balance apparently due to them. The amount of the premium, therefore, actually came into their hands in regular course of business; but on the ground that it was not seasonably paid to their agent they have repaid it to him, and now insist that it was not paid by the assured in conformity to the terms of the policy.

The evidence reported had a tendency to show that a few days before the premium became payable, Osborn had funds in his hands, belonging to the firm of Chickering & Sons, to an amount largely exceeding the premium. He had been the agent of that firm for the sale of pianos, and in that capacity had made sales, and collected the proceeds of these sales. Whatever money he had collected in that way came to his hands as their agent, and he held it in trust for them. The funds in his hands were substantially their funds, and they had a right to direct to what uses they should be applied.

No question is raised by the defendants as to the right of the assured to pay his own personal debt from the funds of the firm. It appears that such a proceeding was in accordance with the ordinary practice of the partners, and that it had been the habit of the assured to pay the premiums on this policy, as they became due, in that very manner.

It is not contended that the fact, that the premium had become due, was forgotten by the assured, or that the necessity of prompt and punctual payment was overlooked. It is clear on the evidence that an arrangement of some sort was proposed and discussed for the purpose of meeting that necessity, and the jury might have found from the evidence that Chickering not only relied upon that arrangement, but had every assurance that it had been carried into effect. If there were funds actually in the hands of Osborn belonging to the firm, and which he was ready at any moment to pay to the assured, and which the assured had an absolute right to control, that control might as well be exercised

by an oral direction to Osborn to apply a portion of the funds to the payment of this premium, as in any other way. If, in addition to such oral direction, there was an express promise by Osborn that he would pay the premium, and after that an express assurance that he had done so, the assured might not unreasonably suppose that he had done all that was required.

It is objected that the effect of such an arrangement would be to render Osborn a debtor to the corporation without their consent; but it is difficult to see how it could have any effect in that respect, to distinguish it from a payment in any other mode. If it were an actual placing of money in the hands of their agent, it would add to the fund which he held in trust for the defendants, and would not make him their debtor in any other capacity or mode.

There was evidence, also, as to a declaration of Osborn, at about that time, that money had come into his possession exceeding the premium by thirty dollars — a declaration having a tendency to show a specific application of the money by him to that precise purpose. And there was also evidence, not contradicted, that the customary receipt, as a voucher of the payment, had come to his hands in the regular course of business; and although it had not been delivered by him to the assured, that fact was explained by his testimony that he retained it only as a voucher for his own account with the firm.

It is manifest also that in rendering his account to the defendants, he included this premium in the balance which he undertook to pay by the "certified check or draft, payable in New York," required by his contract with them; and although this was not done with literal punctuality as to time, whatever delay occurred was consented to by the defendants.

The evidence was sufficient to warrant the jury in finding that funds which the assured had a right to control, and apply to the payment of the premium, had come into the hands of the defendants' agent before the premium became due; that the assured directed that the agent should apply so much of said funds as was necessary to that payment, and that the agent did so apply it. Such facts would show a payment of the premium, within the meaning of the policy.

According to the terms of the report, therefore, there must be
Judgment for the plaintiff.

JOHN DEMERRITT vs. ELLEN M. RANDALL & others.

Suffolk. November 19. — 21, 1874. WELLS & DEVENS, JJ., absent.

On the issue whether a will offered for probate was executed by the testator, the opinion of experts in handwriting as to the genuineness of the signature, formed by comparing it with other instruments proved to have been signed by the testator, is competent evidence, and such witnesses may give the reasons of their opinion.

How many times the same question shall be repeated on cross-examination, and how far the witness shall be compelled to answer, are matters within the discretion of the presiding judge, and not subjects of exception.

APPEAL from a decree of the Probate Court, admitting the will of Sarah S. Ireland to probate.

At the trial before *Morton, J.*, one of the questions in issue was, whether the testatrix executed the will; the attesting witnesses and two other persons testifying for the proponent that they were present and saw her sign the whole of her name to the instrument.

The appellants put in evidence a prior will and codicil of the said Ireland, which were admitted in evidence. The proposed will was also put in evidence. The appellants then called experts in handwriting, who testified that in their opinion, formed by comparison of the signatures in these instruments, and in other instruments proved to have been signed by the testatrix, she did not sign the proposed will, that it was not her signature, and was not signed by the same person who signed the other instruments in evidence. One of these experts, one Southworth, was asked, upon comparing the signatures to the other instruments in evidence, and referred to as standards with the signature to the proposed will, "Which exhibits the greater ease and facility of writing?" His answer was, "The signature to the will shows the most ease, the most skill and cultivation of the art of penmanship." This question and answer were admitted under objection.

One Sawyer, another expert, testified, under objection, that the signature to the will was not, in his opinion, written by the same hand as the signatures to the other writings; that it was entirely unlike, and could not have been written by the same hand. Other experts, witnesses for the appellants, were asked, under objection, similar questions, and gave substantially the same answers.

In the cross-examination of one of the experts for the appellants, who had given his evidence in the same way against the signature of the will, he was asked whether he had compared the signature with the rest of the writing on and in the will. He said he had not. He was asked further to look at and examine the rest, and state whether the handwriting in the signature to the will was the same or similar to any of the rest found on the instrument, or in the body of it. He declined to express an opinion, and said he could not express an opinion without a critical examination. He was asked repeatedly in the cross-examination to look at the rest and compare the handwriting upon the stand, or to take it and look at it so as to express an opinion, or to express any opinion about it, and his attention was called to it; but he repeatedly declined doing so, stating that he could not form an opinion without a critical examination of the instrument. The question was repeated again, and the judge ruled that it should not be again put, and declined to order the witness to answer further, to which exceptions were alleged.

The executor proved in whose handwriting the rest of the instrument was. The jury found for the appellants, and the executor alleged exceptions.

A. A. Ranney, for the executor.

H. G. Hutchins, for the appellants.

GRAY, C. J. The experts were rightly permitted to testify to their opinion of the genuineness of the signature of the testatrix, and to their reasons for such opinion. *Moody v. Rowell*, 17 Pick. 490. *Commonwealth v. Webster*, 5 Cush. 295. *Keith v. Lothrop*, 10 Cush. 453.

How many times the same question should be repeated on cross-examination, and how far the witness should be compelled to answer, were matters within the discretion of the presiding judge, and not subjects of exception. *Exceptions overruled.*

SAMUEL BENTLEY vs. CHARLES WARD.

Suffolk. November 12. — 14, 1874. WELLS & DEVENS, JJ., absent.
November 25. — 28, 1874. COLT & ENDICOTT, JJ., absent.

Under the St. of 1864, c. 111, requiring questions of law to be entered in this court "as soon as may be" after they are reserved by report or otherwise, an excepting party cannot as matter of right enter his exceptions in this court six months after they are allowed; but the court may, in its discretion, allow them to be entered, on his petition, supported by proof that the failure to enter them seasonably was owing to accident or mistake.

On the issue whether labor and materials were furnished on a contract with the defendant or a third person, the defendant put in evidence a memorandum book of the plaintiff, in which the charges were made from day to day to the third person. The plaintiff was then allowed, under objection, to put in evidence his journal, and ledger, posted from the journal, but neither of them from the memorandum book, in both of which the charge was to the defendant after the work was done. *Held*, that the journal and ledger were improperly admitted in evidence.

CONTRACT. At the trial at April term 1874 of the Superior Court, before *Bacon*, J., the plaintiff obtained a verdict, and exceptions were alleged by the defendant and allowed by the presiding judge on May 4, 1874, but were not entered in this court until November 11, being the second day of the usual fall session for the argument of questions of law arising in this county. On that day the defendant undertook to enter the exceptions and papers in this court; and the plaintiff filed a petition alleging that the exceptions had not been prosecuted nor the papers transmitted to this court "nor entered (unless to-day and without consent) according to law," and praying that the exceptions might be dismissed.

A. R. Brown, for the plaintiff.

H. W. Putnam, for the defendant.

GRAY, C. J. By the General Statutes, exceptions were required to be entered in the Supreme Judicial Court for the Commonwealth within twenty days from the final adjournment of the term at which they were taken. Gen. Sts. c. 115, § 12. If the excepting party neglected to enter them in this court, the adverse party might enter a complaint and have the judgment below affirmed. c. 112, § 16. If, by mistake or accident, the exceptions were not duly entered, or a complaint founded on the omission to enter them had not been made by the adverse party, this

court, upon petition filed within a year, and upon such terms as it deemed just and reasonable, might allow the exceptions or complaint to be entered, as the case might be. § 17.

By the St. of 1864, c. 111, § 1, exceptions are required to be transmitted to and entered in this court "as soon as may be" after the question of law is reserved and duly made matter of record in the court in which the action is pending; and by § 3, so much of the Gen. Sts. c. 115, § 12, as is inconsistent herewith is repealed. The whole effect of this statute is to allow exceptions to be entered in this court at any time after they are allowed and filed, without waiting for the close of the term at which they are allowed; and, by the words "as soon as may be," to substitute a reasonable time for the definite period of twenty days.

While uniformity of practice in matters of this description is very desirable, what shall be deemed a reasonable time must depend in some degree upon the circumstances of particular cases, and cannot be absolutely governed by general rules. In *Priest v. Groton*, 103 Mass. 580, the statutes and decisions upon the subject were fully considered by the court; and it was held that exceptions allowed on the last day of a term of the Superior Court, and entered in this court twenty-seven days afterwards, and more than a month before the next law term, at which in the usual course they would be argued, were seasonably entered. As to exceptions allowed nearer the beginning of a regular term, or usual session for the argument of questions of law from the county in which they arise, more prompt action might be required of the excepting party. And we are of opinion that in any case, in which no special circumstances are shown, exceptions not entered in this court within a month after the final adjournment of the term at which they were allowed cannot be deemed to be entered "as soon as may be," as required by the statute; and that in the case at bar in which six months have elapsed since the allowance of the exceptions, and four or five since the final adjournment of that term, the party taking the exceptions is not entitled as matter of right to enter them in this court.

Where the delay has been occasioned by mistake or accident, the excepting party must seek relief in the discretion of the court, and upon such terms as it may impose, by petition for leave to enter the exceptions, under the Gen. Sts. c. 112, § 17: or, if

the judgment has been affirmed on the complaint of the adverse party, then by petition for a review, under the Gen. Sts. c. 146, § 21. *Bowditch Ins. Co. v. Winslow*, 3 Gray, 415.

As the defendant's counsel appears to have acted under a misapprehension of his client's rights, and the plaintiff's petition is in an unusual form, the rights of both parties will be best secured by allowing it to stand over for a day or two. Opportunity will be thus afforded to the plaintiff, on the one hand, to enter a complaint in due form for affirmation of the judgment; and to the defendant, on the other, to file a petition for leave to enter the exceptions. Unless such a petition is filed forthwith, supported by affidavit, and showing reasonable cause for allowing the exceptions to be now entered, a complaint for affirmation of judgment will be granted as of course. *Ordered accordingly.*

Upon the petition of the defendant, and proof that the failure to enter the exceptions seasonably was owing to an excusable mistake, the exceptions were allowed to be entered; and they showed the case to be as follows:

CONTRACT upon an account annexed for labor and materials furnished the defendant in putting soil-pipes, gas-pipes and water-pipes into a block of six houses and three stores.

It was conceded on both sides that the soil-pipes were put in and completed on or before April 16, 1872; the gas-pipes on or before April 20, and that the rest of the plumbing work was begun soon after May 16, 1872, and completed August 20; also, that all the items of labor and materials alleged in the bill of particulars were actually furnished by the plaintiff, and that the prices claimed were correct.

The only question submitted to the jury was whether the plaintiff's contract to do the first-mentioned job was made with the defendant, or with William Atton, a son-in-law of the defendant.

The plaintiff put in evidence to show that in March or April, 1872, he contracted with the defendant to furnish and put in the said pipes into said block; that he gave the defendant the prices at which he would furnish and put in the soil-pipes and gas-pipes, which prices the defendant agreed to; that the plaintiff then said he would give the defendant the prices for the water-pipes as soon

as he could make the necessary estimates ; and that subsequently, on May 16, he gave the defendant said prices, and the latter agreed to them.

The defendant put in evidence that he had never contracted for any of the said labor or materials, and that said Atton had contracted for them with the plaintiff in the same manner, at the same time and on the same terms as the plaintiff claimed that the defendant had.

The defendant offered in evidence, for the purpose of showing to whom credit had been given by the plaintiff, a memorandum book or " blotter," kept by the plaintiff, in which the latter testified that he wrote down, from day to day, the stock which went out of his shop on different jobs, and the names of the workmen who worked upon the several jobs, and the days of the month and the number of days which each man worked, and placed at the head of each page the name of the person to whom the materials and labor were furnished. On two successive pages of this book were memoranda by the plaintiff, of the above character, under the heading, " Atton, 6 houses, 3 stores ; " and in the upper left-hand corner of the page was a memorandum of the prices per house at which the plaintiff had agreed to do the work above mentioned. The court admitted this, and then allowed the plaintiff to put in his day-book or journal. The plaintiff testified that he did not put down all his charges for labor and materials in this book, for the reason that it would cumber it up too much, and that all the charges which he had put down on this job were under three entries, bearing dates April 16, April 20, and August 19, 1872, and made when the different parts of the work were completed. These charges were made to and in the name of the defendant, and the book was admitted for the purpose of rebutting and controlling the effect of the aforesaid memorandum book or blotter. To the admission of this evidence the defendant excepted.

The plaintiff then offered, for the same purpose, his ledger, in which the charges for the labor and materials were also made to the defendant, and which the plaintiff testified that he kept in the regular and ordinary manner of keeping a ledger, by posting from the aforesaid journal or day-book. This was admitted, and the defendant excepted.

The plaintiff testified that he did not post either the journal or ledger from the memorandum book.

The jury found for the plaintiff, and the defendant alleged exceptions.

H. W. Putnam, for the defendant.

A. R. Brown, for the plaintiff.

GRAY, C. J. The entries in the journal and ledger, not having been made contemporaneously with nor posted from the memorandum book introduced by the defendant, were independent declarations of the plaintiff in his own favor, and were incompetent evidence to prove to whom he gave credit, or to rebut or control the entries on the memorandum book, which were in the nature of admissions against him. *Keith v. Kibbe*, 10 Cush. 35. *Gorman v. Montgomery*, 1 Allen, 416. *Dexter v. Booth*, 2 Allen, 559. *Commonwealth v. Goodwin*, 14 Gray, 55.

Exceptions sustained.

COMMONWEALTH vs. NICHOLAS POWERS.

Bristol. Oct. 27. — Nov. 9, 1874. COLT & AMES, JJ., absent.

On the trial of an indictment for the keeping of a tenement for the illegal keeping and sale of intoxicating liquor, there was evidence of a seizure of a keg of whiskey on the premises on September 13, 1873. A witness for the defendant testified that the keg was his, and that he bought it on June 28, 1873. The government then put in oral evidence that the keg seized had on it a United States revenue stamp dated August 17, 1873. *Held*, that the defendant had no ground of exception to the admission of this evidence.

COMPLAINT on the Gen. Sts. c. 87, § 6, charging the defendant with keeping and maintaining a tenement used for the illegal sale and illegal keeping of intoxicating liquors on August 1, 1873, and on divers other days until September 17 next following.

At the trial in the Superior Court, before *Bacon, J.*, it was shown that a ten-gallon keg, containing about two gallons of whiskey, was found in the attic of the building on the lower floor of which it was contended that the offence was committed. The keg was seized on a search warrant on September 13. One *Riley* testified that he occupied the whole of the building above the first

floor, and that the keg and whiskey belonged to him; that he bought it in Boston on June 28, 1873, for his private use; and he produced a bill which he testified was a bill of that whiskey, bearing that date, purporting that he had bought it of a dealer in Boston.

The government contended that it was not that whiskey that was seized, but other whiskey, and offered the testimony of the two officers who seized the keg, who, against the defendant's objections, were allowed to testify that there was a United States revenue stamp on the keg, and that there was upon the stamp the figures "187" in print, followed by the figure "3" in writing, and in writing, preceding "187," the letters and figures "August 17," making "August 17, 1873."

The defendant was found guilty, and alleged exceptions to the admission of this evidence.

J. Brown, for the defendant. The rule that oral evidence cannot be substituted for any writing the existence of which is disputed, and which is material either to the issue between the parties or to the credit of witnesses, was disregarded in this case. 1 Greenl. Ev. § 88. The proof offered was to show the contents of a writing or document to impeach the credit of a witness. This writing was in the possession and control of the officers. There was no evidence that it had been lost or destroyed, and it should have been produced. It was material evidence, and unlike evidence of tags, &c., to prove the identity of an article, or of inscriptions on flags carried about by leaders of a riot, &c. *Commonwealth v. Morrell*, 99 Mass. 542.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. At the trial it appeared that a keg containing whiskey was seized under a search warrant, upon the premises alleged to have been occupied by the defendant. The only question presented to us is as to the admissibility of the testimony of the officers who made the seizure, that there was a United States revenue stamp upon the keg bearing the date of "August 17, 1873." We are of opinion that this testimony was properly admitted. It was competent for the government to put in evidence a description of the keg seized, including a description of the tags, labels or stamps upon it. This was proper for the purpose of identifying the keg seized. *Commonwealth v. Blood*, 11

Gray, 74. *Commonwealth v. Morrell*, 99 Mass. 542. *Commonwealth v. Jennings*, 107 Mass. 488.

The fact that such description tended to contradict the witness Riley, and to show that the whiskey seized was not the same whiskey which he testified that he bought in June, 1873, does not render the testimony incompetent, or make it necessary to produce in court the keg or the revenue stamp pasted upon it.

Exceptions overruled.

COMMONWEALTH vs. JOHN BROWN.

Essex. November 4. — 5, 1874. AMES & DEVENS, JJ., absent.

Where an indictment duly charges the commission of an offence at a time before it was found, and the date of its presentment appears by the record of the court, an error in the date of the caption of the indictment is immaterial.

INDICTMENT, duly averring that the defendant at Lynn on October 1, 1873, and on divers other days and times between that day and the day of the finding of the indictment, kept and maintained a tenement used for the illegal sale and illegal keeping of intoxicating liquors.

The caption was as follows: "Commonwealth of Massachusetts, Essex, to wit: At the Superior Court begun and holden at Salem within and for said county of Essex on the fourth Monday of January in the year of our Lord one thousand eight hundred and seventy-three."

By the minutes of the clerk upon the docket of January term 1874 it appeared that the indictment was presented by the grand jury and filed in court on February 2, 1874.

The defendant, before the jury were empanelled, moved to quash the indictment, because no offence was set forth therein, and because the offence charged therein was alleged to have been committed after the date and finding of the indictment; and at the trial objected to the introduction of any evidence, for the same reasons. But *Lord, J.*, overruled the objections, and admitted evidence tending to show that the defendant was guilty of the offence charged on October 3, 1873. The defendant, being found guilty, alleged exceptions.

W. D. Northend & C. A. Benjamin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The indictment duly charging the commission of an offence at a time before it was found, and the date of its presentment appearing by the record, the error in the caption was immaterial. *Commonwealth v. Hines*, 101 Mass. 38. *Commonwealth v. Smith*, 108 Mass. 486. *Exceptions overruled.*

COMMONWEALTH vs. HENRY McNAMARA.

Essex. November 4. — 5, 1874. AMES & DEVENS, JJ., absent.

A complaint alleging that on a day named the defendant "was guilty of the crime of drunkenness by the voluntary use of intoxicating liquor," sufficiently charges an offence under the Gen. Sts. c. 165, § 25.

COMPLAINT to the Police Court of Haverhill on the Gen. Sts. c. 165, § 25, alleging "that Henry McNamara of Haverhill aforesaid, on the ninth day of February, in the year of our Lord eighteen hundred and seventy-four, at Haverhill aforesaid, with force and arms was guilty of the crime of drunkenness, by the voluntary use of intoxicating liquor, against the peace of the said Commonwealth and contrary to the form of the statute in such case made and provided." Before plea and trial in the Police Court, the defendant filed a motion to quash the complaint, on the ground that no crime known to the laws of this Commonwealth was charged therein; but this motion was overruled; and before plea and the empanelling of the jury in the Superior Court, the defendant renewed his motion, which was overruled by *Rockwell, J.* The defendant, being found guilty, alleged exceptions.

B. F. Brickett, for the defendant. No crime known to the laws of this Commonwealth is set out and charged against the defendant. To say that a person was guilty of a crime on a certain day cannot be construed to mean that a person committed the crime on that day. The phrase "was guilty" of a crime on a certain day contemplates that the crime might have been committed twenty years before. It only denotes the moral position

in which the defendant stood on the day mentioned in the complaint. The allegation should have been "was drunk," thereby charging the crime intended to be charged, in positive terms. An indictment must state the crime intended to be charged with such precision and certainty as may enable the defendant to determine the species of offence, that he may prepare his defence accordingly, be able to plead conviction or acquittal, and that there may be no doubt as to the judgment which should be given, if he is convicted.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. In *Commonwealth v. Miller*, 8 Gray, 484, it was held that this form of complaint, though not to be commended, was legally sufficient. That case must govern this.

Exceptions overruled.

COMMONWEALTH vs. JAMES KELLEY.

Essex. November 4 — 5, 1874. **AMES & DEVENS, JJ.**, absent.

Upon the issue whether the defendant was at a time alleged in the indictment the keeper of a common nuisance under the Gen. Sts. c. 87, §§ 6, 7, evidence is admissible that the defendant sold liquor in the tenement on a day certain about eight weeks before the first date alleged in the indictment, and had gone in and out of the tenement at various other times between that day and the first date alleged in the indictment.

INDICTMENT on the Gen. Sts. c. 87, §§ 6, 7, charging the defendant with keeping a common nuisance, to wit, a tenement in Danvers, used for the illegal sale and illegal keeping of intoxicating liquors, on June 1, 1874, and on divers other days between that day and October 19, 1874.

At the trial in the Superior Court, before *Allen, J.*, the government, to prove that the defendant was keeper of the house in question, asked a witness if he saw the defendant at the house before June 1, 1874. This was objected to, but the witness was allowed to answer that he saw the defendant at said house on April 4, 1874. The witness was then asked if he purchased anything of the defendant from behind the bar at the house on said April 4. This question was objected to by the defendant, but the witness was allowed to answer, and replied in the affirmative.

The witness also testified that he had seen the defendant go in and out of the said house several times after April 4. There was also evidence tending to show that during the time alleged in the indictment the defendant was in the room in question, and that he was keeper of the same. The defendant was found guilty, and alleged exceptions.

C. A. Benjamin, for the defendant. Evidence of sales from behind the bar in the tenement alleged, nearly two months before the time of the offence as alleged in the indictment, was inadmissible as tending to prejudice and mislead the jury.

C. R. Train, Attorney General, for the Commonwealth.

BY THE COURT. The evidence objected to was competent upon the question whether the defendant kept the house at the time alleged in the indictment. *Commonwealth v. Stoeck*, 109 Mass. 365. *Commonwealth v. Dearborn*, Ib. 368.

Exceptions overruled.

COMMONWEALTH vs. CERTAIN INTOXICATING LIQUORS,
Richard Kiely, claimant.

Essex. November 4. — 5, 1874. AMES & DEVENS, JJ., absent.

A complaint under the St. of 1869, c. 415, § 44, averred that intoxicating liquor was kept "in a certain tenement on Derby Square, and numbered six on said square, and the rooms over the tenement on the first floor, numbered six on said square, the entrance to said rooms being numbered eight on said square." The warrant issued on this complaint recited the averment of the complaint, and directed the officer to enter and search "the tenement herein above described." Held, that the warrant was void.

COMPLAINT to the Police Court of Salem on the St. of 1869, c. 415, § 44, alleging reason to believe and belief that certain intoxicating liquors are kept and deposited in Salem, "in a certain tenement on Derby Square, and numbered six on said square, and the rooms over the tenement on the first floor, numbered six on said square, the entrance to said rooms being numbered eight on said square." The warrant issued on this complaint recited the averment of the complaint, and directed the officer "to enter the tenement herein above described," and make search, &c.

The officer's return on the warrant stated that he had searched "the within described premises," and had seized therein the liquors described in the warrant.

In the Superior Court, before the jury were empanelled, the claimant moved that the proceedings be dismissed for the following reasons: "1. That there are two different and distinct tenements described in the complaint and warrant, and that the officer's return does not show from which of these tenements he seized the liquors described. 2. That the description of the place in the complaint and warrant is ambiguous and uncertain, and that the complaint and warrant are bad for duplicity." *Allen, J.*, overruled the motion; the defendant was tried and found guilty, and alleged exceptions.

W. D. Northend, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. The complaint described two distinct tenements in which liquors were alleged to be kept; the first, a tenement on Derby Square, numbered six on said square; the second, the rooms over the first, and having an entrance numbered eight on said square. The warrant directed the officer to enter and search "the tenement" so described, and thus authorized him to search only one tenement, leaving it to him to determine which of the two he should search, instead of clearly designating in the warrant the place to be searched, as the law required. The warrant was therefore illegal and void. St. 1869, c. 415, § 46. *Commonwealth v. Intoxicating Liquors*, 109 Mass. 871. *Same v. Same*, 115 Mass. 145. *Exceptions sustained.*

COMMONWEALTH vs. WORCESTER E. BOYNTON.

Essex. November 4. — 25, 1874. AMES & DEVENS, JJ., absent.

On the trial of an indictment, under the Gen. Sts. c. 165, § 9, for procuring a carriage, the woman upon whom the operation is alleged to be performed is not an accomplice; the rule in relation to the corroboration of an accomplice does not apply; and the defendant has no ground of exception to a refusal of the judge so to rule, and to an instruction that the jury "if they found that the defendant did the acts charged at the request of the woman, "should carefully consider her connection with those acts in reference to her testimony, and should scrutinize her statements with peculiar care on that account."

An indictment under the Gen. Sta. c. 165, § 9, averred that the defendant maliciously and without lawful justification thrust a certain instrument "into the body and womb of one Georgiana Goff, the said Goff being then and there pregnant with child, with intent thereby, then and there, to cause and procure the miscarriage of the said Goff." *Held*, that the indictment sufficiently alleged that the act charged was committed upon a woman. *Held, also*, that the intent was sufficiently alleged to be the intent of the defendant.

INDICTMENT under the Gen. Sta. c. 165, § 9, charging that the defendant, at a time and place certain, "maliciously and without lawful justification, did use a certain instrument, the name of which instrument is to the jurors aforesaid unknown, which said instrument, the said Boynton then and there had and held, by then and there forcing and thrusting the instrument aforesaid into the body and womb of one Georgiana Goff, the said Goff being then and there pregnant with child, with intent thereby, then and there, to cause and procure the miscarriage of the said Goff." Before the jury were sworn, the defendant filed the following motion to quash: "1. Because there is no sufficient allegation that the act charged was committed upon a woman. 2. Because there is no sufficient description of the act, or of the means or instrument used; and no averment that the grand jury were unable to describe the instrument. 3. Because there is no sufficient allegation of intent, it being uncertain from the indictment whether the intent charged was the intent of the defendant or of the other party to the alleged act." This motion was overruled.

The government introduced as a witness Georgiana Goff, who testified substantially to the facts charged, and that she hired and procured the defendant to perform the operation set forth in the indictment. There was other evidence on the part of the prosecution which the government contended corroborated the witness Goff on material points, but which the defendant contended was not such corroboration.

The defendant asked the judge to instruct the jury that, "upon the statement of the witness Goff, she was an accomplice in the commission of the crime she describes, and, unless her evidence is corroborated in material matters, it is unsafe for a jury to convict upon it, because of its corrupt and suspicious source; and under such circumstances courts deem it their duty to advise the jury to acquit." The judge declined to give this instruction as requested; but instructed the jury upon this point that: "As

the witness Goff testified that the defendant did the acts complained of at her request and upon her employment, the jury should carefully consider her connection with those acts in reference to her testimony, and should scrutinize her statements with peculiar care on that account."

The jury returned a verdict of guilty ; and the defendant alleged exceptions.

E. T. Burley, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The court properly refused to give the instruction requested by the defendant. It assumes that the witness Goff was an accomplice of the defendant in the commission of the crime charged. She could not have been indicted as a participator in the offence, and was not an accomplice. This point was decided in *Commonwealth v. Wood*, 11 Gray, 85, which arose under a statute the same in its legal effect as the statute upon which this indictment is brought. St. 1845, c. 27. Gen. Sts. c. 165, § 9.

It was not the duty of the presiding judge to advise the jury to acquit upon the uncorroborated testimony of the witness Goff, and his comments upon her testimony were sufficiently favorable to the defendant, and were not open to exception by him.

The motion to quash was also properly overruled. The ground chiefly relied upon is, that there is no sufficient allegation that the act charged was committed upon a woman. The indictment does not in terms allege that Georgiana Goff is a woman, but the language used necessarily imports this. If all the allegations of the indictment are proved, it necessarily shows that the act alleged was committed upon a woman.

The only other ground relied on is that there is "no sufficient allegation of intent, it being uncertain from the indictment whether the intent charged was the intent of the defendant or of the other party to the alleged act ;" but the indictment clearly charges that the defendant committed the acts alleged with the intent to cause and procure the miscarriage of the said Goff, and it admits of no other reasonable construction. We are of opinion therefore that the indictment is sufficient.

Exceptions overruled.

COMMONWEALTH vs. GEORGE W. THOMPSON.

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| 148 | 265 |

Barnstable. November 23. — 28, 1874. AMES & DEVENS, JJ., absent.

An indictment under the Gen. Sta. c. 160, § 27, charging an assault with intent to ravish, and which also charges a battery, is not bad for duplicity.

Evidence, that a woman, while walking on a pathway through a field, in the evening, was knocked down by a man, who got on the ground by her and holding her down pulled up her clothes and began to uncover her person, and, when she tried to get up, struck her in the face and tried still to uncover her, and put his hands on her legs and pinched them just above the knees, so that they were discolored for some time, that she cried out and the assailant got up and ran away, is sufficient to support an indictment against the man for an assault with intent to ravish.

On an indictment charging an assault with intent to ravish, the jury were instructed that they might find the defendant guilty of an assault or of an assault with intent to ravish. They returned a verdict that the defendant was guilty of both charges. The judge then instructed them that if they found the defendant guilty of the whole charge, they should return a verdict of "guilty," and upon being asked by the clerk for a verdict, the foreman said "Guilty," and this verdict was affirmed. *Held*, that there was no irregularity in receiving or affirming the verdict.

INDICTMENT for an assault with intent to ravish, averring that on November 10, 1873, the defendant, with force and arms, at Mashpee, "in and upon the body of Susan W. Attaquin feloniously an assault did make, and her the said Susan W. Attaquin did then and there beat, bruise, strike and wound, with intent then and there, her the said Susan W. Attaquin feloniously and violently to ravish and carnally know, by force and against her will."

In the Superior Court, before the jury were empanelled or sworn, the defendant moved to quash the indictment for the following reasons: "1. That it charges two distinct crimes, to wit, assault and battery, and assault with intent to ravish, and is therefore bad for duplicity. 2. That it charges the defendant with an assault with intent to ravish, and also with a battery, not alleged nor appearing to be a component part of said assault with intent to ravish, and is therefore bad for duplicity." *Putnam, J.*, overruled the motion; and the defendant alleged exceptions.

At the trial the government introduced evidence tending to show that early in the evening of November 10, 1873, the defendant with several others set out to walk from Mashpee towards Cotuit; that after accompanying them for about half a mile he left them, without assigning any reason, and returned to the

neighborhood of the place from which they had set out, that, at soon after half past six o'clock, when the defendant might have been in the vicinity, the prosecutrix left a store about half a mile from her home, accompanied by her son about eight years of age, to return to her house, and in so doing left the highway, crossed the fence and entered a path which led through a field and through small trees; that a man passed them hastily, and that, when they reached a point at some little distance from the road, a man came up to the prosecutrix and struck her to the ground; that he then pursued the boy, and returning to the prosecutrix, who had risen to her feet, felled her again, got down on the ground by her, and holding her down, pulled up her clothes, and began to uncover her person; that she tried to get up when he struck her in the face and tried still to uncover her, put his hands on her legs and pinched them just above the knees, so that they were discolored for some time; that she called out "God help me," and "Where is Mr. Hammond, he was just behind us," when the assailant got up and ran away. The prosecutrix testified that it was the defendant who assaulted her. This was all the evidence tending to show that the defendant assaulted the prosecutrix with intent to ravish.

After the evidence was all in, the defendant asked the judge to instruct the jury as follows: "1. That there was no evidence to warrant a verdict of guilty of assault with intent to ravish. 2. That the evidence tended to show an attempt to ravish, if any crime beyond an assault and battery."

The judge declined so to instruct the jury, but gave them instructions as to what would constitute rape, and an assault with intent to commit rape, in a manner not excepted to; and also instructed them that under an indictment of this character comprising two charges, an assault, and an assault with a felonious intent, and that under this indictment, if the evidence did not satisfy them that the defendant's intent was to ravish, but only to do something which came short of that, and they believed that he assaulted her, they might find him not guilty of the full crime charged, but only guilty of an assault upon her person; but if they found him guilty of the whole offence charged, they should return a general verdict of guilty. To these instructions no exception was taken; but the defendant alleged exceptions to the refusal to give the instructions asked for.

On the coming in of the jury, when inquired of by the clerk in the usual form if they had agreed on a verdict, they gave their verdict as follows: "We find the defendant guilty of both of the charges." The judge thereupon called the attention of the jury to the fact that he had instructed them that if they found the defendant guilty of the whole charge they should return a general verdict of guilty, and instructed them that if they meant to find a verdict against the defendant of the whole charge they should return a general verdict of guilty, and thereupon the foreman, being again asked by the clerk in the usual manner for a verdict, said "Guilty," and this verdict was affirmed. To this instruction and proceeding the defendant at the time objected and alleged exceptions.

H. W. Chaplin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

WELLS, J. Rape necessarily includes an assault and battery. To sustain an indictment for assault with intent to commit a rape, under the Gen. Sts. c. 160, § 27, it is not necessary to allege or prove a battery. But a battery may be one of the facts by which the offence is made out. It then constitutes a part, though not an essential part, of the offence which the statute defines and punishes. If not alleged, there is no variance; if alleged, there is no duplicity.

In *Commonwealth v. Goodhue*, 2 Met. 193, an indictment for rape contained the unnecessary allegation that the offence was committed by the defendant upon his own daughter; and the court sustained a conviction for incest. In *Commonwealth v. Squires*, 97 Mass. 59, an indictment for rape contained the unnecessary allegations that the defendant was a married man, and that the woman was not his wife. He was convicted of adultery, and, although the objection of duplicity had been seasonably taken before the trial, the conviction was sustained. That allegations of facts connected with the particular offence intended to be charged, and showing that another offence was committed at the same time and by the same acts as set forth, do not necessarily amount to duplicity of pleading, is established by various decisions of this court. *Commonwealth v. Eaton*, 15 Pick. 278. *Commonwealth v. Twitchell*, 4 Cush. 74. *Commonwealth v. Tuck*, 20 Pick. 356. *Commonwealth v. Hope*, 22 Pick. 1. *Common-*

wealth v. Nichols, 10 Allen, 199. *Commonwealth v. Harris*, 18 Allen, 584.

It is also well settled that an indictment for a particular offence may be sustained by evidence which also shows that another and different offence was in fact committed; even though such other offence is of a higher degree of crime. *Commonwealth v. Walker*, 108 Mass. 309.

The evidence in this case would support an indictment either for an attempt to commit rape, Gen. Sts. c. 168, § 8, or for an assault with intent to ravish. The latter only being charged, the court rightly refused the prayer for a ruling that it could not be supported upon the evidence.

There was no irregularity in the manner of receiving and affirming the verdict.

Exceptions overruled.

COMMONWEALTH vs. JULIUS HIRSCH.

Suffolk. Nov. 23. — Dec. 9, 1874. AMES & DEVENS, JJ., absent.

Under the Gen. Sts. c. 116, § 13, and the St. of 1866, c. 279, § 8, the Municipal Court of Boston has concurrent jurisdiction with the Superior Court of a complaint charging an assault and battery upon a police officer while in the discharge of his duty.

COMPLAINT to the Municipal Court of the city of Boston, charging an assault and battery upon Moses S. Moulton, a police officer, while in the performance of the duties of his office; that the assault and battery was not committed with intent to commit any other offence nor with a weapon dangerous to life, and that the life of said Moulton was not endangered thereby, and that he was not maimed thereby.

A fine was imposed upon the defendant in the Municipal Court. He appealed to the Superior Court, and, before trial, moved to dismiss the complaint on the ground that the Municipal Court had no jurisdiction of the offence charged. *Lord, J.*, overruled the motion; the defendant was found guilty, and alleged exceptions.

M. Fischacher, for the defendant.

C. B. Train, Attorney General, for the Commonwealth.

MORTON, J. The Municipal Court of the city of Boston has jurisdiction, concurrently with the Superior Court, of cases of assault and battery, except where committed with intent to commit some other offence, or with a weapon dangerous to life, or where the life of the person assaulted is in danger, or such person is maimed. St. 1866, c. 279, § 8. Gen. Sts. c. 116, § 13. The complaint in this case charges an assault and battery which does not fall within either of the excepted cases.

The additional allegations, that it was committed upon a police officer while in the discharge of the duties of his office, do not affect the jurisdiction of the Municipal Court. That court could, in its discretion, exercise or decline to exercise final jurisdiction in the case. Gen. Sts. c. 116, § 15. *Exceptions overruled.*



LOUANTHA E. PETERSON vs. ENOCH R. MORGAN.

Franklin. Sept. 15. — Dec. 28, 1874. WELLS & MORTON, JJ., absent,

In an action of slander for repeating defamatory words, evidence that rumors, charging the plaintiff with the same offence, previously prevailed in the vicinity, is not admissible either in bar or in mitigation of damages.

TORT for slander in accusing the plaintiff of fornication. The declaration alleged, in different counts, three separate conversations in which the defendant said in substance, speaking of the plaintiff, that he heard she had a pair of twins.

At the trial in the Superior Court, before Lord, J., there was evidence that the defendant as a physician attended the plaintiff from November 18 to December 4, 1872, when he was dismissed. There was no evidence that the defendant uttered the words alleged in the declaration before December 14, 1872, and there was evidence that on that day he heard a rumor that the plaintiff had been delivered of twins, and that on December 17 he told it to one who had not previously heard it. The defendant offered to prove that before he uttered the words attributed to him, rumors were current in the vicinity, and were wide spread and had existed for weeks, that the plaintiff had been delivered of twins,

116 350
154 245

The judge rejected the evidence, as substantive evidence either in bar or in mitigation of damages; the evidence, however, came in incidentally on cross-examination and was argued upon by counsel on each side, and was made the foundation of a prayer for instruction by the defendant, which instruction was given. The defendant offered to show that at the time he uttered the words the character of the plaintiff was bad, in consequence of the rumors relative to her having been delivered of twins and other like rumors, admitting that he was not prepared to show that her character had been questioned prior to the circulation of these rumors; but offering to show that he was in no way responsible for said rumors. The judge ruled that while evidence was competent that the plaintiff's character was bad at the time the defendant uttered the words attributed to him, yet the fact that there were such rumors, if they were false, was not evidence which constituted a bad character, although such false rumors had originated before the defendant uttered the words attributed to him, and although the defendant had nothing to do with the originating or circulating of said rumors up to that time, and excluded the evidence upon the question of character.

The judge ruled that if a report charging a person with the commission of a crime is current in a community, any one who repeats the report or gives currency to it, is fully justified if he answers and proves its truth. If the report is false, and it is presumed to be false if not proved to be true, any person, who so reports it as to affirm its truth, is responsible, though he did not originate it; and if, as in this case, there was no proof or claim that the defendant originated the report or was influenced by express malice in repeating it, the fact that there was such a report in circulation could be given in evidence in mitigation of damages; that evidence of a general bad character of the plaintiff was admissible in mitigation of damages, but that any loss of position, standing or character which the plaintiff had suffered by reason of the circulation of such reports, was not competent to prove such bad character, and that the measure of damages was not what the plaintiff had suffered by reason of the circulation of such reports, but the injury which had been caused to her by the defendant's reporting them as true. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

S. T. Field, for the defendant.

D. Aiken, for the plaintiff.

COLT, J. The judge permitted the defendant to show that the plaintiff's general character was bad at the time the defendant uttered the words attributed to him, but ruled that evidence of rumors charging the plaintiff with the same offence, and prevailing in the vicinity before that time, was not admissible as substantive evidence either in bar or in mitigation of damages. Such evidence came in however incidentally on cross-examination, and, at the defendant's request, the jury were further told that the measure of damages was not what the plaintiff had suffered by reason of the circulation of such reports, but what she had suffered by the defendant's reporting them as true.

To these rulings there is no just ground of complaint. The question of the plaintiff's general character was a question of fact to be proved by the oaths of witnesses who knew what her general reputation was. If bad, it is a fact which rests upon hearsay, (sometimes said to be admitted as an exception to the general rule of exclusion,) but it is still an independent fact. The plaintiff must always come prepared to meet it, but is not required to come prepared to disprove particular false reports as to which he can have no notice; or to defend his reputation in detail. And besides proof of false rumors alone must of necessity be by hearsay evidence in its most objectionable form. Such rumors do not necessarily constitute general bad character. They may fall very far short of it; and while they do, they are clearly inadmissible. *Alderman v. French*, 1 Pick. 1, 18. *Bodwell v. Swan*, 3 Pick. 376. *Kenney v. McLaughlin*, 5 Gray, 3. *Watson v. Moore* 2 Cush. 133, 141.

Exceptions overruled.

MILO WING vs. INHABITANTS OF CHESTERFIELD.

Hampshire. September 15. — December 17, 1874. WELLS & MORTON, JJ., absent.

The admission of immaterial evidence is not ground for a new trial, unless the excepting party shows that he has been prejudiced thereby.

The judge presiding at a trial may refuse to give, in the language of counsel, instructions already given in substance; and no exception lies to his remark, in so refusing, that the party was merely asking him to repeat the portion of the charge most favorable to his case.

In an action under the Gen. Sts. c. 70, § 16, by a physician against a town, to recover for medical attendance furnished a female pauper who had a legal settlement in another town, the jury were instructed that if the pauper was in need of medical aid, and neither town furnished it, the plaintiff could recover for services rendered after notice to the town sued; that the fact that the town in which the pauper had her settlement had made an arrangement with a person to take care of her, would not prevent the plaintiff from recovering, if neither the agent nor the town sued furnished medical attendance; that if the plaintiff was informed that such an arrangement was made, it was his duty to stop attending the pauper until he could ascertain whether or not she was furnished with other medical attendance; and if he found she was not so attended and was in want, he might then have attended her and recovered his pay of the defendant. *Held*, that the plaintiff had no ground of exception.

In an action under the Gen. Sts. c. 70, § 16, by a physician against a town, to recover for medical attendance furnished a female pauper having her legal settlement in another town, there was evidence that a person acting as the agent of the latter town to take care of the pauper told the plaintiff, after he was called to attend the pauper, that if he cured her he would pay him well, but if he failed he would pay him nothing. There was no evidence that the plaintiff made any reply, or that he knew that the person was an agent. The judge instructed the jury that, if they believed this evidence, the plaintiff could not maintain the action. *Held*, that the evidence would warrant the jury in finding that the attendance was furnished by the plaintiff under an agreement to be well paid for it if successful, and that if he failed he was to receive nothing; and that the instruction was correct.

CONTRACT under the Gen. Sts. c. 70, § 16,* to recover for medical attendance furnished Armenia Olds, a pauper in the defendant town. At the trial in the Superior Court, before Lord, J., the following facts appeared:

The legal settlement of Armenia Olds was in the town of Mon-

* "Every city and town shall be held to pay any expense necessarily incurred for the relief of a pauper therein by any person who is not liable by law for his support, after notice and request made to the overseers thereof, and until provision is made by them."

terey; and the overseers of the poor for that town had made a bargain with one Meecham, the father of Armenia, to take care of her and procure and provide everything which she might need, at a fixed price per week, and they arranged with Ephraim Cole, chairman of the overseers of the poor of the defendant town, to see that Meecham faithfully performed his agreement. The plaintiff was called to attend Armenia by her mother, Mrs. Meecham, in October, 1871, and continued to attend her until her death, in February, 1872.

Mr. Meecham testified that he was away from home when the plaintiff made his first visit, but returned while he was there, and had some conversation with the plaintiff as to the condition of Armenia and the prospect of her recovery, and told the plaintiff that if he would cure his daughter he should be well paid for it, but that if he failed to cure her he would pay him nothing; but this part of the conversation was denied by the plaintiff, and there was no evidence that the plaintiff made any reply to the remark of Mr. Meecham, or that he then knew that Meecham was employed by the town of Monterey.

In December, 1872, the plaintiff met Cole and had a conversation with him about his attending Armenia and about his pay. The testimony touching this conversation was conflicting, the plaintiff and his witnesses, two in number, testifying that the plaintiff told Cole that he was doctoring Mrs. Olds, and should look to the town of Chesterfield for his pay, and that Cole contended that she belonged to Monterey, but encouraged the plaintiff to believe that he should be paid by the town of Monterey. Cole testified that the plaintiff met him and told him that he was doctoring Mrs. Olds, and asked him who was to pay him; that he said she belonged to Monterey, that they had made provision for her, but he presumed the overseers of the poor for Monterey would pay him, if satisfied that the plaintiff could do Mrs. Olds any good. It was admitted that the town of Chesterfield furnished nothing for Mrs. Olds, and there was no evidence that any medical services were in fact rendered to Mrs. Olds after the plaintiff's conversation with Cole, except those rendered by the plaintiff; but there was evidence tending to show that Meecham had, previously to the plaintiff's attending, made arrangements with Dr. Streeter to attend her whenever called for.

The defendant offered to show that the neighbors were in the habit of bringing in to Mrs. Olds things for her comfort, as milk and other delicacies such as a sick person would need. This evidence was objected to by the plaintiff, but the objection was overruled and the evidence admitted, to which the plaintiff excepted.

The plaintiff requested the judge to instruct the jury "that if the jury are satisfied that Mrs. Olds was in need of medical aid, and that neither Chesterfield nor Monterey furnished a physician to fully meet that want, and the plaintiff did in fact supply that want, then he is entitled to recover for such services as he so rendered after notice to Chesterfield; that making arrangements with Meecham by the town of Monterey does not relieve the town of Chesterfield, if in fact neither the agent of the town of Monterey nor the town of Chesterfield furnished medical aid for Mrs. Olds." The judge declined to give these instructions, on the ground that he had already given them substantially, and that it was simply asking him to repeat that part of his charge which was most favorable to the plaintiff's case. The judge also instructed the jury that if Cole told the plaintiff that the town of Monterey had made arrangements for providing for Mrs. Olds, it was the plaintiff's duty to stop attending her until he could ascertain whether or not she was furnished with other medical attendance, and if he found she was not so attended and was in want, he then might have attended her, and recovered his pay from the defendant town; and that if they believed Mr. Meecham's testimony that he told the plaintiff he would not pay him if he did not cure his daughter, and the plaintiff then continued doctoring her under that understanding, the plaintiff could not maintain this action.

The jury returned a verdict for the defendant and the plaintiff alleged exceptions.

A. M. Copeland, for the plaintiff.

D. W. Bond, for the defendant.

DEVENS, J. 1. The plaintiff contends that the presiding judge erred in permitting evidence to be introduced that the neighbors of the pauper, Mrs. Olds (for medical attendance upon whom this action is brought under the Gen. Sts. c. 70, § 16), were in the habit of sending her articles for her comfort, "as milk and other delicacies such as a sick person would need." The only suggestion made is that this was immaterial. We cannot see, upon

these exceptions, that it was not competent on behalf of the defendant, upon the issue whether the services rendered by the plaintiff were reasonably necessary ; but, if immaterial, the plaintiff fails to point out wherein he was liable to be injured by the introduction of it, or that it in any mode affected him unfavorably. Where evidence purely immaterial has been admitted, and it is not shown that such admission can have in any way prejudiced the excepting party, the verdict will not be disturbed. *Burghardt v. Van Deusen*, 4 Allen, 374. *Bragg v. Boston & Worcester Railroad*, 9 Allen, 54.

2. Nor was it erroneous, on the part of the presiding judge, to decline to give the instructions asked at the conclusion of the charge. He had already given them substantially, as appears by his statement embodied in the bill of exceptions, and this was all to which the plaintiff was entitled. *Morris v. Bowman*, 12 Gray, 467. *Townsend v. Pepperell*, 99 Mass. 40. He might well apprehend that by repeating them he would give them an undue prominence among the various considerations he had brought to the attention of the jury. His remark, "that the plaintiff was simply asking him to repeat the portion of his charge most favorable to the plaintiff's case," was not, that we can perceive, unjust or calculated to influence the jury against the plaintiff's case ; it simply left such portion to be weighed by them in connection with the rest of the charge.

3. The instruction "that if Cole" (who acted for the town of Monterey to see that the arrangements which it had made for the pauper were faithfully carried out) "told the plaintiff that the town of Monterey had made arrangements for Mrs. Olds' being provided for, it was the plaintiff's duty to stop attending her until he could ascertain whether or not she was furnished with other medical attendance ; and if he found she was not so attended and was in want, he then might have attended her and recovered his pay from the defendant town," is to be taken in connection with the instructions also given as stated by the judge, in substance, "that if the jury are satisfied that Mrs. Olds was in need of medical aid, and that neither Chesterfield nor Monterey did furnish a physician to fully meet that want, and the plaintiff did in fact supply that want, then he is entitled to recover for such services as he so rendered after notice to Chesterfield ;" and further

‘that making arrangements with Meecham by the town of Monterey does not relieve the town of Chesterfield, if in fact neither the agent of the town of Monterey nor the town of Chesterfield furnished medical aid for Mrs. Olds.’ Its obvious meaning is that after the plaintiff was thus informed that provision was made for Mrs. Olds, it was his duty to give an opportunity for medical attendance, if such was necessary, to be furnished by the town to which she was properly chargeable. That town had the right to furnish such attendance through its own agents; and if it did thus furnish it, the town of Chesterfield could not be made liable to the plaintiff. Information having been properly communicated to the plaintiff that provision for medical attendance had been made, the plaintiff could not insist on continuing his attendance. After ceasing, and thus affording an opportunity for other medical attendance, if he found that it was not furnished, the instruction permitted him to recover if he then attended her, she being in need. It could not be inferred from the statement of what the duty of the physician required, that the court intended to limit the statement of the law made elsewhere, that if Mrs. Olds was in want of medical aid, and neither Monterey nor Chesterfield furnished it, and the plaintiff did, he could recover after notice to Chesterfield, and that mere arrangements to furnish it would not be sufficient.

4. There was sufficient evidence to go to the jury upon the testimony of Meecham that if the plaintiff furnished the medical attendance upon an agreement that the plaintiff should be well paid for it if he cured Mrs. Olds, and if he failed that he should be paid nothing. If the services were and continued to be rendered under that understanding with Meecham, the plaintiff would not be entitled to recover against the town, and this was the instruction.

Exceptions overruled.

HENRY L. JAMES vs. WILLIAM R. CLAPP.

Hampshire. September 16. — December 31, 1874. **WELLS & MORTON, JJ.**, absent.

In an action on an open and mutual account, if one item is for a breach of an agreement which occurred more than six years before the date of the writ, and the last item is within the six years, and the defendant pleads the statute of limitations, but does not object that the first item is not properly the subject of an account, the plaintiff may recover both items.

CONTRACT to recover the price of wood sold and delivered in April, 1872. Writ dated October 18, 1872. The defendant filed a declaration in set-off which contained this item, "July, 1868, One double water-wheel, \$140." To this declaration the plaintiff filed a general denial, and also an amended declaration, in which he alleged that the defendant agreed to put a certain water-wheel in the plaintiff's mill for a certain price, if it worked well, and agreed to pay the plaintiff \$100 if it did not work well; that it did not work well, and the plaintiff was obliged to remove it; and that the defendant owed the plaintiff the amount stipulated, \$100. To the amended declaration the defendant pleaded the statute of limitations.

Trial in the Superior Court, before *Aldrich, J.*, who, after a verdict for the plaintiff, allowed a bill of exceptions, the nature of which appears in the opinion.

D. W. Bond, for the defendant.

C. Delano, for the plaintiff.

ENDICOTT, J. Upon the facts and rulings reported in this case, the defendant has no just ground of exception. There was no controversy upon the items set forth in the plaintiff's declaration. But the defendant filed a declaration in set-off, on a mutual and open account, which contained a charge of \$140 for a water-wheel. To this the plaintiff pleaded the statute of limitations, and at the trial made no objection to the item for the water-wheel, as not a proper charge in a mutual and open account. He also amended his declaration to the effect that he did permit the defendant to put a water-wheel into his mill, but upon the express agreement that he would pay the price named only in the event that it was satisfactory and answered his purpose, and, if it did

not, the defendant was to pay him \$100 for his trouble and expense. He further alleged that it was not satisfactory, that he was obliged to remove it, and that the \$100 was due him from the defendant. To this amended declaration the defendant pleaded the statute of limitations, but the bill of exceptions finds that he did not object to it on the ground that it introduced a new cause of action, different from that set forth in the original declaration.

The charge for the water-wheel in the declaration in set-off was more than six years before the commencement of the action, but the last two items were within six years, and the jury were instructed, in accordance with the request of the defendant, that if they found these two items were properly charged to the plaintiff, they might treat the whole account of the defendant as a mutual and open account between the parties. The jury found they were properly charged. This finding carried with it the item for the water-wheel; but whether that item was due depended upon the contract in relation to the delivery and use of the wheel, alleged by the plaintiff, and upon which evidence was introduced by both parties. Upon that evidence the jury found that the contract was as alleged by the plaintiff, and disallowed the \$140, and allowed the plaintiff's claim for the \$100.

It is obvious, from the whole bill of exceptions and the admissions and statements it contains, that all the items in controversy were treated, for the purposes of the trial, as parts of the open account between the parties. The presiding judge stated to the jury, that if the question had been raised it might have been proper to rule that the item for the water-wheel would not be a proper charge in a mutual and open account upon the conditional contract as stated by either party. But the plaintiff did not object to it on this ground, but relied on the statute of limitations as a bar to the defendant's whole claim; and the defendant did not object to the \$100 claimed by the plaintiff if the contract was as the plaintiff alleged, except that it was barred by the statute. As the case was tried by the parties, the ruling that the jury might treat these two items relating to the water-wheel as not barred by the statute, if they found the last items of the defendant's account were properly charged to the plaintiff, was correct, and not open to exception by the defendant.

Exceptions overruled.

MARY McGRATH vs. WILLIAM CONWAY & others.

Hampden. Sept. 21.—Dec. 3, 1874. **MORTON & ENDICOTT, JJ.,**
absent.

A person charged under the bastardy act with being the father of a bastard child, executed a penal bond, payable to the plaintiff, conditioned that he should appear at the next term of the Superior Court and answer to the complaint. At that term he was defaulted, and the case was continued without further action on the complaint. *Held*, that there was a breach of the bond for which nominal damages were recoverable. *Held, also*, that if, by the defendant's failure to comply with a subsequent order in the original process, a further sum should become due on the bond, the plaintiff could sue out a *scire farias* on the judgment, and obtain a new execution for the damages caused by such additional breach.

CONTRACT against the principal and sureties upon a penal bond, dated February 15, 1873, payable to the plaintiff, and conditioned that the defendant Conway should appear at the March term 1873 of the Superior Court at Springfield, and answer to a complaint made by the plaintiff on her examination on oath before the Police Court of Chicopee, charging him with being the father of a bastard child of which she had been delivered, and that he should abide the order of the Superior Court thereon.

The case was heard in the Superior Court by *Aldrich, J.*, without a jury, who allowed a bill of exceptions in substance as follows:

The only question in issue was whether there had been a breach of the bond, it being agreed by the parties that if a breach had occurred, the case should be sent to an assessor to determine the amount recoverable. The execution of the bond was admitted. It appeared by the records of the court that the plaintiff duly entered her complaint in the Superior Court, and that the defendant was then defaulted, and made no answer to the complaint. No judgment was made that Conway was the father of the child, nor other proceeding had on said complaint, but the case was continued.

The judge found that after the default there was no adjudication of affiliation nor any other order of the court passed; that there was no evidence offered except the fact of default; that the defendant Conway was not personally present in court at the time of the default; and that there was no evidence that he was not

ready or would not have been present and ready to abide the final order of the court, if such order had been passed.

The judge ruled upon this evidence that the plaintiff was not entitled to maintain her action, and the plaintiff alleged exceptions.

G. D. Robinson, for the plaintiff.

E. B. Gillett & H. B. Stevens, for the defendants.

AMES, J. The condition of the bond, according to the literal import of its terms, requires that the defendant in the original process should appear at the term at which it was returnable. It is true that, under the changes introduced into the practice in cases of this kind, by the Gen. Sts. c. 72, § 7, the personal appearance of the defendant has not the importance which it had under the earlier statutes; *Jordan v. Lovejoy*, 20 Pick. 86; and the decree of affiliation may be passed, whether he appears or not. *Young v. Makepeace*, 103 Mass. 50. But as he has distinctly bound himself to appear, his failure to do so must necessarily be considered as technically and formally a breach of the bond. The plaintiff is therefore entitled to maintain her suit, and to have judgment for the penalty of the bond, subject, however, to the provisions of the Gen. Sts. c. 133, §§ 9, 10, that execution shall issue only for so much of the penal sum as is then due and payable in equity and good conscience, for the breach of the condition; that is to say, for a nominal sum only for this particular breach. If by his failure to comply with such further or final order as the court may pass, in the original process, any further sum should become due on the bond, she can sue out a *scire facias* on the judgment, and obtain a new execution for the damages caused by such additional breach.

Exceptions sustained.

WILLIAM S. KNIGHT & another vs. JAMES PEACOCK.

Worcester. Oct. 1. — Dec. 4, 1874. COLT & MORTON, JJ., absent.

In an action upon a contract, into which the defendant alleges that he was induced to enter by the plaintiff's false and fraudulent representations, the defendant may be asked on his direct examination, "What induced you to sign the papers and complete the contract?"

CONTRACT for commissions on the sale of certain property by the plaintiffs, as real estate brokers, for the defendant. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

There was evidence tending to show that the plaintiffs represented that they had raised \$1500, which the defendant could have by giving a mortgage upon the property for which he was to exchange his property; that this representation was false; that it induced the defendant to make the trade for effecting which the plaintiffs claimed commissions; and that the defendant made the trade and executed the papers. The defendant's counsel asked the defendant, while testifying as a witness, "What induced you to sign the papers and complete the trade?" To this question the plaintiffs' counsel objected, but the judge overruled the objection, and the witness answered that he signed the papers and completed the trade because of the representation of the plaintiffs that the money had been raised by them. The jury found for the defendant, and the plaintiffs alleged exceptions.

H. B. Staples, for the plaintiffs.

F. T. Blackmer, for the defendant.

AMES, J. It may be gathered from the report of the case, that the plaintiffs had sold certain real estate belonging to the defendant, which had been paid for, in whole or in part, by taking certain other real estate in exchange. In answer to their claim for commissions upon this transaction, the defendant insists that the exchange in question was but a part of the service which they had undertaken to render. He contends, and offered evidence tending to show, that another and important part of their contract was to secure to him a loan to the amount of \$1,500 upon the property which should come to his hands by that exchange. He insists also that this proposed loan was the real and effect-

ive inducement that influenced him to make the exchange. No objection was taken at the trial that this course of defence was not open to him under his answer; and for that reason it is not to be considered as a question of pleading. The only question raised by this bill of exceptions is in regard to the propriety of the inquiry as to the considerations or causes that induced the defendant to sign the papers and complete the trade. As the course of the trial raised the question whether any false or fraudulent representations had been brought to bear upon him, we see no objection to the inquiry in its general and comprehensive form. If he had been induced to sign the papers by a false and fraudulent assurance that the proposed loan had been obtained, a question what induced him to sign them was well calculated to bring out the fact, and was in form unobjectionable.

Exceptions overruled.

SAMUEL THAYER vs. ELLIOT T. SMITH & another.

Worcester. Oct. 6. — Dec. 14, 1874. COLT & MORTON, JJ., absent.

One who indorses, for the accommodation of a partnership, a promissory note signed by one member of the partnership in his own name as maker, and by the other as indorser, can recover, in an action against the partnership for money paid to its use, the amount which he is obliged to pay as indorser.

CONTRACT to recover \$2153.94 paid by the plaintiff to the use of Elliot T. Smith and Charles Thayer, late copartners doing business in Worcester under the name of E. T. Smith & Co.

The declaration alleged that the defendant Thayer made a promissory note, dated July 18, 1870, for the sum of \$2000, payable four months after date to the order of the plaintiff; that the plaintiff indorsed said note to the defendant Smith; that the defendant Smith indorsed the note, and the same was discounted at the First National Bank of Worcester; and that the plaintiff indorsed said note for the accommodation of the defendants; that afterwards the bank brought an action upon the note against the plaintiff, and he was obliged to pay and did pay in that action to the bank the sum of \$2153.94 on December 19, 1871.

The defendant Thayer was defaulted, and Smith alone defended the action. At the trial in the Superior Court, before *Brigham*, C. J., the defendant Smith objected to the introduction of any evidence, on the ground that the plaintiff could not recover against the firm of E. T. Smith & Co., as the name of the firm did not appear on the note. The judge overruled the objection, and admitted evidence tending to show that the defendants were doing business as partners in July, 1870; that the defendant Thayer, in pursuance of a previous arrangement and agreement with the defendant Smith, made the note declared on payable to the plaintiff, and procured the plaintiff's indorsement thereon, informing the plaintiff that the defendant Smith would also indorse it, and that Smith afterwards indorsed it; that the plaintiff indorsed the note for the accommodation of the defendants as a partnership, for the purpose, participated in by both defendants, of raising money to be used in the partnership business; and such money was raised by discount of the note, and used by both defendants for partnership purposes. This evidence was controverted by the defendant Smith, and he introduced evidence tending to prove that the partnership was dissolved at the time of making the note, and that he indorsed the note for the accommodation of the defendant Thayer, after the plaintiff's indorsement, and after the defendant Thayer had offered it for discount; and that the defendant Thayer, and not the plaintiff, paid the note.

The judge instructed the jury as follows: "It is immaterial that the note was not in form the note of the defendants as a partnership; if it was made by the two partners, each signing his name in the partnership interest, one as maker and the other as indorser, and therefore the plaintiff, for the accommodation of the parties to the note, and to further the partnership business, indorsed it and paid it, he may recover in this action."

The jury found for the plaintiff, and the defendant Smith alleged exceptions.

F. P. Goulding, for the defendant Smith.

G. F. Verry & *F. A. Gaskill*, for the plaintiff, were not called upon.

ENDICOTT, J. This is an action for money paid by the plaintiff for the defendants' use, upon a note which the plaintiff indorsed for the defendants' accommodation and at their request,

the proceeds of which they received and used in their partnership business, and which, when due, the plaintiff was obliged to pay.

It is not an action on the note itself ; and it is immaterial that the note is not in form the note of the partnership, or in what character the defendants signed it, whether as a partnership obligation or not. The only question is whether the plaintiff indorsed and paid it for the accommodation of the partnership. When a person assumes a liability as indorser for the accommodation of another, and is compelled to pay in pursuance of that contract, the form and tenor of the note whereon he thus becomes liable does not necessarily determine his rights, or his relations to the party for whose accommodation he indorses. The note may be in such form and tenor as to disclose what the contract in that respect was ; but if not, the real question, whether it was indorsed and paid for the use of another, is to be determined by evidence showing the actual agreement between the parties.

The instructions given were in all respects accurate and carefully guarded.

Exceptions overruled.



CLARA RUSSELL vs. INHABITANTS OF LYNNFIELD.

Essex. Nov. 4. — Dec. 17, 1874. AMES & DEVENS, JJ., absent.

One member of the school committee of a town made a rule that if a scholar was twice tardy the teacher should send the scholar to him. The other members of the committee subsequently assented to the rule. The plaintiff was excluded by a teacher from a school for refusing to comply with this rule. *Held*, that the scholar was not unlawfully excluded within the Gen. Sts. c. 41, § 11, although there was no record made of the order of the committee.

TORT brought in the name of the plaintiff by her next friend, under the Gen. Sts. c. 41, § 11, for the unlawful exclusion of the plaintiff from a public school in Lynnfield.

At the trial in the Superior Court, before *Wilkinson, J.*, it appeared in evidence that the plaintiff was excluded by the teacher, under the direction of Jacob Hood, one of the school committee, for not conforming to a rule made by Hood for the government of the school. After the exclusion, application was made by the father of the plaintiff to Hood, to state in writing the grounds

and reason of the exclusion; and he replied as follows: "In consequence of much tardiness during the last school term, I made the rule that when a scholar was twice tardy the teacher send that scholar to me. That rule has worked admirably in both the Centre schools. On Thursday morning, April 24, Clara Russell, daughter of Levi S. Russell, was tardy the second time; accordingly the teacher told her to come to me. Clara left the school-room, and instead of coming to me as the rule required, she went directly home; and in consequence of Clara's disobedience, the teacher suspended her from school until she will conform to the rules."

It appeared, upon examination of the books of the school committee, that there was no record that such rule had been made or confirmed by the school committee, but there was evidence that, at a meeting of the board for another purpose, Hood stated that he had made such a rule, and each of the other members expressed his approbation of it.

Upon this evidence, the plaintiff requested the judge to instruct the jury, that "if the plaintiff, a scholar in a public school of Lynnfield, was excluded from the school by the teacher, acting under the direction of one of the school committee of the town, for disobedience of a rule relating to tardiness which had been made by such member of the school committee without a vote of the board or a vote confirming the same, then this action could be maintained." The judge refused so to rule; the jury found for the defendant; and the plaintiff alleged exceptions.

C. A. Benjamin, for the plaintiff.

S. B. Ives, Jr., for the defendant.

COLT, J. For the disobedience of a regulation established to prevent tardiness, the plaintiff was suspended from a public school until she should conform to the rule. This action is brought under the statute which declares that "a child unlawfully excluded from any public school shall recover damages therefor in an action of tort, to be brought in the name of such child by his guardian or next friend against the city or town by which such school is supported." Gen. Sts. c. 41, § 11.

The exclusion which the plaintiff complains of in this case was by the school teacher, acting under the direction of one member of the school committee. It is contended to have been unlawful

solely because the rule in question had not been formally established or confirmed by vote of the school committee, duly entered upon their records. The school committee are required to have the general charge and superintendence of all the public schools in town, and to keep a record of their votes, orders and proceedings. Gen. Sts. c. 38, §§ 16, 22. But this does not imply that all rules and orders required for the discipline and good conduct of the schools shall be matter of record with the committee, or that every act in regard to the management of each school in these respects should be authorized or confirmed by formal vote. It would be practically impossible sufficiently to provide for such matters by a system of rules, however carefully prepared and promulgated. Much must necessarily be left to the individual members of the committee and to the teachers of the several schools. *Huse v. Lowell*, 10 Allen, 149. *Hodgkins v. Rockport*, 105 Mass. 475.

Upon the case here presented, we cannot see that there was not a reasonable exercise on the part of the teacher of the power necessary to punish disobedience and promote the proper government and discipline of the school. And the power so exercised in this instance was in no way impaired or diminished by the fact that the teacher acted, under the direction of one member of the committee, according to a rule made by him, but expressly approved of by each of the other members. *Sherman v. Charlestown*, 8 Cush. 160. *Spiller v. Woburn*, 12 Allen, 127.

Exceptions overruled.

JAMES S. NELSON vs. THOMAS S. DODGE.

Essex. Nov. 5. — Dec. 28, 1874. AMES & DEVENS, JJ., absent.

In replevin of a horse, the issue was whether the sale by the plaintiff to the defendant was upon condition that the defendant was to give a note indorsed by A. in payment. The jury were instructed that if the plaintiff sold the horse upon condition that a note indorsed by A. should be given, the property did not pass until the note was indorsed; but if nothing was said about an indorser, and the plaintiff took the defendant's note in payment without an indorser, and the horse was delivered to the defendant, that vested the title in him; that the question was whether there was an agreement originally that there should be an indorser. No exception was taken to these instructions. The jury, after being out

several hours, came in for further instructions, and asked, "if the defendant gave the plaintiff the note in payment for the horse, whether the property passed to the defendant." The judge ruled that it did. The plaintiff asked the judge to further instruct the jury "that if the original agreement was that the note should be indorsed, the property did not pass by giving the note to the plaintiff." The judge declined to further instruct the jury. *Held*, that the plaintiff had no ground of exception.

It is within the discretion of the judge presiding at a trial, after he has answered a question put by the jury, who have come in for further instructions, to decline to repeat instructions given before the jury retired.

REPLEVIN of a horse. Trial in the Superior Court, before *Dewey, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff testified that he was the owner of the horse replevied, and that the defendant came to him and wanted to buy the horse, and said he would give him his note with the indorsement of Elias Magoon thereon in payment; that he told the defendant that he knew Magoon, that his indorsement would be satisfactory, and that he would sell him the horse upon those conditions; that the horse at the time of this conversation was in the possession of one Kimball, and the defendant received possession of it from Kimball; that several days after, the defendant gave the plaintiff his note payable to the order of Elias Magoon, which he said Magoon would indorse; that the plaintiff took the note to Magoon, who refused to indorse it because he said it was on too short time for the defendant to pay; that he took the note back to the defendant and got the time extended by the defendant giving two notes payable to the order of Magoon, which the plaintiff took to Magoon for indorsement, and he refused to indorse them at all.

Elias Magoon, a witness for the plaintiff, testified that he was called upon by the defendant Dodge to indorse his notes for the payment of a horse several days before the plaintiff presented the first note for his indorsement, and he told him he would indorse for him.

The defendant then testified that he purchased the horse of the plaintiff; that the horse was delivered to him; and that he gave the plaintiff his note in payment therefor; that nothing was said to him about indorsement until after the plaintiff had brought back the first note and had received the other two notes in place

of the first ; that the agreement at first was, that he would give him his note and nothing was said about an indorser.

The judge instructed the jury that if the plaintiff sold the horse to the defendant upon the condition that he should give his note with Elias Magoon as indorser, no property passed until the note was indorsed ; but that if the sale was made by the plaintiff to the defendant and nothing was said about an indorser, and he took the defendant's note in payment without any indorser, and the horse was delivered to the defendant, that vested the title to the horse in the defendant ; that the question turned upon the original contract, whether or not there was an agreement, forming a part of the contract of sale, that there should be an indorser. No exceptions were taken to these instructions.

The jury retired, and after several hours returned into court for further instructions, and asked the following question : " If the defendant gave the plaintiff the first note in payment for the horse, whether the property passed to the defendant." The court thereupon instructed the jury, that if the defendant gave that note in payment for the horse, the property passed to the defendant. The plaintiff thereupon asked the court to further instruct them, contending that the last instruction might mislead the jury, " that if the original agreement was that that note should be indorsed, the property did not pass by giving the note to the plaintiff ;" but the judge having answered the question asked by the jury, declined to give any further instruction. The jury found for the defendant, and the plaintiff alleged exceptions to the instruction in answer to the question of the jury, and to the refusal of the judge to further instruct them as requested.

C. Sewall, for the plaintiff. 1. The second instructions given to the jury without any modification misled them, and left an impression in their minds that the judge intended to modify the first instructions given. That the defendant was to give his note, and that the defendant passed his note to the plaintiff, both parties agreed ; but they disagreed as to whether an indorser was to be furnished. The question for the jury was whether the defendant agreed to give the plaintiff an indorsed note ; and not whether the plaintiff, having taken the note without an indorser, to obtain the indorser's name, passed the property, which the inquiry of the jury would seem to imply. The only question which

troubled the minds of the jury was, whether passing the note to the plaintiff, even if the agreement was that there should be an indorser, vested the property in the defendant. The answer given by the judge to the question put by the jury for further instructions, coupled with the fact of a direct refusal in their presence to either modify or explain the instructions, and declining to state that the instructions were to be taken in connection with previous instructions, gave the jury the impression that the judge intended a modification in this respect of the instructions before given.

2. Rulings of a judge, given after the jury have returned into court for further instructions, are open to exception. Such rulings should therefore be so clear that the jury could not reasonably misunderstand them, because the only object of the inquiry is to elucidate a point doubtful in the minds of the jury. *Lund v. Tyngsboro*, 11 Cush. 563.

S. B. Ives, Jr. & C. W. Richardson, for the defendant.

COLT, J. The question which the jury came in to ask, plainly had reference to the second clause in the instructions which were given when the case was committed. The answer of the judge to this question stated the law correctly. Taken in connection with the previous instructions, it implied the necessary element of the plaintiff's acceptance of the note unindorsed in payment. The additional instruction requested by the plaintiff was but a repetition of a proposition which had been once stated to the jury with more fulness, and there was no apparent necessity for its repetition. In the opinion of a majority of the court, there is nothing in the form of the question put, or in the answer given, which justifies the inference that the judge was understood to modify the propositions previously stated, or that his answer was to be considered as disconnected from those propositions.

If properly taken at the time, exceptions lie to instructions which are given to a jury after a case has been committed to them and they have retired for deliberation. But whether those instructions be given in answer to the questions of the jury, or of the judge's own motion, it is proper in most cases that the transaction be confined to communications passing between them. A fresh discussion of the law or the evidence on the part of counsel in the presence of the jury cannot be had, unless allowed by the

judge in his discretion. Nor is the judge required to give additional instructions by way of explanation or modification of those already given at the request of either party. In such matters much must be left to the discretion of the judge, who can best see at the time what may prejudice and what advance an intelligent and honest decision of the questions at issue. *Kellogg v. French*, 15 Gray, 354. *Exceptions overruled.*

CHARLES H. LITCHMAN & another vs. DANIEL POTTER.

Essex. Nov. 4. — Dec. 31, 1874. AMES & DEVENS, JJ., absent.

The value of goods replevied need not be alleged in the writ.

A writ of replevin, served by a constable, did not state the value of the goods to be replevied, but the parties agreed in writing on the writ that the value was \$225. The *ad damnum* in the writ was \$500. The judge presiding at the trial allowed the plaintiff to amend the writ by inserting \$225 as the value of the goods, and overruled a motion to dismiss. *Held*, that the defendant had no ground of exception.

A writ of replevin commanded the officer to replevy "the goods and chattels following, viz: the contents of a grocery store," described the store, and stated the person by whom the goods were taken and held. *Held*, that the description was sufficient under the Gen. Sts. c. 143, § 11, and was not so vague and indefinite as to be bad on demurrer.

REPLEVIN. The writ, which was served by a constable, directed the officer to "replevy the goods and chattels following, viz.: the contents of a grocery store, so called, situate on Lee Street in Marblehead, and numbered 8 on said street, belonging to Charles H. Litchman and William T. Litchman, now taken and held by Daniel Potter." There was no allegation in the body of the writ of the value of the property to be replevied; but there was an agreement signed by the parties on the writ, that the goods should be valued at \$225. The *ad damnum* was \$500.

In the Superior Court, upon the return day of the writ, the defendant filed a motion to dismiss on the ground that there had been no legal service of the writ. This motion was granted by *Brigham*, C. J. The plaintiff then moved to amend the writ by alleging that the property was of the value of \$225. The judge thereupon rescinded the order dismissing the action, allowed the

amendment, and overruled the motion to dismiss the action ; and the defendant alleged exceptions.

The defendant then filed an answer containing a demurrer to the writ, on the ground that the property to be replevied was not sufficiently described. The demurrer was overruled ; and the defendant appealed. The case then proceeded to trial, and the jury found for the plaintiff.

C. Sewall, for the defendant. The authority of a constable to serve a replevin writ is a special authority, in which the subject matter must not exceed three hundred dollars. Gen. Sts. c. 18, § 61. St. 1872, c. 268. His authority must, therefore, appear upon the face of the writ. *Conner v. Palmer*, 13 Met. 302. *Pomeroy v. Trimper*, 8 Allen, 398. Unless the authority appears upon the face of the writ, (except in personal actions where the *ad damnum* qualifies the authority of the constable to serve,) a constable cannot serve a replevin writ, and the court should have dismissed the same, there being no service. *Wood v. Ross*, 11 Mass. 271. *Brier v. Woodbury*, 1 Pick. 362. If, as said in *Pomeroy v. Trimper*, *supra*, an exception to the rule that the writ need not allege the value, may exist where the writ is to be served by a constable whose authority is limited, then the officer was a trespasser *ab initio*, and the court could not, after the act was done, legalize such tortious acts by an amendment.

2. A replevin writ is a special writ commanding the officer to take specific property, and must be "in the form heretofore established and used." Gen. Sts. c. 143, § 11. This language was substantially the same in the Rev. Sts. c. 113, § 28, which refers to the St. of 1789, c. 26, § 4, which contains the entire form of the writ, and the direction to the officer is as follows : " We command you that you replevy the goods and chattels following, viz. : (here enumerate and particularly describe them) belonging to." The law is the same in trover, an action which the party can elect to bring instead of replevin. The Gen. Sts. c. 129, § 87, use the following language : " Defendant has converted to his own use one horse (or the goods mentioned in the schedule hereto annexed)." The allegation in the plaintiffs' writ, " the contents of a grocery store," does not describe any property. The officer is not commanded to replevy the " grocery store," but something that may be in it ; what that is does not appear. The

writ commands the officer to replevy the "goods and chattels following, viz.:" and in this action none are described. An officer would not be justified in serving a search-warrant with no description of the property. *Sandford v. Nichols*, 13 Mass. 286. Prior to the Gen. Sts. c. 129, § 87, it was held that a schedule annexed to a writ of trover or replevin was no part of the declaration. *Rider v. Robbins*, 13 Mass. 284. And in *Kinder v. Shaw*, 2 Mass. 398, which was trover, describing sundry goods in a schedule annexed, in a note is the following: "The chief justice observed to the counsel for the plaintiff that this was a very improper practice. The schedule annexed to a declaration is no part of the declaration. It is allowed in actions of assumpsit for goods sold and delivered, because the plaintiff is not held to particularize the articles; but it is otherwise in trover and replevin."

W. C. Fabens, for the plaintiffs.

ENDICOTT, J. It is not necessary in a replevin writ to allege the value of the goods to be replevied. *Pomeroy v. Trimper*, 8 Allen, 398. *Blake v. Darling*, ante, 300. If alleged, it may under some circumstances be admissible against the plaintiff as evidence of value; *Clap v. Guild*, 8 Mass. 153; *Barnes v. Bartlett*, 15 Pick. 71; but is not conclusive evidence even on the question of jurisdiction, if the agreement or appraisal establishes the value to be less than twenty dollars. *King v. Dewey*, 11 Cush. 218. The agreement or appraisement determines the value for all the purposes of the case. *Leonard v. Hannon*, 105 Mass. 113. As the value named in the agreement in this case was less than three hundred dollars, a constable could serve the writ, the determination of the value being preliminary to the service. Gen. Sts. c. 143, §§ 3, 12; c. 18, § 61. St. 1872, c. 268. The *ad damnum*, alleged in the writ to be five hundred dollars, is not an allegation of value; that is determined by the agreement; and it was clearly within the power of the court to allow the amendment in conformity to the fact.

The description of the property to be replevied, though general in its terms, meets the requirements of the statutes, and is not so vague and indefinite as to be bad on demurrer. The officer is directed to replevy the contents of a grocery store. The goods ordinarily contained in such a store are too numerous and varied

to be enumerated in detail. The store is pointed out, and the goods are further described as now taken and held by a deputy sheriff as the property of another. This is a sufficient description to inform the officer and to furnish the means of clearly identifying the property; and that it was so identified appears by the agreement of the parties as to the value.

Exceptions and demurrer overruled.

PETER C. V. WORTHLEY *vs.* BENJAMIN L. EMERSON & another.

Essex. Nov. 4. — Dec. 31, 1874. AMES & DEVENS, JJ., absent.

A payment made on an account current, in the absence of an appropriation by the parties, is to be applied to the earlier items of the account, although for some of these the creditor has a lien, and has none for others.

One who furnishes materials used in the construction of a block of houses situated on one lot, under an entire contract with the owner, has a lien under the Gen. Sta. c. 150, upon the whole estate for the value of the materials so furnished.

PETITION to enforce a lien under the Gen. Sta. c. 150, for labor performed and materials furnished in the construction of a block of five houses in Lawrence. The case was sent to a referee, the nature of whose award appears in the opinion.

E. J. Sherman & J. Cleaveland, for the petitioner.

W. S. Knox, for the respondents.

ENDICOTT, J. The respondents contend that the petitioner is not entitled to a lien for the hitch-posts and fence stone in front of the block, because they are no part of the building or structure; the posts being ten feet from the land on a public street, and the fence being no part of a building. The referee, after reciting their position and connection with the building, finds that they are both "integral parts of the said block of dwelling-houses." But it is not necessary to consider the question here raised, as upon other grounds the objection is not open to the respondents.

It appears from the accounts annexed to the award of the referee that the respondents, at different times before the filing of the certificate, paid to the petitioner the sum of \$1875. No appropriation of these payments was made by the parties; the law

therefore applies them to the earlier items of the account. *Crompton v. Pratt*, 105 Mass. 255. The charges for the posts and fence stone are among the first thirteen items of the account, which amount in the aggregate to \$655, and are therefore paid; and whether a lien on the building would attach therefor cannot be raised by the respondents. *The A. R. Dunlap*, 1 Lowell, 350, 361.

The respondents also contend that the petitioner cannot enforce a lien for materials used in the construction of five houses, treating the whole as one structure. The case finds that the materials were furnished under an oral contract to provide the stone necessary for the erection and completion of a block of dwelling-houses, situated on one lot, belonging to the respondents. It was an entire contract, and a lien attaches upon the whole estate for the value of the materials so furnished. *Wall v. Robinson*, 115 Mass. 429. *Exceptions overruled.*

AMOS GILBERT vs. ALBERT C. FOWLER.

Essex. Nov. 4. — Dec. 31, 1874. AMES & DEVENS, JJ., absent.

A petition to enforce a lien under the Gen. Sts. c. 150, alleged that labor was performed and materials furnished in pursuance of a contract under seal between the petitioner and the respondent. The answer admitted the making of the contract. At the trial, the petitioner admitted that the labor was performed and the materials were furnished by the petitioner and his partner, and that the contract was made for the partnership in the name of the petitioner alone, doing the business of the firm in that name. *Held*, that the non-joinder of the partner did not, without an amendment to the answer, entitle the respondent to a nonsuit.

A certificate under the Gen. Sts. c. 150, § 5, need not aver that the account therein set forth is "a statement of a just and true account of the amount due, with all just credits."

PETITION on the Gen. Sts. c. 150, to enforce a lien for labor performed and materials furnished in building a house and stable on the respondent's land, alleged to have been performed and furnished by the petitioner under a contract with the respondent, which contract was under seal. The answer admitted the making of the contract.

At the trial in the Superior Court, before *Lord, J.*, the petitioner admitted that the labor and materials were performed and

furnished by the petitioner and one Dodge, as partners; that the contract was made for the partnership in the name of the petitioner alone, doing the business of the firm under that name. The respondent asked the judge to rule that the action could not be maintained in the name of the petitioner alone, and that Dodge should have been joined, and asked for a nonsuit.

It also appeared that the certificate filed by the petitioner in the office of the town clerk did not aver that the account therein set forth was a "statement of a just and true account, with all just credits given." The respondent asked the judge to rule that the certificate was not in compliance with the Gen. Sts. c. 150, § 5.

The judge declined to give either of these instructions, and assigned as reasons for refusing to give the first, that this defence was not set up in the answer, and that it was sufficient if the name of the petitioner was used as the descriptive name of the partnership. The jury found for the petitioner, and the respondent alleged exceptions.

H. N. Merrill, for the respondent. 1. The non-joinder of the petitioner's partner was not apparent on the record, and was first shown at the hearing. The motion for a nonsuit should therefore have been granted. *Halliday v. Doggett*, 6 Pick. 359. *Wesson v. Newton*, 10 Cush. 114. *Cushing v. Marston*, 12 Cush. 431. *Bartlett v. Brickett*, 14 Allen, 62.

2. The Gen. Sts. c. 150, § 5, contemplate the making the affidavit by the person or persons by whom the labor is performed or materials furnished, or by some one in their behalf. The affidavit described in the declaration is not in behalf of the firm, and is not the affidavit of the firm, since a partnership cannot be sworn. If made in behalf of the firm, it should have been made by Gilbert, or some person in behalf of Gilbert & Dodge, doing business under the name of Amos Gilbert. *Rockwood v. Walcott*, 8 Allen, 458.

3. The affidavit should state that the account therein set forth is a just and true account with all just credits given. See *Lynch v. Cronan*, 6 Gray, 531, 532.

J. P. Jones, for the petitioner.

ENDICOTT, J. The petitioner made a contract under seal with the respondent to perform labor and furnish materials in the erection of a dwelling-house and stable on land of the respondent. It

appeared in evidence before the auditor and at the trial, that one Dodge was interested in the contract, as partner with the petitioner; and the respondent asked the court to rule that the action could not be maintained in the name of the petitioner alone. The court properly declined so to rule. The answer admits that the contract was made with the petitioner, and the respondent cannot, without amendment, set up that he made it with the petitioner and another jointly. The contract also having been made with the petitioner alone, it is immaterial whether the labor was performed wholly by the petitioner, or jointly with another person.

It is not necessary that the certificate under the Gen. Sts. c. 150, § 5, should contain the averment that the account therein set forth is "a statement of a just and true account of the amount due, with all just credits." It is sufficient if the certificate in fact contains a just and true statement of the account, not wilfully or knowingly inaccurate.

Exceptions overruled.



WILLIAM WALSH & another vs. RICHARD J. WALSH
& others.

Suffolk. Nov. 20. — Dec. 2, 1874. WELLS & DEVENS, JJ., absent.

- A decree against an infant trustee, even when the trust results by implication of law, is not erroneous for want of allowing him a day to answer after coming of age.
- A decree made upon the consent of the guardian *ad litem* of an infant, and upon the representations of counsel and adjudication of the court that it was a decree fit and proper to be made as against an infant, is binding upon him.
- A decree ordered four heirs at law, two of whom were infants, to convey an estate to the *cestui que trust* of their ancestor. Before the conveyance the *cestui que trust* died, having previously conveyed his interest in the estate to the two heirs who were of age. A decree was then made, reciting these facts, and ordering the infant heirs to convey their interest in the estate to the other heirs. *Held*, on a bill of review brought by the infant heirs against the others, to reverse the decree, that the *cestui que trust* had an equitable fee simple which he could convey, and that the fact that the conveyance had not been made to the *cestui que trust* was no ground for reversal.

BILL OF REVIEW, filed October 6, 1874, in behalf of William Walsh and Bridget Walsh, infants, and heirs at law and devisees of Richard Walsh, against Richard J. Walsh, Ellen E. Walsh and Thomas Keyes, to reverse a decree of this court, rendered

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January 1, 1873, in a suit in equity in which Ellen Donovan was the plaintiff; and the plaintiffs in review, and Richard J. Walsh, Ellen E. Walsh, both heirs at law of Richard Walsh, Margaret E. Walsh, his widow, and Thomas Keyes, special administrator of the estate of Richard Walsh, were defendants.

The bill of review set forth that the bill in equity brought by Donovan alleged that, on March 30, 1860, Michael Driscoll was seised of the equity of redemption of a parcel of land, with the buildings thereon, situated on South Street in Boston, and being the estate occupied by Donovan and Richard Walsh for a residence from 1860 to 1870; that Driscoll conveyed the estate to Richard Walsh, but the consideration therefor moved from Donovan and not from Walsh, who became seised of the equity of redemption in trust for the use and benefit of Donovan; that he held the estate in trust for her until his decease, which occurred September 14, 1871; that his heirs at law were his children; and that he also left a widow, Margaret E. Walsh; that if no will should be proved and allowed, the legal title to said estate had come to the parties last above named by descent and operation of law; that an instrument purporting to be the last will and testament of said deceased had been filed in the Probate Court, but had not been allowed and proved, and that the plaintiff was informed and believed that proof and allowance of said instrument was to be contested; that the residuary devisees named in said instrument were the said Bridget, William and Margaret E. Walsh, to whom the legal title to said estate had come by operation of the will, if the will should be proved and allowed, but charged with the trust in favor of the plaintiff; that the bill recited various facts, consisting in part of declarations and acts on the part of Richard Walsh tending to show that he acknowledged himself as trustee, and various acts of ownership on the part of the plaintiff, and set forth various transactions in regard to paying and making mortgages upon the said estate; that the bill stated that Walsh and his representatives were indebted to the plaintiff in the sum of \$400 for money received on a mortgage, and that the said Walsh and his representatives should account for the rents and profits upon the said estate since January 1, 1864, and should pay over the same; that the bill alleged that the defendants therein named refused to con-

vey said estate to the plaintiff, and that William and Bridget Walsh alleged that they were infants, and could not execute the conveyances to which the plaintiff claimed to be entitled; and that the prayer of the bill was, that Margaret E., Richard J., Ellen E., William and Bridget Walsh might be ordered to convey the said estate to the plaintiff, and that the said special administrator might be ordered to pay over to the complainant the sum of \$400, and to account for and pay over to her also the rents and profits of the said estate since January 1, 1864.

The bill of review further alleged that Margaret E. Walsh and Thomas Keyes appeared, and suggested that the present plaintiffs were minors for whom no guardian had yet been appointed; whereupon Thomas Keyes was appointed guardian *ad litem* for the plaintiffs; that thereafter the plaintiffs, by their guardian *ad litem*, appeared and put in their answer to the bill, to the effect following: they admitted that on March 30, 1860, the said Michael Driscoll was the owner of the equity of redemption of the land described in the plaintiff's bill, subject to the mortgages amounting to \$2100, and that on or about said date said Driscoll conveyed said land to Richard Walsh, subject to the said mortgages; but they denied that the consideration of said conveyance was only \$1100, but averred that on the contrary it was, including said mortgages, \$3650; they also denied every material allegation of the bill, alleging that the said Richard Walsh bought the estate for himself, and that it was paid for by him; that the said plaintiff had no other interest in the estate than as tenant of the said Walsh; that the said Walsh had always carried on the transactions relating to the estate in his own name, and not as trustee; they denied that said Walsh was bound to account to the plaintiff as alleged; and they denied that any trust resulted in said estate to the plaintiff; that Donovan filed a replication to this answer; and issue having been joined, the cause was heard before a justice of this court, on January 1, 1873, when a decree was pronounced, which was afterwards entered, as follows: "And the plaintiff and the defendants, Margaret E. Walsh, Richard J. Walsh, Ellen E. Walsh, Thomas Keyes in his capacity of special administrator of the estate of Richard Walsh, deceased, and also in his capacity of guardian *ad litem* of Bridget Walsh and William Walsh, consent-

ing to the following decree; and this court being satisfied upon the representations of counsel that the decree is fit and proper to be made as against the said Bridget and William; it is thereupon ordered and adjudged and decreed, as and for the final decree in this cause, that a trust be declared of one undivided half of the estate described in the plaintiff's said bill, subject to the incumbrances therein set forth; that the said defendants, Richard J., Ellen E., Bridget and William, convey said undivided half of said estate to the plaintiff by deed of quitclaim and release; that said defendant Keyes file an account of his special administration within thirty days, and that he pay the plaintiff one half of the net rents and profits of said estate received by him as such special administrator; that no costs be taxed."

The bill of review alleged that thereafter, on February 8, 1873, Richard J. Walsh and Ellen E. Walsh filed a motion in this court that the decree entered as and for the final decree in the cause, January 1, 1873, be in part rescinded and modified; which was done in accordance with the motion by a decree pronounced March 11, 1873, which was afterwards entered, as follows: "In this cause the death of the plaintiff since the entry of the decree of January 1, 1873, having been suggested, and it appearing that Richard J. Walsh of Boston, clerk, and Ellen E. Walsh of Boston, singlewoman, are entitled to prosecute this cause in the stead of the plaintiff, by reason of a conveyance from the plaintiff, a copy of which is filed with the papers in this cause, it is therefore ordered, adjudged and decreed as and for the final decree in this cause, that the defendants, Bridget and William, release and quitclaim to the said Richard J. two thirds of one undivided half of the estate described in the plaintiff's bill, and to the said Ellen E. one third of one undivided half of the said estate, the said grantees assuming, respectively, one third and one sixth of the mortgage thereupon, said conveyances to be executed within ten days from the date of this decree; that the defendant, Thomas Keyes, file an account of his special administration within ten days, and that he pay to the said Richard J. two thirds of one half of the net rents and profits of the said estate, and to the said Ellen E. one third of one half of said net rents and profits; said payments to be made within ten days from the allowance of said account; that no costs be taxed."

The bill of review then set forth the reasons why the decree should be reversed, which are stated in the opinion. The defendants demurred; the demurrer was sustained by *Devens, J.*; and the plaintiffs appealed.

J. Q. A. Brackett, for the plaintiffs.

C. F. Williams, for the defendants.

GRAY, C. J. This bill of review assigns three errors in the decrees in the original suit: 1st. That two of the defendants were infants, and that decrees were made against them without giving them a day after their coming of age to show cause against the same. 2d. That the decrees appear to have been made by consent of their guardian *ad litem*, and upon the representation of counsel, without proof. 3d. That the original plaintiff had no title which she could convey to those who were admitted to prosecute in her place. We are of opinion that the bill of review cannot be maintained upon either of the grounds assigned.

1. The ancient rule of practice in chancery, (recognized by this court in *Coffin v. Heath*, 6 Met. 76, and *Whitney v. Stearns*, 11 Met. 319,) which allows to an infant a day after coming of age to answer a bill filed against him during his minority, does not apply to infant trustees.

The St. of 7 Anne, c. 19, provided that infants holding lands in trust might be directed or required by order of the Court of Chancery or Exchequer, on the petition of their guardian, or of the *cestuis que trust*, to convey and assure the same. That statute was repeatedly held by Lord Chancellor King to include trusts resulting by implication of law. *Bertie v. Vernon*, cited in Mosely, 197, and 2 P. Wms. 549. *Holeworth v. Lane*, Mosely, 197. *Ex parte Vernon*, 2 P. Wms. 549; *S. C.* 7 Price, 685, note. Lord Talbot, indeed, apparently unaware of the decisions of his predecessor, expressed the opposite opinion, and decreed accordingly, but with liberty to the plaintiff to apply to the court in case any precedent could be found where such constructive trusts had been held to be within the statute. *Goodwyn v. Lister*, 3 P. Wms. 887. And Chancellor Kent considers the opinion of Lord King the better authority. *Livingston v. Livingston*, 2 Johns. Ch. 587, 541.

The Court of Chancery in some cases declined to act under the St. of 7 Anne, when the infant himself had or claimed any

interest in the estate. *Anon.* 2 Eq. Cas. Ab. 521. *Hawkins v. Obeen*, 2 Ves. Sen. 559.

But our statutes have removed all doubt upon the subject, by providing that when a person seised or possessed of an estate, real or personal, or any interest therein, upon a trust, express or implied, is an infant, or under other disability, or out of the jurisdiction, this court may by decree direct either a sale or a conveyance to be made of such estate, or of any interest therein, by him or his guardian, or by some suitable person appointed by the court for the purpose, in the place of the trustee, in order to carry into effect the objects of the trust. Gen. Sts. c. 100, § 15.

The decrees complained of are not therefore erroneous for want of allowing to the infants a day to answer after coming of age.

2. A decree cannot indeed be safely made against an infant on default upon taking the bill for confessed for want of an answer, or upon an answer filed in his behalf by his guardian *ad litem*; for the answer in such cases generally is, that the infant knows nothing of the matter, and therefore neither admits nor denies the allegations, but leaves the plaintiff to prove them, and throws himself on the protection of the court; and whatever it may be, it is the answer of the guardian and not of the infant, and therefore cannot be used against him. *Mills v. Dennis*, 3 Johns. Ch. 367. 1 Dan. Ch. Pract. (4th Am. ed.) 169.

The practice under the St. of 7 Anne, as stated in one of the earliest cases, was that, upon a petition in the name of the *cestui que trust*, and motion by counsel in his behalf that the infant should assign, "counsel is to consent for the infant," and the court then referred it to an officer like a master in chancery, and upon his report made an absolute order. *Duppa v. Bridgley*, Bunb. 52.

An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. *Tillotson v. Hargrave*, 3 Madd. 494. *Levy v. Levy*, Ib. 245. And a compromise, appearing to the court to be for the benefit of an infant, will be confirmed without a reference to a master; and, if sanctioned by the court, cannot be afterwards set aside except for fraud. *Lippiat v.*

Holley, 1 Beav. 423. *Brooke v. Mostyn*, 33 Beav. 457, and 2 De G., J. & S. 373.

If the court does pronounce a decree against an infant by consent, and without inquiry whether it will be for his benefit, he is as much bound by the decree as if there had been a reference to a master and a report by him that it was for the benefit of the infant. *Wall v. Bushby*, 1 Bro. Ch. 484. 1 Dan. Ch. Pract. 164. The case falls within the general rule, that a decree made by consent of counsel, without fraud or collusion, cannot be set aside by rehearing, appeal or review. *Webb v. Webb*, 3 Swanst. 658. *Harrison v. Rumsey*, 2 Ves. Sen. 488. *Bradish v. Gee*, Ambl. 229; *S. C.* 1 Keny. 73. *Downing v. Cage*, 1 Eq. Cas. Ab. 165. *Toder v. Sansam*, 1 Bro. P. C. (2d. ed.) 468. *French v. Shotwell*, 5 Johns. Ch. 555.

The only foundation of the statements in some of the text books, that if a decree against an infant is drawn up as made by consent, it will be error, is a very brief and imperfect report in 2 Freem. 127, as follows: "If an infant suffer a decree by consent, it is forever reversible, otherwise of an adversary bill." This is so contrary to the weight of authority, that Hovenden, in a note to that case, has suggested that "reversible" was probably a typographical error for "irreversible." But that suggestion is refuted by referring to the Reports in Chancery, from which Freeman's report seems to have been abridged. See Wallace's Reporters (3d ed.) 301. It there appears that the case was of a motion for an injunction for want of an answer, and the point in question is stated thus: "If an infant suffer a decree against him by consent, he may at any time reverse it for that error of his being an infant; otherwise, if he be defendant by an adversary bill, and a decree pronounced." 3 Rep. Ch. 21. If the case cannot be explained, and brought into harmony with the other authorities, by supposing its purport to be that when an infant suffers a decree to pass against him by mere default he will not be bound by it, but that a decree pronounced by the court after answer and hearing will bind him, it is too blind to be followed.

In the case before us, the first decree appearing upon its face to have been made, not upon the consent of the defendants and the guardian *ad litem* merely, but upon the representation of counsel and adjudication of the court that it was a decree fit and

proper to be made as against the infants, it must be held binding upon them.

3. The infants, together with the other defendants, having been thus duly adjudged to hold an undivided half of the land in trust for Ellen Donovan, the original plaintiff, she had an equitable fee simple therein which she might convey, and her conveyance passed her right to her grantees.

Demurrer sustained, and bill dismissed.



116 384
152 181

MICHAEL E. SWEENEY vs. BOSTON FIVE CENTS SAVINGS BANK.

Suffolk. Nov. 11, 1873, Nov. 12, 1874. — Dec. 3, 1874.

A man who deposits money in a savings bank in the name of his wife, and has the bank book therefor made in her name and delivered to her, cannot maintain an action against the bank for its refusal to pay the money to him.

CONTRACT to recover money deposited by the plaintiff with the defendant in the name of Mary E. Sweeney, the plaintiff's wife, but alleged to belong to the plaintiff. Trial in the Superior Court, before *Pitman, J.*, who reported the case, after verdict, for the determination of this court, in substance as follows :

The plaintiff testified that before the first deposit of the aggregate sum now claimed, he had \$1000 deposited in his own name in the defendant bank, and that he knew he could not deposit any more in that way ; that his wife asked him if he would deposit in her name ; that he asked her if she would be willing to draw it when he wanted it, and that she said she would ; that upon the occasion of the first deposit he went with her to the bank and deposited it as his own money, but in her name ; that the subsequent deposits were all made upon the same account, and were made by him personally, except that it might be that his wife made one while he was sick ; that the money was all his own ; that his wife had the bank book locked up in her trunk for safe keeping, with his own, during all the time, but that he had it when wanted ; that since the last deposit he and his wife had separated, and she had retained the book ; that before suit he had notified the defendant that the money was his, and not to pay it to

the wife, and demanded the same ; and that the defendant declined to pay without the production of the bank book.

It appeared that the wife, at the time of the first deposit, when the husband was with her, signed the usual agreement to conform to the by-laws of the bank, one of which provided that " no person shall receive any part of his principal or interest, without producing the original book, that such payments may be entered therein."

Upon this evidence, the judge ruled that the action could not be maintained ; and directed a verdict for the defendant.

The case was argued in November, 1878, and reargued in November, 1874.

A. R. Brown, for the plaintiff.

C. F. Kittredge, for the defendant.

AMES, J. We do not find, upon the facts stated in this report, any ground for the conclusion that the defendant corporation made any express contract with the plaintiff, or made itself liable to him, under any implied contract, for the payment of any portion of the deposit in question. On the contrary, upon the occasion of the first deposit, he went in company with his wife to the bank, and the money, though furnished by him, was entered in the defendant's books as her money, and the book, which is the appropriate evidence of the deposit, was delivered to her, and purports on its face to be her property. The book is evidence of a contract of the defendant with her ; and it appears from the report that this contract was made with his sanction and concurrence. The subsequent deposits, though made by him and with funds belonging to him, were nevertheless entered in the defendant's accounts as her deposits, and were credited to her and in her book with his authority. It does not appear that the defendant was notified that he claimed the money as his own, or was informed that there was any understanding between him and her that the money was to be subject to his control until after the deposits were all made.

Upon this state of the case, proof that it was his money, and that he never intended to give it to his wife, is not sufficient to make out an implied promise to return it to him. It was received by the defendant under an express promise to account for it to her, or to such person as she shall appoint, upon the production

of the deposit book. The case does not make it necessary to consider what circumstances will excuse the owner of a deposit from the actual production of the deposit book, or whether he may recover upon proof of its loss, upon giving proper indemnity, as in the case of a lost promissory note. The difficulty in the plaintiff's case is not that he has lost the book, or that it is wrongfully taken from him, but that it is not his book. On the contrary, so far as the defendant corporation is concerned, it is rightfully in the hands of the party in whose name it was made out, and who is the only person with whom the defendant has made any contract upon which it can be called to account. This contract was expressly made with the plaintiff's wife, by his authority, and in fact by his procurement. It is not a case, therefore, of a principal seeking to avail himself of a contract made with his agent in the name of the agent. The deposits were not made by the wife for the benefit of the husband, and as his agent, but by the husband, upon an express contract that they should be paid to the wife. In this respect the case differs from *McCluskey v. Provident Institution for Savings*, 103 Mass. 300.

Judgment on the verdict for the defendant.



JAMES ORMSBY & another vs. JOHN B. DEARBORN.

116 386
154 181
116 386
158 245

Suffolk. Nov. 17. — Dec. 9, 1874. WELLS & DEVENS, JJ., absent.

A creditor who has proved a claim against an estate in bankruptcy, as for goods sold and delivered to the bankrupt, cannot maintain an action of replevin for the goods by proof that he did not sell them to the bankrupt.

REFLEVIN of certain articles of jewelry. Trial in the Superior Court, before *Putnam, J.*, who allowed a bill of exceptions in substance as follows :

The defendant, a deputy sheriff, claimed the property by virtue of an attachment upon a writ of J. N. Kendall against I. M. Friselle, dated May 2, 1872. Friselle filed a petition in bankruptcy under the laws of the United States, June 6, 1872, and was on the same day adjudicated a bankrupt. Horace Partridge, the assignee in bankruptcy, defended this action for the benefit of

the creditors of said Friselle. The plaintiffs contended that they were the owners of the goods replevied, and that they left them with Friselle as their agent, to sell on their account. The defendant contended that they had been sold to Friselle by an absolute sale, and were his property, and this was the issue submitted to the jury.

The defendant offered evidence that on June 24, 1872, the plaintiffs proved their claim on an account against the estate of Friselle in bankruptcy; that the account included the identical articles replevied; and that the claim was allowed. The defendant requested the judge to rule that the proof of the claim in bankruptcy was a waiver of the claim to the identical articles, and a bar to this action, and that the verdict should be for the defendant. The judge, for the purpose of settling the question of the title to the property, declined so to rule, but left the question to the jury, with the other evidence, as bearing on the question whether this was understood by the plaintiffs to be an absolute sale of the property to the said Friselle, and not a mere consignment. The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

C. S. Lincoln, for the defendant.

C. F. Donnelly, for the plaintiffs.

MORTON, J. The goods replevied were delivered by the plaintiffs to Friselle, and the issue in the case was, whether they were sold to him, or intrusted to him as the plaintiffs' agent. Friselle having been adjudicated a bankrupt, his assignee defends this action for the benefit of his creditors. It appeared at the trial that the plaintiffs have proved an account against the estate of the bankrupt, which account includes the price of the goods replevied, as goods sold and delivered to him.

The remedy thus elected by the plaintiffs is utterly inconsistent with their claim in this suit. The two cannot stand together. If they could, the plaintiffs might receive the whole or a part of the price of the goods under the proceedings in bankruptcy, and by this suit regain and hold the goods themselves.

As the plaintiffs have elected to prove their debt for the price of the goods, and have not withdrawn the proof before this suit was brought, the learned judge who presided at the trial should

have ruled, as requested by the defendant, that such proof was a bar to this action. See *Cook v. Farrington*, 104 Mass. 212.

Exceptions sustained.

RICHARD W. PRATT & another vs. JAMES A. MAYNARD.

Suffolk. Nov. 12. — Dec. 9, 1874. WELLS & DEVENS, JJ., absent.

A boiler made for a person was by his direction placed by the maker on a lot of land belonging to him in the rear of his shop, and was paid for. *Held*, that as between the maker and the purchaser, the title passed to the latter.

If the mortgagee of a chattel orally authorizes the mortgagor to sell it, a sale by the latter passes the title to a purchaser in good faith.

A manufacturer bought materials and borrowed money from time to time to carry on his business, from a person to whom he gave, as security, mortgages on his stock and manufactured property. One of these mortgages included a boiler which was afterwards paid for by the purchaser, and by his direction placed by the maker on a lot near his shop. The purchaser had dealt with the maker for three years before, buying stock and materials included in such mortgages, and sometimes paying the maker and sometimes the mortgagee, who had a general knowledge of this course of dealing, and acquiesced in it. *Held*, on the trial of the issue whether the purchaser or the mortgagee had the better title to the boiler, that the jury would be warranted in finding that the mortgagee gave the mortgagor a general authority to sell mortgaged property bought by the plaintiff, and that evidence that the mortgagee did not know of the sale of the boiler or of the delivery of it to the purchaser, was immaterial.

REPLEVIN of a locomotive boiler. Writ dated June 14, 1869. The answer set up the ownership of the replevied property in Isaac M. Cate, and the defendant's right of possession in the same as Cate's agent and keeper. The case was heard in the Superior Court, without a jury, by *Brigham*, C. J., who allowed a bill of exceptions in substance as follows :

In 1867, 1868 and 1869, the plaintiffs employed William H. Snow, a boiler-maker, to repair and build boilers and machinery for them, and usually paid said Snow therefor in bank checks as soon as such work was done. During these years, Cate was selling iron and other materials, and lending money to Snow to enable him to carry on his business, and as security therefor took mortgages of Snow's stock and manufactured property, and also had, for the same purpose, Snow's order to the plaintiffs, accepted by

them on October 28, 1867, to pay to Cate all moneys due and to become due to Snow from the plaintiffs on account of his work done for them. The plaintiffs, late in 1868, knew that Cate was furnishing Snow with iron and other materials, and had large claims against him, and supposed that he held as security therefor Snow's stock and manufactured property. They were several times urged by Cate in the summer and autumn of 1868 to make payments to him on account of work done by Snow for them. Four bills, chiefly for repairs, were in the early part of 1868 rendered by Snow to the plaintiffs, on account of which the plaintiffs gave checks to Snow for small sums, and some of these checks were indorsed by Snow to Cate. At that time the plaintiffs had no knowledge of Cate's connection with Snow's business, beside that derived from these indorsements. The boiler replevied was one of two boilers ordered to be manufactured by Snow for them in June and July, 1868, and the boiler not replevied was completed and delivered to the plaintiffs in September or October, 1868. Cate, in the autumn of 1868, knew of the order for the two boilers, and that the price of them was to be about \$1350. The replevied boiler was completed by Snow before December, 1868, but not delivered to the plaintiffs otherwise than by placing it on a lot of land in the rear of Snow's shop by direction of the plaintiffs, acquiesced in by Snow. This arrangement was made before the replevied boiler was completed. The boiler remained there until June, 1869, when Cate took possession of it by his agent, the defendant, and kept it until the plaintiffs replevied it in this action.

In December, 1868, Snow rendered a bill to the plaintiffs for work done, which included the price of the replevied boiler, and amounted to \$1901.60, and this bill was paid by the plaintiffs to Snow by various sums in cash at different dates, and by a promissory note for \$1400, dated December 22, 1868. This note was received by Cate from Snow on December 26, 1868, indorsed by Cate, its net proceeds put to Snow's credit in account with Cate, and on its maturity it was paid by the plaintiffs.

The replevied boiler, with other personal property, was the subject of one of a series of mortgages made by Snow to Cate in 1868, and duly recorded as made. Notice of his intention to foreclose the mortgage applying to the replevied boiler and other

property was given by Cate to Snow on May 6, 1869; and on May 7, 1869, Snow released to Cate all his right and interest in the property to which it applied. Thereupon Cate, having taken possession of the replevied boiler and the other property, to which said mortgage and the proceedings for foreclosure and release applied, sold the same, excepting the replevied boiler, which he put into the keeping of the defendant. The proceeds of the mortgaged property thus sold amounted to about \$400; and this sum, together with the value of the replevied boiler, which was about \$600, was not sufficient to pay the debt due from Snow to Cate, and secured by that mortgage. The only evidence in the case was the report of an auditor, who reported the facts herein stated, and no other facts, and who reported no conclusions or findings upon the legal effect of the facts reported by him, or any finding for either party upon them.

The judge found, upon the foregoing facts, that there was a course of dealing between the plaintiffs and Snow in the years 1867, 1868, and 1869, in manufacturing boilers, &c., by Snow upon the plaintiffs' orders for the same; that the sale, delivery and payment for the same between Snow and the plaintiffs, in all of which dealing more or less of the stock, materials, &c., mortgaged by Snow to Cate, were disposed of to the plaintiffs, for which Snow received payment; that in some instances Snow turned over to Cate the money received in such payment, or such payment was made directly by the plaintiffs to Cate upon Snow's order, and that Cate had a general knowledge of such a course of dealing between the plaintiffs and Snow, and acquiesced in it, and received and applied more or less of the fruits of it to the payment of the debt secured by the mortgages of Snow to him. The judge did not find, upon the facts herein stated, that Cate had any knowledge of the specific arrangement between the plaintiffs and Snow that the replevied boiler, when completed, should be placed in the lot of land in the rear of Snow's shop, or that it was placed there in January, 1869, and remained there until taken and sold by him in May, 1869, under such an arrangement; nor did the judge find that Cate knew that the bill rendered by Snow to the plaintiffs in December, 1868, for \$1901.60 applied in part to the replevied boiler, or that the promissory note for \$1400 was received by Snow in part payment of a bill which applied in any part to the replevied boiler.

The plaintiffs contended that the course of dealing between them and Snow in relation to more or less of the property mortgaged by him to Cate, known generally and assented to by Cate, together with his receipt of more or less of the fruits of the same with full knowledge, operated to give Snow license and authority to sell any of the mortgaged property to the plaintiffs, and that the facts proved conclusively a sale, payment for, and delivery of the replevied boiler, under such a license and authority. The defendant contended that, in the absence of evidence that Cate knew of the sale or payment for the replevied boiler, or any act by Snow tending to show that it had passed out of his possession or control, the court could not find a sale of the same to the plaintiffs with Cate's consent, or by his authority or license, notwithstanding the fact that the course of dealing between the plaintiffs and Snow was generally known to and acquiesced in by Cate.

The judge ruled against the claim of the plaintiffs, sustained and ruled in accordance with the claim of the defendant, found for the defendant, and assessed damages in the sum of one dollar ; and the plaintiffs alleged exceptions.

B. E. Perry & S. W. Creech, Jr., for the plaintiffs.

E. D. Sohler & C. A. Welch, for the defendant.

MORTON, J. This is an action of replevin for a locomotive boiler. It appeared at the trial that the plaintiffs bought the boiler of Snow, paid for it, and that, by direction of the plaintiffs, Snow placed it on a lot of land in the rear of Snow's shop. The title to the boiler thus passed to the plaintiffs, as between them and Snow. It also appeared that, before this, Snow had mortgaged the boiler, together with other property, to Cate, who is the real defendant in this case, and the issue was whether the plaintiffs or Cate had the better title. The plaintiffs contended that the sale to them was made by Snow with the consent and by the authority of Cate.

As we understand the bill of exceptions, the learned judge ruled, as matter of law, that "in the absence of evidence that Cate knew of the sale or payment for the replevied boiler, or any act of said Snow tending to show that it had passed out of his possession or control, the court could not find a sale of the same to the plaintiffs, with said Cate's consent, or by his authority or license." This is the same, in legal effect, as a ruling that there

was no evidence which would justify a jury, if the case were on trial before it, in finding a verdict for the plaintiffs.

We are of opinion that this ruling was erroneous. If, after the mortgage to him was made, Cate orally authorized the mortgagor to make sales of the mortgaged property, a sale by the latter would convey a good title to a *bond fide* purchaser. *Staf-ford v. Whitcomb*, 8 Allen, 518.

Whether Cate gave Snow authority to sell the boiler in suit was a question of fact, and there was evidence in the case which would justify the finding of this fact in favor of the plaintiffs. Snow was a manufacturer of boilers, and Cate from time to time sold him iron and other materials, and lent him money "to enable him to carry on his business," taking as security mortgages of his stock and manufactured property. The plaintiffs dealt with Snow for three years, buying stock and materials, which were included in Cate's mortgages, sometimes paying Snow, and sometimes paying directly to Cate upon Snow's orders, and Cate had a general knowledge of this course of dealing and acquiesced in it. Without considering the other evidence, it would be competent for a jury, or the judge to whom the facts were submitted, to infer from these facts, if uncontrolled, that Cate gave Snow a general authority to sell the mortgaged property to the plaintiffs.

If this be so, the fact that Cate did not know of the sale of this specific boiler, or of Snow's acts in placing it in the rear lot, is immaterial, and would not terminate Snow's authority. As the ruling was, in substance, that it was not competent for the court upon all the evidence to find for the plaintiffs, there must be a new trial.

Exceptions sustained.



EZEKIEL S. JOHNSON vs. PATRICK COLLINS.

Suffolk. Nov. 14. — Dec. 9, 1874. WELLS & DEVENS, JJ., absent.

An attachment made more than four months before proceedings in bankruptcy under the U. S. St. of 1867, c. 176, is not dissolved thereby; and the attaching creditor of the bankrupt may have a special judgment against the property attached.

116 282
151 283

In an action for a breach of the covenant in a deed against incumbrances, the grantee may pay off the incumbrance after suit brought and recover this amount as damages.

A. conveyed land to B. by a deed containing a covenant against incumbrances. The land was then subject to an attachment in favor of C. B. brought an action on the covenant against A. and attached his property. A., more than four months afterwards, was adjudged a bankrupt under the U. S. St. of 1867, c. 176, and obtained a discharge. After this, B. paid off the attachment in favor of C. *Held*, that B. was entitled to recover the amount so paid, and to have a special judgment therefor against the property attached in his action against A.

CONTRACT for breach of warranty against incumbrances contained in a deed of land from the defendant to the plaintiff, dated July 11, 1870. Writ dated November 4, 1870.

At the trial in the Superior Court, before *Pitman*, J., it appeared that the defendant was adjudicated a bankrupt September 2, 1872, and obtained a discharge on May 5, 1873. The plaintiff sought to obtain a special judgment against certain property of the defendant attached more than four months before the filing of the petition in bankruptcy.

There was evidence that the land conveyed was, at the time of the delivery of the deed, subject to taxes for the year 1870, and that the plaintiff paid the taxes on July 10, 1871. This debt was not offered for proof in the bankruptcy proceedings.

The plaintiff also put in evidence tending to show, that at the time of the delivery of the deed there was an attachment on the premises in favor of one Nolan against this defendant; and that on June 14, 1873, he paid the execution issuing on said attachment. The evidence of this payment was objected to by the defendant, but was admitted.

The defendant asked the judge to rule that the plaintiff could not maintain his action, except for the item of taxes paid; the judge declined so to rule, and instructed the jury that the plaintiff was entitled to recover the amount of both items, as the measure of his damages for the breach of covenant against incumbrances, on a special judgment, to be satisfied from the property attached. To this ruling, and refusal to rule, the defendant alleged exceptions.

T. Weston, Jr., for the defendant.

B. E. Perry & S. W. Creech, Jr., for the plaintiff.

MORTON, J. The plaintiff's attachment, having been made more than four months before the commencement by the defend-

ant of proceedings in bankruptcy, was not dissolved thereby. The lien created by it remains a continuing security for any judgment which the plaintiff may obtain in the suit in which it was made. It has been repeatedly decided that, in such a case, the court in which the suit is pending should render a qualified judgment, to be enforced only against the property attached, and not against other property or the person of the defendant. *Bates v. Tappan*, 99 Mass. 376. *Bosworth v. Pomeroy*, 112 Mass. *Stockwell v. Silloway*, 113 Mass.

The rules of law, by which the amount for which the plaintiff is entitled to judgment is determined, are not affected by the bankruptcy of the defendant. In an action to recover damages for a breach of the covenant in a deed against incumbrances, where the incumbrance is one which can be removed by the grantee, he may recover the amount fairly and justly paid by him for the removal of such incumbrance, not exceeding the value of the estate, although he pays it after the action is commenced. *Leffingwell v. Elliott*, 10 Pick. 204. *Brooks v. Moody*, 20 Pick. 474. *Norton v. Babcock*, 2 Met. 510. In the case at bar there were two incumbrances, the taxes assessed for the year 1870, and an attachment in favor of one Nolan, both of which the plaintiff removed by paying them, in good faith, before the trial, but after the commencement of the suit.

Upon the principles stated above, the Superior Court correctly ruled that the plaintiff was entitled to recover the amount of both items thus paid, as the measure of his damages for the breach of the covenant against incumbrances, and that a special judgment therefor should be entered to be enforced against the property attached.

Exceptions overruled.

HENRY B. BLACKWELL vs. ABEL GOSS.

Suffolk. Nov. 12. — Dec. 11, 1874. WELLS & DEVENS, JJ., absent.

Upon an oral submission to arbitration, parol evidence is competent to show what was in controversy, and submitted to the referee.

A. bought a horse of B., and paid him for it, and, not being satisfied with the horse, returned it to B., who agreed to give him another. The horse died while in B.'s

possession. The parties then agreed to submit to arbitration two questions, who was the owner of the horse at the time of its death, and what would be a fair adjustment of the loss occasioned by the death of the horse between the parties. The arbitrators found that B. should pay A. a certain amount. *Held*, that the award was binding.

CONTRACT upon the following award in writing and signed by the arbitrators: "The undersigned, to whom was referred a matter of difference of opinion between Henry B. Blackwell and Abel Goss, in relation to the ownership of a horse, owned at different times by each of the parties, after a full consideration of the facts in the case, made this award: that Goss shall pay to Blackwell the sum of \$140 in cash."

At the trial in the Superior Court, before *Putnam, J.*, without a jury, the plaintiff offered evidence of the execution of the award and put it in the case. He then offered to show by his own testimony and that of the referees that the submission was an oral one, and to show what the parties agreed should be submitted to the referees. The defendant objected to the admission of such evidence, but it was admitted, subject to the defendant's exception. Upon this evidence, the judge found the following facts:

The plaintiff purchased of the defendant a horse for which he paid him \$200 in cash; and not being satisfied with the horse, returned it to the defendant, who agreed to give him another horse, when he should have one which he thought would satisfy the plaintiff, and, while thus in the defendant's possession, the horse died. A dispute then arose between them as to the ownership of the horse at the time of its death, and which of them should bear the loss. They thereupon agreed to submit to the referees these questions: 1. Who was the owner of the horse at the time of his death? and 2. What was a fair and equitable adjustment between them of the loss thus occasioned? The referees determined both of these questions submitted to them, and rendered the award in question.

Upon this evidence, the judge found for the plaintiff in the sum of \$147, the amount which the referees found that the defendant should pay to the plaintiff, with interest from the date of the writ, and the defendant alleged exceptions.

C. P. Hinds, for the defendant.

H. G. Parker, for the plaintiff.

AMES, J. This is a case in which an oral submission would be binding. Of course in such a case parol evidence must be admissible for the purpose of showing what it was that was submitted. *Homes v. Aery*, 12 Mass. 134. *Eveleth v. Chase*, 17 Mass. 458. *Cook v. Jaques*, 15 Gray, 59. *Byam v. Robbins*, 6 Allen, 63. Otherwise it could hardly be an oral submission. It must be taken as shown therefore by competent evidence that the horse which the plaintiff had bought and paid for had been returned to the seller, the defendant, who agreed to furnish another that should be satisfactory. The horse so returned having died before the proposed substitute had been furnished, the controversy arose that was submitted to arbitration. The plaintiff's claim must have been that upon the return of the horse it became the defendant's property, and that its death was the defendant's loss, leaving the plaintiff in the position of an intending purchaser who had paid for an article of property which he had not yet received. The award does not in terms answer the question as to the ownership of the horse at the time of its death, but in substance and effect it answers it by sustaining the plaintiff's claim. An award in favor of the plaintiff can have no other meaning than that the horse at the time of its death was the property of the defendant; and that as the defendant had been paid for a horse not yet delivered he was equitably indebted to the plaintiff.

We see no cause for the objection that the award did not conform to the submission, or failed to include all that was submitted.

Exceptions overruled.

CHARLES A. MOORE vs. WILLIAM CAINE.

Suffolk. Nov. 17.—Dec. 11, 1874. WELLS & DEVENS, JJ., absent.

In an action to recover damages caused by the defendant's inducing the plaintiff to enter into a partnership with him for a term of years, by means of a fraudulent representation that he was the owner of certain buildings agreed to be used for the purposes of the partnership, and the use of which was to be contributed by the defendant as his share of the capital, proof that the buildings were owned by the defendant's wife, who gave the defendant verbal authority to use the buildings for the agreed term, is not a valid defence, if the representation is material; and the question of the materiality of the representation is for the jury.

TORT for fraudulent representations, whereby the plaintiff claimed to have been fraudulently induced to enter into a copartnership with the defendant for the manufacture of glass at South Boston, under the style of the Phoenix Glass Works. The declaration alleged that the defendant represented, among other matters, that certain buildings named in the partnership agreement were well worth \$50,000, and that the title to the property was in him, subject to a mortgage of \$20,000, or a little more than \$20,000. Trial in the Superior Court, before *Pitman, J.*, who allowed a bill of exceptions in substance as follows :

There was evidence tending to show that the defendant represented to the plaintiff that the works to be used by the proposed firm were owned by the defendant, subject to a mortgage for \$22,000, and that he would furnish the use of them in the business of said firm as his contribution. This evidence was controverted by the defendant, and it further appeared in evidence which was uncontrolled, that the wife of the defendant was seised in fee of the premises, subject to the mortgages aforesaid, and that she had verbally authorized the defendant to use the factory and outbuildings during the term of five years, he paying interest on the mortgages, taxes and insurance. The agreement of partnership provided as follows : " William Cains is to furnish the use of the buildings of the aforesaid works, and of all the tools used in the business and at present upon the premises, the estimated value of which is about \$14,000." The day-book of the firm contained the following entry, under date of February 2, 1872 : " William Cains and Charles A. Moore have this day entered into partnership under the firm of Phoenix Glass Works. William Cains contributes as capital the use of buildings, tools and materials, estimated at \$10,000." The plaintiff and defendant continued in business as a firm, making and selling glass, for about seventeen weeks, at the end of which time the plaintiff, as he contended, and offered evidence tending to show, for good cause, and after the works had stopped, abandoned the business and instituted this suit.

The defendant's counsel asked the judge to rule as follows :
" 1. If the title to this property was in Cains's wife, and Cains had the right from his wife to permit the proposed partnership to

use the building, that was a sufficient compliance with the partnership agreement. 2. If the title to this property was not in Cains, yet on the uncontrolled evidence in the case Cains had the right to put in the use of the buildings by the owner. 3. It was not necessary that Cains should have had the actual title and ownership of the buildings, provided he had the right to use the buildings in business."

The judge declined so to instruct the jury, but charged them that the question of the materiality of this representation was for them to pass upon; that the authority granted by the wife was revocable, and in case of her death would cease; and that such a permissive privilege would not be a substantial compliance with the representation of ownership, if made. The jury found for the plaintiff, and the defendant alleged exceptions.

W. E. L. Dillaway, for the defendant.

J. S. Abbott, for the plaintiff.

AMES, J. The partnership, according to its terms, was to continue for the period of five years. The defendant had no such title in the premises that he could give any assurance that the firm could have an undisturbed occupation for that, or, indeed, for any fixed period. His wife was the owner of the estate, subject to certain mortgages, and whatever authority she had given to the defendant in relation to it was permissive only, and revocable at her pleasure. So insecure and slight a title was not a compliance with the partnership agreement. The question of the materiality of the defendant's representation was properly left to the jury, and the rulings of the presiding judge were correct.

Exceptions overruled.



NATIONAL LIFE INSURANCE COMPANY *vs.* GEORGE D. ALLEN.

Suffolk. March 13. — Dec. 17, 1874. *COLT & ENDICOTT, JJ., absent.*

A principal may sue in his own name on a promissory note not negotiable made in his behalf and for his benefit, although by its terms it is payable to the agent.

CONTRACT upon the following promissory note, signed by the defendant: "\$422.83. Boston, May 31, 1869. Borrowed and

received of J. T. Phelps, agent, four hundred and twenty-two and $\frac{1}{10}$ dollars, which I promise to pay on demand, with interest."

At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the following facts were found:

The plaintiff is a corporation in the State of Vermont, having, in 1867, an office in Boston, where J. T. Phelps acted as its general agent in the business of life insurance. On December 31, 1867, the plaintiff issued to the defendant a policy of insurance on his life for \$5000 for the term of ten years, for an annual premium of \$323.25. The defendant procured this policy to be issued through Phelps, and received it from him, to whom the defendant then paid the first year's premium. The note declared on was made and given to Phelps in consideration of premiums of insurance due from the defendant to the plaintiff, as provided by the policy issued to the defendant as aforesaid, and for interest on such premiums. The premiums then due, and interest, amounted, on May 31, 1869, to \$422.83; and Phelps had no property or interest therein, excepting in his character of general agent of the plaintiff in Boston.

Upon these facts, the judge ruled that the plaintiff could maintain this action, and found for the plaintiff. The defendant excepted to this ruling.

E. M. Bigelow, for the defendant.

L. W. Howes & E. B. Smith, for the plaintiff.

DEVENS, J. The note upon which this suit is brought is not in the usual form of promissory notes, but recites that, having borrowed and received the sum of \$422.83 of J. T. Phelps, agent, the defendant promises to pay the same on demand, with interest. The facts found, the case having been tried by the Superior Court without a jury, showed that the whole consideration of this agreement moved from the plaintiff corporation, it having made a policy of insurance upon the life of the defendant, and this paper having been given by him for the balance of unpaid premiums, in which Phelps had no interest. It was a note to the possession of which the plaintiff was entitled, the whole beneficial interest being in it, and which it also had a right to collect. *West Boylston Manufacturing Co. v. Searle*, 15 Pick. 225, 230. But it is objected by the defendant that the note could only be collected by a suit in the name of Phelps.

As a general rule, where a written agreement not under seal is made on behalf of a principal not named, and the consideration has moved from him, it is competent for the principal to bring an action in his own name on such agreement thus made for his benefit; and, on the other hand, even when the agent may himself be liable upon a written contract, because he has failed fully to disclose that he has made it on behalf of another, the principal on whose behalf he has made it may also be liable. *Huntington v. Knox*, 7 Cush. 371, 374, and other cases cited in *Exchange Bank v. Rice*, 107 Mass. 37, 43.

The instrument here sued, although not negotiable, is properly designated as a promissory note, it being an absolute promise to pay money at all events; but, from its nature, an action upon it must necessarily be confined to those who are actually parties to it, either really or nominally, and it is clearly not intended to make any contract which was capable of transfer or assignment. On notes similar in their general character to this, it has been held that the action might be maintained in the name of the principal from whom the consideration moved. In *Garland v. Reynolds*, 20 Maine, 45, upon a note not negotiable for \$100, payable to Enoch Huntington, treasurer of the committee of surplus revenue, it was held that the town for whose money the note was given might sue in its own name.

In the present case, the principal is entitled to the benefit of the note, and the defendant can sustain no injury by suit in the name of the principal, as he would have the benefit of any payments made by him to the nominal payee, while acting as agent.

Nor do we think that the St. of 3 & 4 Anne, c. 9, § 1, upon which the modern doctrine of promissory notes is founded, which declares that the money mentioned in such note shall be construed to be due and payable to such person to whom the same is made payable, should be held to prevent the principal from maintaining an action in his own name on a note not negotiable, where the nominal promisee is an agent. Nor, even if it may be sued by the principal in his own name, does it present the case of a note payable to A. or to B., as claimed by the defendant, which has been held bad as a promissory note. *Osgood v. Pearsons*, 4 Gray, 455. Here, there is in fact but one payee, Phelps being merely the representative of the plaintiff. *Exceptions overruled.*

CHARLES C. PRIEST & another vs. JAMES R. NICHOLS & others.

Suffolk. Nov. 13. — Dec. 18, 1874. WELLS & DEVENS, JJ., absent.

If goods of a tenant of part of a building are injured by water escaping from a waste pipe and from an engine, through the negligence of the landlord, who occupies the rest of the building, and who has charge of the waste pipe and engine, the tenant may maintain an action therefor against the landlord.

In an action for injury done to goods by water, the judge instructed the jury on the question of damages, that the evidence must be such that they could decide thereon as to the amount of damage; that guesses of witnesses were not sufficient to found a verdict upon; that the judgment of persons having sufficient knowledge and opportunity of judging as to the amount of goods injured, and as to the extent of the injury, was competent; that exact accuracy in testimony was not required, but that the jury could not give damages to an amount exceeding what they were satisfied of on the evidence. *Held*, that the defendant had no ground of exception.

If goods are damaged by two different causes, and the defendant is only responsible for one of them, the burden of proof is on the plaintiff to show the extent of the damage occasioned by the cause for which the defendant is liable.

In an action for injury sustained by the goods of a tenant who occupied part of a building, caused by the negligence of the landlord who occupied the rest of the building, in not keeping a waste pipe which was in his charge, in repair, there was evidence that the floor of the plaintiff's premises was not level, and that the water flowed down the incline to the goods. The defendant asked the judge to instruct the jury that he was not liable if there was any negligence on the part of the plaintiff in not looking after the waste pipe, or if the fact that the floor was not level caused any additional damage. The judge refused to give these instructions, and instructed the jury that for injuries arising from the plaintiff not taking reasonable precaution to prevent injury, when he had reasonable cause to believe that such precaution was reasonably necessary to avoid damage to his property, the defendant was not liable. *Held*, that the defendant had no ground of exception.

TORT for injury to the plaintiffs' goods by leakage from pipes alleged to be under the control of the defendants.

The first count of the declaration alleged that the plaintiffs were tenants of the first story and basement of a building on Congress Street, Boston, where they carried on business as wool dealers; that the defendants used the second story of the building as a manufactory of chemicals, and had charge of and used, for the purpose of carrying off the waste water and material of their manufactory, a water closet and sink, from which a waste pipe extended down through the plaintiffs' premises, which waste pipe the defendants carelessly and negligently suffered to leak, and from which waste

water and refuse of the chemicals ran upon and through the plaintiffs' wool, greatly injuring it.

The second count, after alleging the use and occupation of the building by the parties as in the first count, set forth that the defendants had a steam-engine upon their premises to supply power to their manufactory, and that by the defendants' negligence the pumps and pipes thereof leaked, whereby a large quantity of water came down into the plaintiffs' premises, spoiling their wool.

The third count was of the same purport, alleging that "the defendants operated, employed and had charge of a steam-engine upon their said premises, and while so operating and running the said engine, the defendants carelessly and negligently suffered the pumps and pipes thereof to get out of order and repair, and leak, whereby a great quantity of water ran down into the plaintiffs' said premises, and spoiled and injured a large amount of the plaintiffs' wool."

Trial in the Superior Court before *Dewey, J.*, who allowed a bill of exceptions in substance as follows :

Evidence was offered by the plaintiffs that they occupied the floor and basement under the premises occupied by the defendants. There was an engine on the defendants' floor over the premises of the plaintiffs, put in and used by the defendants to run their manufacturing establishment, after their lease to the plaintiffs, and also used to carry an elevator, which was used principally by the defendants, and occasionally by the plaintiffs. There was also a waste pipe, which, passing from a water closet and two sinks of the defendants, ran down, inclosed in a wooden box, through the premises of the plaintiffs to the basement. At about four feet from the basement floor it made a right angle, and flowed into the sewer, and connected with this waste pipe was a sink and water closet of the plaintiffs. The damages alleged in the declaration were caused by the water flowing back from the sewer at high tides and flooding the basement, and thereby damaging the plaintiffs' wool, then piled up on the floor, by a leak in the waste pipe at the angle in the plaintiffs' basement, and at a similar angle immediately over it on the premises of the defendants, from which the water leaked in upon the plaintiffs' wool in a room above the basement, and by water leaking down from the defendants' boiler and engine upon the plaintiffs' wool in the same upper room.

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The plaintiffs testified that about the middle of July, 1872, their floor was flooded by the water backing in from the sewers, and damaging their wool, but were unable to state the precise amount of damage then caused, or by any subsequent leaking.

The plaintiffs also testified that from July, 1872, to November, 1872, water came down occasionally from the engine and boiler in the defendants' premises, and on one occasion water enough came down to wet the floor to a considerable extent, and that they were obliged to remove some bags of wool. They were not able to say exactly how much wool was injured in this way, but stated the amount of the injury in their judgment.

They further testified that some time in August a leak was discovered in the waste pipe, and the water had flowed down from the defendants' premises and wet their wool, stored on the floor of the plaintiffs over the basement; that the defendants, on being notified, had repaired the same; that damage had been done thereby. As to the amount of the damage, the witnesses testified as to their judgment, but were unable to say exactly how much. Some time after, a leak was discovered in the basement of the plaintiffs' premises at the elbow of the waste pipe, the water from which had flowed on to the floor, and, the floor being inclined, had flowed the entire length of the building, and had damaged considerable wool on the floor; the water from the leak at the elbow had flowed along the entire length of the floor, and damaged considerable wool in that way, but they were unable to state the exact amount. The leak had continued for some time before it was discovered, and when the defendants were notified they repaired the same, and since that time no damage had been done. By water from the engine and leaks in the pipe, some 20,000 pounds of wool had been damaged about ten per cent. of its value, which was fifty cents per pound. They had paid about \$100 for having about twenty bags, which had thus been damaged, cleaned, and three loads had been carted off for manure. No bill had ever been presented to defendants for damages, but they had claimed damages of the defendants, and none of this wool had been sold for anything less by reason of the damage so done, as it was on the premises when they were destroyed by fire. In making up their proof of loss, no mention was made of any damaged wool, because their losses largely exceeded their insur

ance. The waste pipe was in the premises at the time of the first occupation thereof by the plaintiffs, and it was in evidence that the pipe had been in for many years; that it was not originally strong, and had become defective and weakened by long use, and that the defendants had by their employment of their plumber at different times to repair the same, treated the same as being under their charge.

At the request of the defendants' counsel, all evidence of damage done by reason of the tide backing in to the sewers and doing damage by flooding the basement was excluded.

At the close of the plaintiffs' case upon the foregoing evidence, the defendants asked the judge to rule that the plaintiffs were not entitled to recover; but the judge declined to give this ruling.

The defendants then offered evidence that the boiler, engine and pipes, were during this time in the best order and condition, and that the engine was run and managed with the best of care, and that occasional leaks from the boiler and pipe were unavoidable; that the elevator was run by said engine for the mutual benefit of both parties. The defendants also testified that as soon as they knew of the leak in the waste pipe they had immediately repaired the same; and that no complaint of damage to wool had been made to them except from the tide overflowing the sewers, and so flooding the basement of the premises, when the defendants had told the plaintiffs that they could leave the premises at any time, and that afterwards they had put in a floor to the basement.

The counsel for the defendants asked for the following instructions: "1. The allegations showing that the defendants had a right to use the waste pipe, it is to be taken for granted that they had the right to use it in the ordinary way. They were not obliged to repair it; and if they used it in the ordinary way they are not liable for any damages. They are liable only for gross negligence in the use of the same, and damages resulting from such gross negligence. 2. The defendants are only liable for gross negligence in the management of their engine and boiler, it being there for the mutual benefit of the parties. 3. That as the engine and boiler were placed in the defendants' premises by consent of the plaintiffs, and for the benefit of both parties, as there is no evidence to show gross carelessness or neglect in the man-

agement of the same, and no evidence to show any want of care on the part of the defendants, the plaintiffs cannot recover on either of the two counts relating to damage done by reason of the water from the engine or boiler. If the plaintiffs took the premises as they were at the time of the execution of the lease, the pipes might be used by the defendants in the same way they had been heretofore. The facts show an implied assent of the plaintiffs for the defendants to use the waste pipes for their waste water, and they are not liable for any damage done by its leaking or bursting, if they used them with ordinary care. 4. The waste pipe being on the inside, if the damage could have been avoided by keeping it in repair, the defendants are not liable for its bursting; nor are the defendants liable if there was any want of care or any negligence on the part of the plaintiffs in not looking after said waste pipe. 5. If the decline in the floors of the plaintiffs' premises in any way contributed to cause the water to flow from the place of its bursting to the front of the store, and by such flow of water caused the wool to be damaged, which would not have been so damaged if the floor had been level, the plaintiffs cannot recover. 6. In this action, where the damages alleged were caused by different causes, each of which causes more or less damaged the plaintiffs' wool, if a portion of the damages was for causes for which the defendants were not liable, the burden of proof is upon the plaintiffs to show the damage done by causes for which the defendants were liable; and if they fail to offer testimony tending to show this, or to apportion the damages done by the different causes, they cannot recover."

The judge declined to give these instructions, and instructed the jury as follows:

"1. That to recover on the first count, the plaintiffs must prove that the defendants had the charge of and used for the purpose of carrying off the waste water, a water closet and sink, from which a waste pipe extended down through the plaintiffs' premises, and that the defendants carelessly and negligently suffered the waste pipe to leak, and the waste water from the water closet to run upon and through the plaintiffs' wool, thereby injuring and spoiling the same; and if this is proved, the defendants are responsible for the damages arising therefrom.

"2. That to recover on the second count, the plaintiffs must prove that the defendants had a steam-engine upon their premises for obtaining power to use in their manufactory, and that they so carelessly and negligently managed and operated said engine as to cause the pumps and pipes thereof to leak, whereby a large quantity of water came down from the premises of the defendants upon the premises and property of the plaintiffs, and thereby injured and spoiled their said property.

"3. That to recover on the third count, the plaintiffs must prove that the defendants had a steam-engine upon their premises, which they operated, employed and had the charge of, for their own business purposes, and while so operating and running the engine, the defendants carelessly and negligently suffered the pumps and pipes thereof to get out of order and repair, and to leak, and that thereby a quantity of water ran down into the plaintiffs' premises, and spoiled and injured a quantity of wool of the plaintiffs."

4. On the question of damages, the judge instructed the jury : "That the defendants were responsible for the direct, but not for the remote injury, caused by their negligence and carelessness," stating fully the distinction between direct and remote injuries, to which no objection was made. "That the evidence must be such that the jury may be able to decide thereon as to the amount of the damage ; that guesses of witnesses were not sufficient to found verdicts upon ; that the judgment of persons having sufficient knowledge and opportunity of judging as to the amount of the wool injured and as to the extent of its injury are competent ; that exact accuracy in testimony is not required, but that the jury could not give damages to an amount exceeding what they are satisfied of on the evidence.

"5. That when the damage was occasioned by different causes, from each of which there was more or less damage to the plaintiffs' wool, if a portion of the damage was from causes for which the defendants were not liable, as from the tide water, the burden of proof was on the plaintiffs to show the damage to the wool from causes for which the defendants are liable, as distinguished from the other causes ; and for this damage only could the plaintiffs recover.

"6. That for injuries arising from the plaintiffs not themselves taking reasonable precaution to prevent injury, when they had reasonable cause to believe that such precautions were reasonably necessary to avoid damage to their property, the defendants were not liable."

The jury found for the plaintiffs, and the defendants alleged exceptions.

T. Weston, Jr., for the defendants.

B. Dean, for the plaintiffs, was not called upon.

ENDICOTT, J. There was evidence upon which this case could properly be submitted to the jury. The plaintiffs occupied as tenants the lower floor of a building belonging to the defendants. The defendants occupied the floor above. There was a pipe leading through the plaintiffs' premises which conveyed the waste water and material from the manufactory, sinks and water closet of the defendants to the sewer below. This pipe was alleged to be in charge of the defendants, and evidence was offered that they had so treated it, and had, from time to time, upon notice, made repairs upon it. But they negligently suffered it to be out of repair, whereby the water damaged the goods of the plaintiffs. It was a question of fact for the jury, whether the pipe was in charge of the defendants, and was out of repair through their negligence. The rule that a landlord is not bound to keep the premises of his tenant in repair, and therefore cannot be held responsible for negligence, if out of repair, has no application to the facts presented in this case.

The defendants also had an engine on their premises, and the plaintiffs contended that by their negligent management of the engine, and their negligence in not keeping its pipes and pumps in repair, they leaked, and caused the water to come down and damage their goods. Evidence was offered on these points, and it was for the jury to decide.

The rulings of the presiding judge were carefully stated, and are not open to exception.

Exceptions overruled.

EMELINE J. CUTTER vs. ALEXANDER COCHRANE.

Suffolk. Nov. 11. — Dec. 28, 1874. WELLS & DEVENS, JJ., absent.

The release of a party from the performance of a contract constitutes a sufficient consideration for his promise to account with the other party for moneys paid by the latter under the contract.

CONTRACT for money had and received, with counts on an agreement to repay money paid by the plaintiff to the defendant on a contract, alleged to have been rescinded.

At the trial in the Superior Court, before *Rockwell, J.*, the plaintiff offered evidence tending to prove the following facts: In November, 1870, the plaintiff and the defendant acting through his agent, Hugh Cochrane, entered into a verbal agreement for the purchase by the plaintiff of the defendant, as guardian of certain minor heirs, of a dwelling-house and land connected therewith, situated in Malden. On November 11, the plaintiff made the first payment, and took a receipt and memorandum, as follows: "Received of Mrs. E. J. Cutter one hundred dollars, on account of purchase of estate known as Cochrane estate, situated on Court leading from Main Street; price, forty-seven hundred dollars; to be paid in instalments of seventy-five dollars per month, until June 1, 1871, at which time amounts of payments to equal one thousand dollars, and one thousand dollars to be paid in quarterly payments from that date. Balance on mortgage for three years from that date. Bond for deed to be given on that date, and deed when the balance of the second thousand is paid. Hugh Cochrane, for guardian."

The authority of Hugh Cochrane to act as agent for the defendant was not denied. Various payments were made by the plaintiff, from November 11, 1870, to October 17, 1871, amounting to \$950 in all, for which receipts were given, sometimes signed by the defendant, and sometimes by Hugh Cochrane, in his behalf.

In November, 1870, the plaintiff entered into possession of the house and premises under the agreement of sale, and continued to occupy the same until July, 1872. About April 1, 1872, no further payments having been made, Hugh Cochrane

went to the house of the plaintiff, and said the defendant was dissatisfied, on account of the delay in making the payments ; and it was then agreed that the agreement of sale should be rescinded ; that the plaintiff should give up possession of the premises to the defendant, but should hold possession and keep the house furnished for a while, to enable the defendant to make a more advantageous sale of the same, and pay the defendant interest at eight per cent. per annum on the purchase money for the time she should have occupied ; and that the defendant, in consideration thereof, should pay back to the plaintiff the several sums she had paid towards the purchase, with eight per cent. per annum on the several payments from the date of such payments, and also refund to her \$60.03, being the amount of taxes on the estate paid by her. The plaintiff remained, and kept the house furnished until the defendant sold the same on May 24, 1872, and, as soon as requested thereafter, gave up the possession to the purchaser on July 18, 1872. In September, 1872, she went to the store of the defendant in Boston for a settlement, where she found Hugh Cochrane and the defendant together, and where Hugh, in the defendant's presence, made out a statement of the balance due the plaintiff, placing it at \$267.75 ; that it differed from the above agreement only in that it did not embrace the item of taxes, nor did it allow her interest on the payments made by her ; while on his side was claimed an item of \$24.25, alleged to have been paid by him for insurance, and which he contended ought to be paid by the plaintiff. The plaintiff declined to settle on these terms, and subsequently, and before suit brought, made formal demand for all the money paid by her as above, which was refused by the defendant.

After the evidence was closed, the defendant's counsel asked the judge to rule that the plaintiff was not entitled to recover, on the ground that there was no consideration for the alleged promise on the part of the defendant. The judge so ruled, and ordered a verdict for the defendant, and the plaintiff alleged exceptions.

N. B. Bryant, for the plaintiff.

J. P. Converse & E. A. Kelly, for the defendant.

AMES, J. Whether by her failure to make the stipulated payments the plaintiff had lost all her rights under the original con-

tract, and forfeited the money which she had paid, is a question which the defendant is not entitled to raise in this case. The settlement which was had between the parties proceeded upon a very different ground. An agreement to rescind a previous contract imports that, until it is rescinded, it is recognized by both parties as subsisting and binding. The rescinding of a previous contract containing mutual stipulations is a release by each party to the other. The release by one is the consideration for the release by the other, and the mutual releases form the consideration for the new promise, and are sufficient to give it full legal effect. The defendant is bound to account for the money that has been paid to him, not because the purchase did not go into effect, but because, in consideration of mutual releases, he has excused the plaintiff from its fulfilment, has consented to a new agreement, and has expressly promised to account for the money.

Exceptions sustained.

RICHARD PROUT *vs.* GRAHAM A. ROOT.

Berkshire. September 8, 1874 — January 5, 1875. MORTON & ENDICOTT, JJ., absent.

A mortgagee's interest in personal property in his possession, after breach of condition and before foreclosure, is not subject to attachment.

TORT against the sheriff of the county of Berkshire for the official misconduct of Horace S. Streeter, one of his deputies, in converting to his own use a span of horses, alleged to be the property of the plaintiff by virtue of a mortgage to him from one C. I. Ray. The answer set up a special property in Streeter by virtue of an attachment upon a writ in an action in which Richard Prout was defendant. Trial in the Superior Court, before Allen, J., who allowed a bill of exceptions in substance as follows:

The plaintiff testified that he sold the horses to Ray on December 30, 1871, and took his promissory note therefor for \$330, payable on demand, with interest, and also a mortgage of the horses to secure the payment of said note; that on the day of the sale, Ray took possession of the horses, and they remained in his

possession about five weeks, when the plaintiff demanded payment of the note of Ray, who declined to pay it, and thereupon the plaintiff demanded possession of the horses, and they were immediately surrendered to him by Ray; that the horses remained in his possession some three or four days, when they were attached by Streeter.

There was no evidence tending to prove that the plaintiff had ever given the notice of foreclosure as required by statute, or that Ray had ever offered to redeem the horses. The plaintiff put in other evidence tending to corroborate his testimony, and rested his case.

The defendant introduced evidence tending to prove that the horses were delivered up to the plaintiff by Ray, in satisfaction of the mortgage, and that the note and mortgage were fictitious, and intended to keep the horses from the reach of the plaintiff's creditors.

The defendant requested the judge to instruct the jury "that in no view of the case was the plaintiff entitled to recover, and that they must find a verdict for the defendant." The judge declined to so instruct the jury, but did instruct them, among other things not excepted to, that if the jury were satisfied from the evidence that the horses were delivered up to the plaintiff by Ray on the mortgage for the purpose of foreclosure, they were not liable to attachment upon the writ against the plaintiff while so held, and before foreclosure, and the jury must in that case find a verdict for the plaintiff. The verdict was for the plaintiff, and the defendant alleged exceptions.

N. H. Bixby, (*F. O. Sayles*, with him,) for the defendant.

H. L. Dawes & J. C. Wolcott, for the plaintiff.

COLT, J. A mortgage of personal property transfers the general property, and, in the absence of any agreement to the contrary, the immediate right of possession. The title is subject to a defeasance; but unless it has been divested by a performance of the condition, or by the exercise of the mortgagor's right to redeem, the mortgagee can alone maintain an action against a stranger for its conversion. It differs in this respect from a pledge, where only a special property passes and the general ownership remains in the pledgor. At law, and without statute intervention, the interest of the mortgagor is not liable to be

taken on execution, because it is a mere equitable interest, and where there is no legal right there can be no legal remedy *Badlam v. Tucker*, 1 Pick. 389, 399.

The precise question here presented is, whether the interest of a mortgagee of personal property in his possession, after breach of condition, and before foreclosure, is liable to be so taken. We are referred to no case in which the point has been distinctly passed upon by this court. In the decision of it, regard must be had to existing legislation, and to the course of adjudication with reference to similar rights of property.

There is no substantial difference, at common law, in respect to the nature of the title between a mortgage of real and a mortgage of personal property. In both, the title vests in the mortgagee, subject to be defeated by the performance of the condition. In both, upon a breach of condition, the interest becomes absolute at law; and yet it was held in the case of *Blanchard v. Colburn*, 16 Mass. 845, that land mortgaged could not be levied on for the debt of the mortgagee, unless he had first entered upon the same; for it was said, although to some extent the mortgagee is seised of the estate in fee simple, defeasible only by the performance of the condition or by redemption, yet within the meaning of the statutes which provide for the levy of executions, the land is treated as belonging to the mortgagor, liable to be taken in execution as his real estate subject to the mortgage. It was called a pledge for the security of a debt, which, if paid to the assignee of the debt, would discharge the mortgage and defeat any title acquired by the levy of a creditor of the mortgagee. These and other objections were declared insuperable. And again, in *Eaton v. Whiting*, 3 Pick. 484, and *Marsh v. Austin*, 1 Allen, 235, the mortgagee's interest was declared to be in fact but a chose in action, at least until entry to foreclose, and not liable to be levied on for his debts. All right of redeeming mortgaged lands had before these decisions long been subject to be taken on execution for the mortgagor's debt, and the mode of doing so pointed out by the statutes. St. 1783, c. 57, § 2.

The rule thus maintained as to mortgages of real estate applies with equal if not greater force to mortgages of personal property. The general property technically passes, but it passes only as needed for the security intended. It is in the nature of a

pledge. If it be for the payment of money, then it is treated but as an incident of the debt. An assignment of the mortgage carries the title to the property, and an assignment of the debt, without the mortgage, by operation of law, carries with it, in the absence of any controlling agreement or waiver of the right, an equitable lien on the property which attaches to it in the possession of the mortgagee, and all claiming title under him, with notice. *Eastman v. Foster*, 8 Met. 19. *New Bedford Institution for Savings v. Fairhaven Bank*, 9 Allen, 175. Upon payment or tender to the mortgagee of the debt secured, the title, without further formality, is revested in the mortgagor, and he may maintain replevin for it, or recover damages for its detention. Gen. Sts. c. 151, § 5. But what is more to the point, under our statutes, the mortgagor's interest in the property, so long as his right to redeem remains, is liable, as in the case of real estate, to be attached and taken on execution, as well after as before condition broken, and whether the property be in the possession of the mortgagee or not. Under such an attachment, the property passes into the custody of the sheriff, and there is only left to the mortgagee the right to redeem, after a demand, within a limited time, of the amount due on his mortgage. If this be paid, the possession of the attaching officer cannot be interfered with, and the mortgagee's title is ended. Gen. Sts. c. 123, §§ 62-71. The rights thus given by statute are inconsistent with the existence of a similar right at the same time to attach the same property in favor of the creditors of the mortgagee. It is impossible that two officers should have equal right of possession by virtue of attachments against different parties in favor of different creditors.

The conclusion is, that under our laws, so long at least as the mortgagee's interest in personal property is held by him in good faith only as security, — before it has been, in fact, applied to the satisfaction of his debt by foreclosure or otherwise, — it cannot be attached as his property. Upon this bill of exceptions, it must be taken that the plaintiff's title as mortgagee was held in good faith, with no fraudulent purpose of defeating or delaying creditors. Upon this point we must presume that proper instructions were given, and the verdict is conclusive. Nor is there any

question raised as to the true rule of damages to be applied in a case where the mortgagee's interest is applied to the payment of his own debt.

Exceptions overruled.

ALVIN A. LONG vs. EDWARD W. COLTON, executor.

Franklin. Sept. 15, 1874. — Jan. 5, 1875. WELLS & MORTON, JJ.,
absent.

In an action of tort for breaking and entering the plaintiff's close, it appeared that the plaintiff's deed mentioned as the corner where the description began, a stake and stones on land of a third party. A witness testified that he had a conversation with this third party on his land, while he owned it, about the corner, and that the third party was not living at the time of the trial. It was admitted that the third party had never owned the land in controversy. The witness was then asked what statement the third party had made in this conversation. *Held*, that this statement was rightly excluded.

TORT for breaking and entering the plaintiff's close.

At the trial in the Superior Court, before *Dewey, J.*, the plaintiff put in the deed under which he claimed title to the premises in dispute, the description in which began as follows: "Beginning at the northwest corner of the premises hereby conveyed, at a stake and stones, on land formerly owned by Joseph Lyman," and, having given courses and distances to a certain stake and stones, concluded with "thence west twenty degrees north seventy-seven rods to the first mentioned bound." Upon this description, it being conceded that "the northwest corner of the premises" conveyed by the deed was at the corner of the land mentioned in said deed as "land formerly owned by Joseph Lyman," evidence to establish the position of that corner was introduced by both parties. The defendant called Joseph Lyman, who testified that he was a son of the Joseph Lyman named in the deed; that his father, who had been dead many years, formerly owned the land mentioned in the deed as "land formerly owned by Joseph Lyman;" that he had a conversation with his father in his lifetime, fifty-two years ago, while he owned said land, and when he was on the same, about the corner mentioned in said deed. The witness was asked what statement his father made, and the judge ruled that the evidence offered was not admissible.

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Neither of the Lymans had ever owned the land in dispute in the present action. The jury found for the plaintiff; and the defendant alleged exceptions to the exclusion of this evidence.

S. O. Lamb, for the defendant.

A. Brainard, for the plaintiff.

COLT, J. The northwest corner of the land in controversy is described in the deed under which the plaintiff claims as on land formerly owned by Joseph Lyman. It was conceded at the trial that a corner of Lyman's land was at the same point. The plaintiff's northwest corner, therefore, could be located by establishing the position of Lyman's corner.

Joseph Lyman had been dead many years, and his son was called to testify to his father's declarations made on his own premises while he owned the land, about this corner of his land.

The declarations of deceased persons respecting boundaries are received as evidence as an exception to the rule which rejects hearsay testimony. In most of the decided cases, it is held that the declaration should appear to have been made in disparagement of title, or against the interest of the party making it; but in *Daggett v. Shaw*, 5 Met. 223, it is said that the rule as practised in this Commonwealth is not so restricted, and that declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, are admissible as evidence when nothing appears to show that they are interested to misrepresent, and it need not appear affirmatively that the declaration was made in restriction of or against their own rights. And in *Bartlett v. Emerson*, 7 Gray, 174, it is held that, to be admissible, such declarations must have been made by persons now deceased, while in possession of land owned by them, and in the act of pointing out their boundaries, with respect to such boundaries, and when nothing appears to show an interest to deceive or misrepresent. *Ware v. Brookhouse*, 7 Gray, 454. *Flagg v. Mason*, 8 Gray, 556.

The declarations offered and rejected at the trial do not come within the exception thus defined to the rule by which hearsay is excluded. The decisive objection to their competency is that they do not appear to have been made while in the act of pointing out the boundaries of the declarant's land. This is an element which cannot be disregarded, especially when the question is one

of private boundary. The declaration derives its force as evidence from the fact that it accompanies an act which it qualifies or gives character to. The declaration is then a part of the act. Without such accompanying act, the declaration is mere narrative, liable to be misunderstood or misapplied, and open to the objections which prevail against hearsay evidence.

The declaration rejected does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible; and in the cases from New Hampshire, cited by the defendant, it seems to be held that declarations of deceased persons, who, from their situation, appear to have the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land. *Smith v. Forrest*, 49 N. H. 230, 237. *Great Falls Co. v. Worster*, 15 N. H. 412, 437. But by the current of authority and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or *quasi* public nature. 1 Greenl. Ev. § 145. 1 Phil. Ev. (N. Y. ed. 1849) 241, 242, Cowen & Hill's notes. *Hall v. Mayo*, 97 Mass. 416. *Exceptions overruled.*



E. STILLMAN DIX vs. THOMAS E. MARCY.

Franklin. Sept. 15, 1874. — Jan. 30, 1875. WELLS & MORTON, JJ.,
absent.

One who makes a valid conveyance of real estate subject to a verbal agreement that the grantee shall support the grantor and his family, and give back a mortgage or life lease of the property, may, upon the refusal of the grantee after part performance to fulfil his verbal promise, recover the value of the property conveyed, deducting so much as he has received from the previous part performance of the agreement, or the value thereof.

CONTRACT to recover \$1800, the price of certain real estate conveyed by the plaintiff to the defendant. The answer admitted the conveyance, but averred that it was made voluntarily and without any agreement for payment on the defendant's part.

Trial in the Superior Court before *Dewey, J.*, who, after verdict for the plaintiff, reported the case to this court. The facts appear in the opinion.

S. T. Field, for the defendant.

C. G. Delano, for the plaintiff.

ENDICOTT, J. The plaintiff conveyed his farm in August, 1872, to the defendant, his son-in-law, upon an oral agreement, that the defendant would furnish him, his wife and daughter, with a comfortable support during their lives. The defendant also agreed to give the plaintiff a mortgage on the farm or a life lease thereof to secure the support. Under this agreement the plaintiff with his wife and daughter lived with the defendant on the farm until January, 1874. A difficulty then occurred. The defendant ordered the plaintiff to leave, and refused to give him a mortgage according to the agreement. Since then the defendant has furnished no support to the plaintiff, though his wife and daughter have remained with the defendant.

The defendant denied that he made such an agreement. But the jury found that in consideration of the conveyance he agreed to give the plaintiff a mortgage or life lease to secure the support of himself and family.

By ordering the plaintiff to leave the farm and refusing to give the mortgage, the defendant rescinded his oral agreement. This agreement, being within the prohibition of the statute of frauds, the plaintiff could not enforce it, but brings this action to recover the value of the property conveyed. It is well settled that he may do so. Where a person pays money, renders service, or conveys property under an agreement, within the statute of frauds, and which the other party refuses to perform, an action will lie by such person, against the party so refusing, to recover the money paid, or the value of the services rendered or property conveyed. *Sherburne v. Fuller*, 5 Mass. 133, 138. *Kidder v. Hunt*, 1 Pick. 328. *Cook v. Doggett*, 2 Allen, 439. *Basford v. Pearson*, 9 Allen, 387. *Williams v. Bemis*, 108 Mass. 91. *White v. Wieland*, 109 Mass. 291. *Gillet v. Maynard*, 5 Johns. 85. *King v. Brown*, 2 Hill, 485. *Day v. New York Central Railroad*, 51 N. Y. 583. *Richards v. Allen*, 17 Maine, 296. Chit. Con. (11th Am. ed.) 422, n. and cases cited.

A person, who has received a benefit under such an agreement, and then repudiates it, is held to pay for that which he has received ; and there is an implied assumpsit on which the action against him can be maintained. In such an action the plaintiff is entitled to recover what is due him, or the balance that is due him arising out of the transaction between the parties. If the suit is to recover the value of land conveyed, and there has been part performance by the party refusing to complete it, that is to be considered in determining what is due. If payments have been made, they must be deducted from the amount to be recovered for the value of the land. And if the land was not to be paid for by money, but by furnishing support and maintenance, and there has been a partial performance in that respect, the value of such partial performance to the plaintiff must be allowed by him. He is only entitled to receive from the defendant the value of the property conveyed to him.

In this case the value of the support furnished to the plaintiff by the defendant under the oral agreement, and before its rescission, was properly deducted from the value of the farm, and the plaintiff was entitled to recover the value so found. *Day v. New York Central Railroad*, 51 N. Y. 583. *Richards v. Allen*, 17 Maine, 296. *Moses v. Macferlan*, 2 Burr. 1005.

Judgment on the verdict.

BOARDMAN P. BACKUS *vs.* MARK H. SPAULDING & another,
executors.

Hampshire. Sept. 15, 1874. — Jan. 6, 1875. WELLS & MORTON, JJ.,
absent.

Where A., in consideration of a sum of money lent to him by B., and of a note made to him by B. for the payment of an additional sum in four months, makes and delivers to B. a note for the amount of both sums, payable in six years, together with an assignment, as collateral security for the payment thereof, of a contract relating to certain real estate, the promise of A. to pay his note at maturity, and the delivery of the collateral security, constitute a sufficient consideration for the promise contained in B.'s note to pay the sum therein expressed at an earlier date.

CONTRACT brought for the benefit of William H. Stoddard and J. D. Kellogg, against the executors of Jonathan S. Baker, on a promissory note for \$3180, made by Baker on March 1, 1871, and payable to the plaintiff within four months from date, with interest. Writ dated January 1, 1873.

At the trial in the Superior Court, before *Lord, J.*, the plaintiff offered evidence tending to show that on March 1, 1871, Baker agreed with the plaintiff to lend him \$5000, and to take the plaintiff's note therefor, payable within six years from date, and as security for the payment of that note, he agreed to take an assignment of a contract which the plaintiff had in relation to certain real estate in Northampton; and that on the same day the plaintiff executed his promissory note for \$5000 as agreed, payable within six years from date with interest, and also an assignment of said contract of the plaintiff in relation to said real estate, and delivered said note, contract and assignment, to Baker, who held them at the time of his death, and the defendants, as his executors, now hold the same; that Baker thereupon lent the plaintiff the sum of \$1820, and gave him the note in suit for the balance; that before said note became due Baker died, and on June 29, 1871, the plaintiff assigned said note to Stoddard & Kellogg, as collateral security for goods sold and delivered, and to be sold to him; and that Stoddard & Kellogg took said note in good faith. The defendants filed the \$5000 note in set-off.

Upon this evidence the judge ruled that, inasmuch as the only consideration for the \$3180 note was Backus's promise to repay the amount furnished on such note, such promise was not in law a sufficient consideration for the note, although such promise was secured by the assignment of the contract referred to, as collateral to it. Upon this ruling a verdict was taken for the defendants, and the plaintiff alleged exceptions.

D. W. Bond, for the plaintiff.

S. T. Spaulding, for the defendants.

GRAY, C. J. One promise is a legal consideration for another. Met. Con. 182. If a promissory note is made by A. to B. in exchange for a promissory note made by B. to A., each note is a valid consideration for the other, whether between the original parties, or in an action by an indorsee. *Eaton v. Carey*, 10 Pick.

211. *Higginson v. Gray*, 6 Met. 212. *Whittier v. Eager*, 1 Allen, 499. If both notes are over due, and each remains in the hands of its payee, the one may doubtless be set off against the other. But the two contracts, though mutual, are independent, and if they are for the payment of money at different times, each must be performed according to its terms. *Strangborough v. Warner*, 4 Leon. 3. *Waterhouse v. Kendall*, 11 Cush. 128. *Traver v. Stevens*, Ib. 167.

But this case is not one of a mere exchange of notes. The plaintiff, in consideration of a sum of money lent to him by the defendants' testator, and of a note made to him by the latter for the payment of an additional sum in four months, made and delivered to him a note for the amount of both sums, payable in six years, together with an assignment, as collateral security for the payment thereof, of a contract relating to certain real estate. The promise of the plaintiff to pay his note at maturity, and the delivery of the collateral security for the performance of that promise, constitute a sufficient consideration for the promise, contained in the note received by him, to pay the sum therein expressed at an earlier date. *Exceptions sustained.*

JOSEPH HAWKS vs. INHABITANTS OF NORTHAMPTON.

Hampshire. Sept. 15, 1874.—Jan. 6, 1875. WELLS & MORTON, JJ
absent.

A town is primarily liable, under the Gen. Sta. c. 44, for a defect in a highway occasioned by the careless, negligent or unskilful conduct of a street railway corporation, notwithstanding the St. of 1871, c. 381, § 21.

TORT under the Gen. Sta. c. 44, § 22, for a personal injury sustained by reason of an alleged defect in a highway in the defendant town.

At the trial in the Superior Court, before *Aldrich, J.*, there was evidence that the plaintiff was driving on Main Street in Northampton, across a railway track constructed in the wrought and travelled part of said street by the Northampton and Williamsburg Street Railway Company, when one of the fore wheels of his wagon was caught by one end of a guard rail in the

track of the railway ; that the wagon was suddenly stopped, the horses became detached, and the plaintiff was thrown from the wagon to the ground and injured. There was also evidence tending to show that the guard rail had become loosened from its original position and fastening more than twenty-four hours before the accident, and that the part of the rail with which the wheel came in contact projected upwards above the level of the main tracks. On this part of the case there was conflicting evidence.

The railway was constructed in conformity with the provisions of the charter of the company, unless the place of the guard rail constituted an exception. As part of such construction, the company placed at a curve in the railway a guard rail, some seventy feet in length, just inside the north main rail and between the two rails on which the cars ran, the purpose of which was to keep the cars on the track while passing the curve at this point. It was laid on, and fastened to, timbers underlying it in the road bed, in the same manner as were the rails which formed the main track.

The following questions of law arising at the trial were, by consent of parties, reported before verdict for the determination of this court :

“ 1. If the guard rail was an unnecessary part of the track, or so improperly or insufficiently laid in the construction of the railway as to be a defect or want of repair, through which the plaintiff while travelling on the highway and using due care, received bodily injury, or damage to his property, was it a defect or want of repair in the highway for which the defendant is liable ?

“ 2. If the guard rail, loosened from its original position and fastenings, and projecting upwards at one end more than twenty-four hours before the accident, was a defect or want of repair through which the plaintiff while travelling on the highway and using due care, received bodily injury, or damage in his property, was it a defect or want of repair in the highway for which the defendant is liable ?

“ If the defendant is liable on either or both grounds stated, the case is to stand for trial ; if not liable upon either ground, the plaintiff is to become nonsuit.”

G. M. Stearns, (S. T. Spaulding, with him,) for the plaintiff.
G. Delano, for the defendant.

COLT, J. It is for the jury to say whether a guard rail, which is not a necessary part of a street railway, or which is improperly or insufficiently laid, or which has been loosened from its original position and fastenings, is a defect within the meaning of the statute which imposes upon towns the duty of keeping its highways in repair. If found by them to be a defect which has existed for twenty-four hours, or of which the town has been duly notified, then the town is primarily liable for all injuries of which it is the sole cause.

This liability is imposed when, in the words of the statute, "other provision is not made therefor." Gen. Sts. c. 44, §§ 1, 22. It is contended that such provision is made in the Street Railway Act, requiring such corporations to keep in repair such portions of the street as are occupied by its tracks. St. 1871, c. 381, § 21. But it has been said by this court, in construing similar provisions in earlier laws concerning street railways, that a city is not thereby released from its obligation to repair, and that all the provisions of the statute imply that the city is primarily liable. *Lowell v. Proprietors of Locks & Canals*, 104 Mass. 18, 23. *Proprietors of Locks & Canals v. Lowell Horse Railroad*, 109 Mass. 221. The St. of 1871, c. 381, § 21, requires the corporation to repair the streets to the satisfaction of the proper officer of the city or town having charge of the streets and highways. Section 22 makes the corporation liable over to the city or town for any defect or want of repair in any part of the street occupied by its tracks for which a recovery has been had against the town or city. Section 26 gives to the city and town authorities the power to order a discontinuance of the use of the tracks whenever public safety and convenience require. At most, the act only gives to these corporations the right to use the highway in common with all other public travel, and implies, in its various provisions, that although the duty to repair is ultimately placed upon the corporation, yet it is subordinate to the original duty of the city or town to the public. A duty which the statute does not remove or change, except as it may be modified by the existence of a railway track legally authorized, properly constructed and properly maintained. The clause relied on by the defendant is a provision in-

tended to regulate the relations between the corporation and the city or town, by imposing upon the former the burden of certain partial repairs of the highway. The general control still remains with the latter, and with it the liability which has always existed for injuries occasioned by want of repair. In *Davis v. Leominster*, 1 Allen, 182, which was an action to recover for a defect in a highway where it was crossed by a steam road at grade, it was said, after much consideration, that "the general liability of a town to keep the way safe and convenient cannot be limited by implication, except to the extent to which the construction and operation of the railroad deprives the town of the power to discharge the duty imposed upon it by law." And the fact that an action may be brought directly against the railroad corporation, when the defect is attributable to its misconduct or negligence, does not affect the right to go against the town. *Gillett v. Western Railroad*, 8 Allen, 560. *Johnson v. Salem Turnpike*, 109 Mass. 522.

The defendant further insists that this action should have been brought against the railway company, and not against the town, because by the St. of 1871, § 21, the former is made expressly liable for any neglect or misconduct in the construction, management, and use of its tracks; and the case at bar falls within this description. The answer is, that it is enough to support this action, as we have seen, if the misconduct or negligence of the corporation in constructing or maintaining its track has created a defect in the highway. If the plaintiff has suffered from an accident occasioned by an authorized public work constructed and kept in repair with reasonable care and skill, then he may indeed be wholly without remedy. *Jones v. Waltham*, 4 Cush. 299. This case shows that there was conflicting evidence upon these points with reference to the guard rail complained of. And the jury, under proper instructions, might have found it to have been a defect for which the town is liable, or might have found otherwise.

*Case to stand for trial.**

* A similar decision was made in Suffolk, March, 1875, in the case of

SAMUEL K. BAILEY vs. CITY OF BOSTON.

The alleged defect in the highway was the end of a grooved rail in the tracks of the Highland Street Railway, which projected an inch and a half

AMOS SAWYER & another vs. YALE IRON WORKS.

Hampshire. Sept. 22, 1874. — Jan. 6, 1875. MORTON & ENDICOTT, JJ.,
absent.

The certificate of the presiding judge, disallowing a bill of exceptions, is *prima facie* evidence that it is not conformable to the truth.

Upon the return of the report of a commissioner, to whom a petition to establish the truth of exceptions has been referred, the question whether the truth of exceptions is established is a question of law to be decided by the court.

Aⁿ exception, not taken at the trial and seasonably presented in writing to the presiding judge, cannot be considered by this court upon a petition to establish the truth of exceptions.

If an exception alleged does not state the ruling excepted to, and the evidence to which it applied, with substantial accuracy, so as to present the same question and in the same aspect to this court as to the court below, the petitioner is not entitled to be heard in this court upon the exception, either in the form in which it was, or in that in which it appears that it should have been, tendered to the presiding judge.

When a bill of exceptions is disallowed by the judge presiding at the trial, the right of the excepting party to prove some of the exceptions and to waive others is limited to the case where the exceptions are wholly distinct from each other; and if the true and false statements are intermingled in the exceptions as tendered, the presiding judge may properly disallow the whole bill of exceptions as not conformable to the truth.

When evidence offered to prove a fact is excluded by the presiding judge, and afterwards admitted only for the purpose of contradicting a witness who had previously been examined upon the subject, a bill of exceptions, which states that the evidence was offered and admitted for the purpose of proving the fact, may be disallowed as not conformable to the truth.

A bill of exceptions tendered stated that the judge refused to rule, that, under circumstances specified, there was no implication that a fixture was personal property; the implication, if any, was that it became real estate. The judge did actually rule that the circumstances did not authorize the implication either that it was personal property or that it was real estate. *Held*, that the exception was rightly disallowed.

Where one series of requests for instructions, intermingling two subjects, is presented to the judge just before he charges the jury, a bill of exceptions to his rulings upon the whole series, which does not truly state the requests and rulings as to one of these subjects, may be wholly disallowed.

above the street, and against which the plaintiff's wagon struck and was overturned, and he was injured. It was admitted that the defendant had sufficient notice of the alleged defect. *Pitman, J.*, ordered a verdict for the defendant, and the plaintiff alleged exceptions.

J. D. Long, for the plaintiff.

C. F. Kittredge, for the defendant.

BY THE COURT. A city or town is not exempted from liability for a defect in a highway, because it is caused by misconduct or negligence in the construction or repair of a street railway. *Hawks v. Northampton, ante, 420.*

Exceptions sustained.

PETITION to establish the truth of exceptions alleged by Amos Sawyer and Theodore Clapp in an action brought against them by the Yale Iron Works, and disallowed by *Wilkinson, J.*, who presided at the trial in the Superior Court.

The petition was referred by this court to a commissioner, to hear the parties and report his findings.

The bill of exceptions, as tendered by the petitioners, was as follows; the words printed in italics and not in brackets being those which the commissioner reported should be stricken out; the words printed in brackets being those which the commissioner reported should be inserted, except the letters and figures prefixed to the instructions, which are here added for convenience of reference to the commissioner's report as stated below; and the words printed in italics and inclosed in brackets being those found by the commissioner to have been in the requests as presented to the judge at the trial, as to which the commissioner reported that no exceptions ought to be allowed:

"Action of trover to recover the value of a steam boiler. The boiler was bought by Jonathan E. Janes, and was set in brick previously to April 18, 1871, in a building built by him on land of Lowell E. Janes, his father. It was set in such manner that it could not be removed without taking down the brick, and was so placed to be used as a part of a steam saw-mill in said building.

"Jonathan E. Janes testified that there was no agreement between him and his father in regard to putting either said building or boiler on his father's land; that he was an only child, living separate from his father, but in the same house, and then expected eventually to own the land. [He further testified to circumstances and acts which the plaintiffs claimed tended to show that the building and boiler were so placed on the land of the father with the father's permission and consent, and under an understanding that the same continued the property of Jonathan E. Janes, and was subject to removal.]

"On April 17, 1871, Lowell E. Janes executed a mortgage of this real estate, on which said mill and boiler then was, to the Haydenville Savings Bank, without special mention of anything on the land, but with a covenant that the premises were free of incumbrances. Jonathan E. testified that he procured the loan

from the savings bank, was present when said mortgage was executed, and that his father gave said mortgage at his request and to raise money for putting in said mill and machinery.

" There was evidence tending to show that in May, 1871, Jonathan E. set a steam-engine in said mill, on brick, and bolted down, which engine he bought of the plaintiff.

" On September 14, 1871, he mortgaged said engine and boiler to the plaintiff as personal property, by a mortgage not under seal, to secure the price of the engine. This mortgage was recorded in the town clerk's office, and notice of foreclosure given on December 18, 1871. The plaintiff claimed title to the boiler by virtue of said mortgage and foreclosure.

" On December 20, 1871, Jonathan E. Janes went into bankruptcy. On February 10, 1872, Lowell E. Janes also went into bankruptcy. The defendant Clapp was duly appointed assignee of both estates. On March 17, 1872, Lowell E. Janes died. In June, 1872, the assignee sold said boiler to Sawyer, the other defendant, by whom the same was disannexed and removed.

" The treasurer of the savings bank testified that the sale of the boiler was without the consent of the bank ; that the bank [had not made any claim and] did not relinquish any rights, *but should maintain its rights* under the mortgage ; that the bank had no knowledge of any understanding between the father and son about the boiler *or mill* [and engine].

" *The plaintiff offered evidence that Jonathan E. had mortgaged other machinery in the mill to other parties, as personal property. The defendants objecting, the court admitted the evidence for the purpose of showing that Jonathan E. had treated the machinery by him put in the mill as his personal property.* [The plaintiff offered in evidence other mortgages of other machinery in said mill, given by Jonathan E. Janes to other parties, as personal property ; and, upon the defendants objecting, they were excluded. Jonathan E. Janes having sworn that there was no agreement with his father about putting this property upon the real estate, he was recalled, and asked if he had not made written declarations to other parties that this property was personal property and contradictory to his statement, and he said he had not. The plaintiff then offered the mortgages, and they were admitted for the purpose of contradicting Jonathan E. Janes.]

"The defendants contended that the savings bank had the right to the possession of said boiler, and asked the court to instruct the jury as follows :

[A. 9.] "If the boiler was so annexed to the real estate in the first instance as to be the personal property of Jonathan E., yet if he agreed that the father might mortgage it to the savings bank, or if he was present, acting with or for his father in giving said mortgage of the land upon which was the mill and boiler, the boiler would pass with the land, and the defendants may avail themselves in this action of the savings bank title.

[B. 1.] "[If the savings bank had a mortgage due and unpaid of the real estate on which the boiler was set in bricks to operate a mill there, the boiler would pass with the real estate, and the bank would have the right to the possession thereof.]

[B. 2.] "*Where an only child set a boiler in brick on the land of his father, without any understanding between father and son other than such as arose from their relations, there is no implication that the boiler was the personal property of the son ; the implication, if any, is that it becomes real estate.*

[A. 1.] "*Aside from any agreement to the contrary, the boiler was so attached to the land [of the father] as to become part of the realty. [In other words, if the boiler had been placed and affixed in the manner it was by Lowell E. Janes himself, and for himself, or if it had been so placed and affixed by him or for his benefit, it would be part of the realty, and pass by his deed to the savings bank, whether that deed was executed and delivered before or after the boiler was so annexed.]*

[A. 2.] "*To show that it remained personal property of [that might be mortgaged by] the son, the jury must be satisfied that there was an agreement, express or implied, between father and son, that when the boiler was annexed to the realty [of the father], it should [not become part of it, but still] remain the property of the son.*

[A. 3.] "*Such agreement [between father and son] must be made before or at the time the boiler was so annexed.*

[A. 4.] "*The giving of a mortgage [or mortgages] by the son is no evidence of such [assent and] agreement on the part of the father, unless the father had notice or knowledge of such mortgage. [And the mere record of the mortgage or mortgages is not evidence of such knowledge or notice.]*

[A. 5.] "*The sale and removal of the boiler by the [defendant Clapp as] assignee is not evidence of an understanding [or agreement] between the father and son [at the time the boiler was annexed or before] that it should remain personal property.*

[A. 6.] "If there was such understanding [and agreement] between the father and son, nevertheless the boiler was so annexed to the land as to pass by the mortgage to the savings bank, unless the bank has had notice or knowledge of such [understanding or] agreement [before or] when it took said mortgage. [And there is not only no evidence that it had such knowledge or notice, but evidence that it had not.]

[A. 7.] "*The plaintiff must recover upon the strength of its own title. [And it has shown that the savings bank has a better title.]*

[A. 8.] It being in evidence that the savings bank [relinquishes no right acquired under the mortgage, but] intends to maintain [insist upon] all its rights under the mortgage, the defendants are liable [if at all] to the savings bank, and not to the plaintiff.

"The judge declined thus to instruct the jury; and instructed them that the sole question was whether there was an understanding between the father and son that the boiler, when annexed to the realty, should remain the property of the son; and if there was such understanding, the mortgage to the savings bank would be no defence, and the plaintiff could recover the value of the boiler in this action; [and, after instructing the jury as to the conditions and circumstances under which this property would be real estate or personal property, in a manner not excepted to, ruled that the question whether it was real estate or personal property must be determined by what took place before or at the time it was put upon the land, and that nothing had transpired since which could be considered by the jury as affecting this question; that the fact that the property was afterwards mortgaged to the savings bank, without anything being said as to this boiler and engine not being real estate, would not be a bar to the plaintiff's recovery, but that the plaintiff might now come forward and show that when the mortgage was made it was personal property and not real estate; that the defendants could not interpose the bank title as a bar to the plaintiff's claim.]

[“The defendants asked the court to rule that when an only child, upon land of his father, sets a boiler in brick to operate machinery there, without any understanding between the father and son other than such as arises from their relations, there is no implication that the boiler remained the personal property of the son ; but the implication, if any, is that it becomes realty. But the court declined so to rule ; and ruled that the fact that Jonathan E. Janes was an only son of Lowell E. Janes, and lived in the same house with his father, did not authorize the implication that this property in question was personal property when put upon the land, nor did it authorize the implication that it was to be real estate.]

“The jury returned a verdict for the plaintiff. To which rulings the defendants except, and pray that their exceptions may be allowed.”

The commissioner's report, after specifying the alterations to be made in the statement of the evidence in the bill of exceptions, proceeded as follows :

“I further find that the defendants' counsel handed the judge who presided at the trial, as he arose to charge the jury, certain written requests for instructions, being those marked A. 1, 2, 3, 4, 5, 6, 7, 8 and 9. The judge stated, in substance, that he could not stop then to read them, but that he would consider them as handed in, and would charge the jury, and if there were any matters not covered by the charge, his attention could be called to them. The counsel for the defendants then called his attention generally to their requests by reading to him portions of them. The counsel for the defendants did not understand, as the matter was then left, that they were to call the attention of the judge again to their requests, in order to save their clients' rights in reference to the matters contained in the requests, in case the judge should not instruct the jury as requested.

“The judge instructed the jury as to the conditions and circumstances under which this property in question would be real estate or personal property. He ruled that, *prima facie*, it would go with the land ; but if it was put on the land by the son, with the knowledge and consent of the father, under an agreement, express or implied, that the same should remain the personal property of Jonathan E. Janes, and that Jonathan E. Janes

might remove the same at his pleasure, then it would not go with the real estate, but would remain the property of Jonathan E. Janes; that the question whether it was real estate or personal property must be determined by what took place before or at the time it was put upon the land, and that nothing had transpired since which could be considered by the jury as affecting this question; that the fact that the property was afterwards mortgaged to the savings bank without anything being said as to the boiler and engine not being real estate, would not be a bar to the plaintiff's recovery, but that the plaintiff might now come forward and show that when the mortgage was made it was personal property, and not real estate; that the defendants could not interpose the bank title as a bar to the plaintiff's claim.

"The judge explained to the jury the effect of the admission of the subsequent mortgages by Jonathan E. Janes of other property in said mill as personal property, and the ground upon which they were admitted under the statute. He charged the jury that they were not evidence of the fact that it was personal property, but were only admitted to contradict the witness Jonathan E. Janes.

"After the judge had finished his instructions, the counsel for the defendants handed him two other requests, marked B. 1 and 2. To the request marked 1, the judge said that his charge covered it; and as to the one marked 2, he instructed the jury that the fact that Jonathan E. Janes was an only son of Lowell E. Janes, and lived in the same house with his father, did not authorize the implication that this property in question was personal property when put upon the land, nor did it authorize the implication that it was to be real estate.

"No exceptions were taken by the counsel for the defendants to the instructions given, except such as may be considered as taken by the facts above stated.

"I find that the jury were not instructed as requested in the requests marked B. 1 and 2, and that the exceptions to the instructions given on these points were properly saved and ought to be allowed.

"I find that, although the requests marked A. 1, 2, 3, 4, 5 and 7 are not stated in the bill of exceptions precisely as handed to the judge, the jury were instructed substantially as requested

therein, and that no exceptions ought to be allowed on these points.

"I find that the jury were not instructed as requested in the requests marked A. 6, 8 and 9. I find that if the attention of the judge was not sufficiently called to these points by the requests handed to him before his charge, and by reading portions of them to him, it was called to the points therein after his charge by handing him the request marked B. 1; and therefore that the exceptions to the instructions given on these points were properly saved. I find that the requests 6, 8 and 9 were not stated in the bill of exceptions precisely as handed to the judge, but substantially the same. I therefore find that the exceptions to the instructions given on the points embodied in these requests ought to be allowed.

"I find that the bill of exceptions presented to the judge for allowance, and annexed to the petition, was not correct and ought not to have been allowed; that a true bill of exceptions requires the changes above stated, so that the bill will read as follows," namely, as above printed, excluding all the words printed in italics, and the letters and figures prefixed to the requests for instructions, and including the other words printed in brackets.

The judge who presided at the trial made, upon the bill of exceptions tendered to him, and ordered to be filed, the following certificate:

"The exceptions are disallowed. The evidence is incorrectly stated. On the part of the plaintiff, the evidence tended to show that the boiler was put into the building of the father with his consent, for the sole benefit of the son; that it was designedly so fixed, and the building so fitted, that it might be removed at the will of the son without injury to the freehold, and that all this was done with the consent of the father. There was no evidence that the savings bank had made any claim to the boiler. I do not remember any exception as to the admission of other mortgages of the boiler by the son.

"As to the written prayers for instruction, I stated to the counsel that if, after my charge to the jury, they should think there were any of their prayers not sufficiently covered by instructions, to call my attention to them. This was done in several instances, and further instructions were given and no exceptions were taken.

"The clerk may enter the exceptions disallowed, unless the parties make some other agreement, and file this paper."

A. J. Fargo, (S. T. Spaulding with him,) for the petitioners.

G. M. Stearns, for the respondent.

GRAY, C. J. The right to establish the truth of exceptions disallowed by the judge presiding at the trial is given and limited by the statute, which provides that "the truth of the exceptions presented may be established before the Supreme Judicial Court upon petition setting forth the grievance, and thereupon, the truth thereof being established, the exceptions shall be heard, and the same proceedings had as if they had been duly signed and brought up to said court with the petition." Gen. Sts. c. 115, § 11.

The certificate of disallowance, which the presiding judge is required by the Gen. Sts. c. 115, § 8, to make in writing, is *prima facie* evidence that the exceptions presented are not conformable to the truth, though subject to be controlled by other evidence. *Bottum v. Fogle*, 105 Mass. 42.

If no objection is made to the form, the time of filing or the service of the petition, the practice is to refer it to a commissioner to hear the parties and report to the court the facts bearing upon the question whether the truth of the exceptions is established; but that question is a question of law, to be decided by the court upon the facts reported. *Cullen v. Sears*, 112 Mass.

The remedy is limited to exceptions taken at the trial and seasonably presented in writing to the presiding judge. *Joannes v. Underwood*, 6 Allen, 241. *Lee v. Gibbs*, 10 Allen, 248. *Bottum v. Fogle*, 105 Mass. 42. And the substantial truth, though not the literal accuracy, of the exceptions as so alleged and tendered must be proved. If an exception alleged does not state the ruling excepted to, and the evidence to which it applied, with substantial accuracy, so as to present the same question, and in the same aspect, to this court as to the court below, the petitioner is not entitled to be heard in this court upon the exceptions, either in the form in which they were presented to the judge below, or in the form in which it is made to appear that they should have been presented; not upon the exceptions alleged, because they are not proved; nor upon the exceptions proved, because they were not alleged. *Cullen v. Sears*, above cited. *Crow v. Stowe*, 113

Mass. . But the right of the excepting party to have an exception, duly alleged by him, considered by this court, is not to be defeated by mere verbal errors or unimportant differences in the form of statement. *Bates v. Santom*, ante, 120.

If the bill, as tendered to the presiding judge, contains several distinct and independent exceptions, clearly and separately stated, the truth of one or more of them may be established, although the others are not proved as alleged, or are waived by the excepting party. Thus in *Commonwealth v. Marshall*, 15 Gray, 202, where a bill of exceptions alleged twelve distinct grounds of exception, stated and numbered separately, and the excepting party waived all but one, which related to a ruling upon a question of evidence, that exception was allowed and considered and sustained. The right to waive some of the exceptions alleged, and rely upon the others, on proving their truth, was recognized in the opinion of the court in *Bottum v. Fogle*, 105 Mass. 42, 44; but, as no exceptions had been duly alleged in that case, the court had no occasion to consider this matter particularly. In *Cullen v. Sears*, above cited, the bill tendered contained two matters of exception, wholly distinct from each other, the one to rulings as to the effect of an auditor's report, and the other upon a variance between the declaration and the proof; and, although the truth of the exceptions upon the first point was not established, the exception upon the other, being proved to be true, was considered and decided. But when true and false statements are blended or intermingled in the exceptions as tendered, the presiding judge is under no obligation to sift out the truth from the falsehood, and may properly disallow the whole bill of exceptions as not conformable to the truth.

The case before us is an action of tort in the nature of trover for the conversion of a boiler, bought and set up by an only son in a building erected by him on the land of his father. The plaintiff claimed title under a chattel mortgage from the son. The defendants contended that the boiler was part of the land, and had passed with it by an earlier mortgage from the father to a savings bank.

The defendants' exceptions relate, 1. to the admission in evidence of mortgages from the son to other persons of other machinery in the same building as personal property; 2. to the

effect of the original placing of the boiler by the son on his father's land ; 3. to the effect of the mortgage of the land by the father, with the assent of the son, to the bank.

1. The bill of exceptions tendered states that the other mortgages were admitted for the purpose of showing that the son had treated the machinery, put by him in the mill, as his personal property. It omits to state, what appears by the commissioner's report to be the truth, that those mortgages, when first offered, were excluded ; that they were ultimately admitted for the sole purpose of contradicting the testimony of the son, and after he had been asked whether he had not made written declarations to other parties that this property was personal property ; and that the judge instructed the jury that the other mortgages were not evidence of the fact that the boiler was personal property, but were only admitted to contradict the witness. In short, the bill of exceptions untruly states the rulings of the court, and the state of the evidence at the time the rulings were made.

2. Upon the question of the effect of the original placing of the boiler by the son on the land of the father, the statement, both of the evidence and the rulings, is also wide of the truth. The bill of exceptions omits an important portion of the evidence, as recited in the certificate of the judge, and reported by the commissioner ; and it states that the rulings requested on this part of the case were all refused, whereas it appears by the commissioner's report that they were given in substance, or with slight modifications. Indeed, the defendants' counsel at the argument waived his exceptions to all the rulings and refusals upon this subject, except to the alleged refusal to give one instruction requested, marked by the commissioner as B. 2. But even upon that the bill of exceptions fails to conform to the truth ; for it merely states that upon the fact therein supposed the judge declined to instruct the jury that "there is no implication that the boiler remained the personal property of the son ; but the implication, if any, is that it became realty ;" and fails to state that the judge did rule that that fact did not authorize the implication that it was personal property, nor did it authorize the implication that it was real estate.

3. Upon the subject of the mortgage of the land by the father, with the assent of the son, to the savings bank, it is unnecessary

to consider the effect of the inaccuracy in the report of the testimony of the treasurer, of the variation between the requests as actually presented to the judge and as stated in the bill of exceptions, or of the including, in some of them, of recitals of evidence. It is sufficient to say that the request upon this point, found by the commissioner to have been presented to the judge at the conclusion of his charge, is not stated in the bill of exceptions as tendered; and that all those which are stated therein form part of one series of requests presented to the judge as he rose to charge the jury, in which the requests as to the effect of the mortgage to the bank are so intermingled with those upon the effect of the original setting of the boiler on the land, that the whole series, and the rulings and instructions of the judge upon the matters which it embraces, must be treated as one subject, the exceptions relating to which must, so far as the question of their conformity with the truth is concerned, stand or fall together.

For these reasons, we are of opinion that the whole bill of exceptions was rightly disallowed. In order to guard against misunderstanding, it is proper to add that we have great doubt whether, upon the commissioner's report of the facts and circumstances attending the presenting of the requests for instructions and the rulings upon the subject of those requests, there is anything which could in law be permitted to control the explicit certificate of the judge that no exception was taken to the refusal to give the instructions requested. But as, aside from this, the bill of exceptions is not conformable to the truth, we need not further consider that question. *Petition dismissed.*

NATIONAL BANK OF TROY vs. RACHEL W. STANTON,
executrix.

Hampshire. Sept. 16, 1874. — Jan. 6, 1875. WELLS & MORTON, JJ.,
absent.

An executor and residuary legatee who has given bond to pay debts and legacies, and, being afterwards required by the judge of probate to give a similar bond in a larger sum, fails to do so, may be removed from office by the judge of probate, and after such removal no judgment can be rendered against him in an action previously brought against him in his representative capacity on a debt of the testator.

The provision of the Gen. Sta. c. 97, § 16, that "no executor or administrator shall be held to answer to the suit of a creditor of the deceased, if commenced within one year after his giving bond for the discharge of his trust," includes an executor who is also a residuary legatee and has given bond to pay debts and legacies; and the exception in the statute, "unless it is for the recovery of a demand that would not be affected by the insolvency of the estate," does not apply to a suit brought against such an executor upon a debt of the testator, which is not preferred by statute.

An action was brought upon a general debt of a testator against his executor, in his representative capacity, who was also residuary legatee and had given bond to pay debts and legacies. The executor was subsequently removed, and an administrator *de bonis non* appointed. The answer of the executor set up merely his removal and that he ought not to be held to answer. *Held*, that the administrator was properly allowed to defend the action and to file an answer setting up that it was brought within one year from the giving of the bond by the executor; and that this fact, if proved, was a defence to the action.

CONTRACT on a promissory note for \$1324.15, made by the Hampden Manufacturing Company, and indorsed by Jabez Stanton, deceased, who, by his will, made his widow, Rachel W. Stanton, executrix and residuary legatee.

In December, 1872, the Probate Court admitted the will to probate, and appointed Mrs. Stanton executrix, and approved a bond filed by her, with sureties, in the sum of \$3000, to pay debts and legacies.

The plaintiff made a demand on her for payment of the note, and, the same not being paid, on May 12, 1873, brought this action, returnable at June term of the Superior Court, against her as executrix of Jabez Stanton. The writ commanded the officer to attach the goods and estate of the testator in her hands; and the declaration alleged the making and indorsement of the note, demand of payment on the maker, its neglect to pay, and due notice to the testator of nonpayment, the probate of the will, the defendant's acceptance of the trust of executrix and giving bond to pay debts and legacies, that the note was a just debt against the testator, and that the defendant owed the plaintiff the amount thereof and interest.

The Probate Court in June, 1873, upon the petition of another creditor, ordered that she should give a new bond with sureties in the sum of \$20,000, and, after notice to her to show cause against it, and she not appearing nor filing such a bond, on August 5, 1873, passed an order removing her from her trust as executrix,

and appointed Enos Parsons administrator *de bonis non*, with the will annexed, who gave bond in the usual form, with sureties to the satisfaction of the judge of probate, for the performance of his trust.

At October term, 1873, of the Superior Court, Mrs. Stanton filed an answer, alleging her removal and the grant of administration to Parsons, and therefore that she ought not to be held to answer to this action.

At the same term, Parsons applied for leave to come in and take upon himself the defence of the action; and at February term 1874, (having meanwhile represented the estate insolvent, and commissioners having been appointed by the Probate Court to receive proof of debts against it,) was permitted to appear and file an answer, setting up, 1st. That the action was prematurely brought, namely, within one year from the approval and filing of the bond given by the executrix. 2d. The representation of insolvency and appointment of commissioners, and that the plaintiff's claim was provable before the commissioners and not in this action. 3d. His ignorance of the facts alleged in the declaration, so that he could neither admit nor deny, but left the plaintiff to prove the same.

No question was made by Mrs. Stanton as to her liability upon the note in suit, except by reason of the order removing her from the trust of executrix. There are not known to be any assets of the estate, except real estate valued at about \$3000, and Mrs. Stanton's bond, so far as that can be deemed assets.

By consent of parties, and before verdict, the case was reported by *Aldrich, J.*, for the consideration of this court. If, upon the facts above stated, the action could be maintained against Mrs. Stanton, either as executrix or as residuary legatee, judgment to be rendered for the plaintiff for the amount of its claim in such form as this court might determine; if it could not be maintained against her, but might against the administrator *de bonis non*, the case to stand for trial; otherwise, the plaintiff to become nonsuit.

D. W. Bond, for the plaintiff.

E. B. Gillett & H. B. Stevens, for the executrix.

C. Delano, for the administrator *de bonis non*.

GRAY, C. J. The executrix and residuary legatee, having given bond to pay debts and legacies, would doubtless be estopped to deny assets in any action to enforce the personal obligation thereby assumed by her; as, for instance, in an action upon a promissory note given by her for a debt of the testator, or an action to recover a legacy. *Stebbins v. Smith*, 4 Pick. 97. *Jones v. Richardson*, 5 Met. 247. *Colwell v. Alger*, 5 Gray, 67.

But the present action is not brought upon her bond, or in any form against her personally. It is an action upon a contract of the testator, and brought against her merely as his representative; the writ commands the officer to attach the goods and estate of the testator in her hands; and any judgment recovered against her would be *de bonis testatoris*, and not *de bonis propriis*. *Hapgood v. Houghton*, 10 Pick. 154.

The judge of probate, if satisfied that the bond given upon her appointment was insufficient security for those interested in the estate, might lawfully require her, as well as any other executor, to give a new bond in a larger sum; and, upon her refusal or neglect to do so, remove her from the office of executrix, and appoint an administrator *de bonis non* with the will annexed. Gen. Sts. c. 101, §§ 2, 15, 17.

Upon her removal from the office of executrix, her liability to, and right to defend against, this action ceased. It follows that no judgment therein can be rendered against her. *Taylor v. Savage*, 1 How. 282, and 2 How. 395.

The administrator *de bonis non* having accepted and qualified under his appointment, it was his duty to assume the defence of this action as the legal representative of the testator. Gen. Sts. c. 128, §§ 11, 12. *Brown v. Pendergast*, 7 Allen, 427.

No answer to the merits having been previously filed, and the administrator having obtained leave of the court to file such an answer, he might set up therein that the action was prematurely brought—that being a matter pleadable in bar of the action, and not in abatement only. *Benthall v. Hildreth*, 2 Gray, 288.

By the Gen. Sts. c. 97, § 16, “no executor or administrator shall be held to answer to the suit of a creditor of the deceased, if commenced within one year after his giving bond for the discharge of his trust, unless it is for the recovery of a demand that would not be affected by the insolvency of the estate, or unless

it is brought after the estate has been represented insolvent, for the purpose of ascertaining a contested claim." The comprehensive words of this statute — "no executor or administrator" — include those who, being also residuary legatees, have given bond to pay debts and legacies, as well as those who have given bond in the ordinary form. *Holden v. Fletcher*, 6 Cush. 235. The whole section relates to suits against executors or administrators as such. The exception of "a demand that would not be affected by the insolvency of the estate," is clearly shown, by referring to the other statutes upon the subject, to apply to expenses of the last sickness and funeral of the deceased, and preferred debts to the government and for taxes; although it is true, as suggested by the learned counsel for the plaintiff, that such debts might be entitled to a dividend only, if the estate should prove insufficient to pay them in full. *Sts.* 1784, c. 2; 1788, c. 66, § 2. *Rev. Sts.* c. 66, § 10; c. 68, §§ 1, 19, and commissioners' note. *Gen. Sts.* c. 99, §§ 1, 20. *Hapgood v. Houghton*, 10 Pick. 154, 156. *Wilson v. Shearer*, 9 Met. 504, 507. This exception might also apply to claims against an executor or administrator for property in his hands, which the deceased held without right or upon a trust, and which were not assets for distribution among creditors. 2 *Williams on Executors* (5th Am. ed.) 1565. *Johnson v. Ames*, 11 Pick. 173, 181. *Gen. Sts.* c. 128, §§ 3, 4. But it does not include debts like that of the plaintiff, which, as against the estate of the deceased, would be affected by the insolvency thereof equally with the claims of his creditors generally. This action, having been brought before the estate was represented insolvent, is not within the other exception in the statute.

The objection that the action was prematurely brought is therefore a good defence, and, having been duly pleaded, the result is that, according to the terms of the report on which the case was reserved, there must be a

Nonsuit.

ROLAND G. USHER vs. WILLIAM C. PEASE & others.

Hampshire. Sept. 15, 1874. — Jan. 6, 1875. **WELLS & MORTON, JJ.,**
absent.

The arrest of a bankrupt, after the adjudication of bankruptcy, upon a warrant issued before that adjudication under the U. S. St. of 1867, c. 176, § 40, is unauthorized by law, and a bond given to procure release from such arrest is void.

CONTRACT by the United States marshal against the sureties on a bail bond, reciting that a warrant had issued out of the District Court of the United States for the district of Massachusetts, for the arrest of Washington Graves. The condition was that Graves should "appear before said court, at such times as shall by said court be required, until the decision of said court upon the petition in bankruptcy filed against said Graves, in said court, and until the further order of the court." The declaration alleged as a breach that Graves did not, when ordered by said court, appear before I. F. Conkey, a register in bankruptcy.

The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on an agreed statement of facts, in substance as follows:

The bail bond was signed by the defendants on December 28, 1872. On September 10, 1872, a petition was filed in the United States District Court by a creditor of Graves, asking that said Graves be adjudged a bankrupt, for causes set forth therein. Upon the filing of this petition, the court directed the entry of an order requiring the bankrupt to appear and show cause according to the provisions of § 40 of the U. S. St. of 1867, c. 176, and issued a warrant to the United States marshal, commanding him "to arrest the alleged bankrupt and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition, and until the further order of the court."

On September 23, 1872, Graves was adjudged a bankrupt upon the above petition. No arrest or service of the warrant was made until after said adjudication, and after a meeting of creditors had been held and an assignee appointed. On December

28, 1872, the marshal arrested Graves upon said warrant, and he gave the bail bond with sureties now declared on. Some weeks after the bond was executed, the assignee procured an order of the court, directing Graves to appear for examination before I. F. Conkey, a register in bankruptcy, and this order was served according to the precept thereof, but Graves failed to appear. The sureties were also notified to produce Graves for examination under the order, but failed to do so.

"If upon the foregoing facts the plaintiff is entitled to recover, judgment is to be entered for the plaintiff, and damages are to be determined according to principles of law applicable to such cases; otherwise, judgment for the defendants."

C. Delano, for the plaintiff.

G. M. Stearns, for the defendants.

GRAY, C. J. The 40th section of the bankrupt act relates to the preliminary proceedings upon the petition of a creditor to have his debtor adjudged a bankrupt; authorizes the court, on the filing of such a petition, to issue an order of notice to the debtor (to be served on him personally or by publication as therein directed) to appear, at the time specified in the order, to show cause why the prayer of the petition should not be granted; and also an injunction to restrain the debtor and any other person, in the mean time, from making any transfer or disposition of the debtor's property; and, if there is probable cause for believing that the debtor is about to leave the district, or to remove, conceal or fraudulently convey or dispose of his property, "issue a warrant to the marshal of the district, commanding him to arrest the alleged bankrupt, and him safely keep, unless he shall give bail, to the satisfaction of the court, for his appearance from time to time, as required by the court, until the decision of the court upon the petition, or the further order of the court." U. S. St. 1867, c. 176, § 40.

The object of the provision for the arrest of the debtor is to secure his attendance at the hearing and adjudication upon the petition to have him adjudged a bankrupt, and to prevent him from meanwhile absconding or putting his property out of reach. The debtor is to be held in custody, or give bail for his appearance, only "until the decision of the court upon the petition, or the further order of the court." The second alternative clearly

relates to a time within, and not beyond, that of the first; and appears to have been inserted in the statute with the object of allowing the debtor to be discharged at the discretion of the court before the adjudication of bankruptcy, not of keeping him in custody or attendance after that adjudication and during the pendency of the proceedings in bankruptcy.

When the debtor has attended the court at the time of the order adjudging him a bankrupt, he has fulfilled the whole obligation imposed upon him by the statute. That obligation could not be enlarged or extended by the court by substituting "and" for "or" in its order and warrant, and ordering him to be committed, or give bail for his appearance, "until the decision of the court upon said petition, and until the further order of the court." After the adjudication of bankruptcy, the mode of proceeding to compel him to submit to examination would be the same as in the case of a voluntary bankrupt, by petition under § 26.

The arrest of the bankrupt after the adjudication of bankruptcy, upon the warrant of arrest issued before that adjudication, was therefore unauthorized by law, and the bond given to procure his release from that illegal arrest was void.

Judgment for the defendants.



CASE OF THE NORTHAMPTON BRIDGE.

Hampshire. Jan. 6. — 11, 1875. ENDICOTT & DEVENS, JJ., absent.

The St. of 1871, c. 177, declares the bridge over the Connecticut River, between the towns of Northampton and Hadley, to be a public highway upon the acceptance by this court of the award of commissioners to be appointed under the act. It then provides that the commissioners shall determine the amount of the damages to the proprietors of the bridge, and what proportions of the damages shall be paid by the towns benefited and by the county of Hampshire; that the decree of the commissioners shall be made to this court for said county, and also to the bridge proprietors, to each of said towns, and to the county commissioners of said county; that the decree shall be binding upon all the parties interested, reserving a right of appeal to a jury; and that "if neither party shall so appeal to a jury within sixty days after receiving the award and decree of said commissioners, as aforesaid, then the same shall be absolutely binding upon all the parties interested therein." The commissioners made their award to this court, and it was filed in the

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clerk's office, but not during a term of the court; it was also made on the same day to the parties interested. The award stated the rulings of the commissioners on various questions of law which they therein reserved for the consideration of this court. At the next term of this court in said county, but more than sixty days after the award was made and filed, some of the parties interested claimed an appeal to a jury. *Held*, that in the absence of an appeal to a jury, the award of the commissioners was final, and that they could not reserve questions of law for the consideration of this court. *Held, also*, that the appeal to a jury was taken too late, and that the award must be accepted.

PETITION of the selectmen of Hadley, praying for the appointment of commissioners under the St. of 1871, c. 177, entitled "An act to make the Northampton Bridge free."

Commissioners were appointed, who heard the parties, and made an award, in which they determined the amount which should be paid as damages to the proprietors of the bridge; and decreed that the towns of Northampton, Hadley and Amherst were specially benefited, and that they and the county of Hampshire should pay these damages in certain proportions, and also the expenses of keeping the bridge in repair; and submitted to the court their rulings upon various questions of law, which arose at the hearing before them, and which it is now unnecessary to state.

The report of the commissioners was directed to this court, and filed in the clerk's office on June 27, 1874; and copies thereof were on the same day sent to, and received by, the proprietors of the bridge, the said towns and the county of Hampshire.

On September 14, 1874, the county commissioners of the county of Hampshire, in behalf of the county and of the towns of Northampton and Amherst, filed a motion that the report of the commissioners be rejected, for errors in certain rulings of the commissioners; and on the same day, in behalf of said county and towns, and also of the town of Hadley, filed in this court an appeal from the decree of the commissioners "to a jury, to be empanelled by said court for a rehearing and trial of all the issues, the determination and decision of which, by the said commissioners, has been returned and certified to said court."

On September 16, 1874, the proprietors of the bridge moved that the report of the commissioners be accepted, and judgment entered thereon.

The case was reserved by *Colt, J.*, for the consideration of the full court, on a report setting forth the above facts, and concluding as follows :

“ The said parties are to be heard on the question whether the county of Hampshire, or the towns of Northampton and Amherst, now have a right of appeal, and on all the questions referred by the commissioners and arising on this report ; all subject however to the preliminary objection reserved by the said proprietors, that not only is there no right of appeal, but that the decision of the commissioners on all questions of law as well as fact arising in the regular proceedings before them, including the questions made before them and stated in their report, was final, and not to be revised or corrected in this court ; and such judgment, further order or direction in the case is to be made by this court as law and justice may require.”

M. P. Knowlton, for the petitioners.

S. T. Spaulding, for the bridge proprietors.

D. W. Bond, for the county of Hampshire.

C. Delano, for the town of Northampton.

GRAY, C. J. The St. of 1871, c. 177, is a legitimate exercise of the power of the Legislature to lay out public highways. The proprietors of the bridge and property, thereby taken for the purpose under the right of eminent domain, were doubtless entitled by the Constitution to a jury to assess their damages. But the question whether the county, and any and which towns therein, should bear the burdens of paying such damages, and of maintaining and repairing this public highway for the future, and in what proportions, was to be determined by the Legislature, or in such manner as it should direct, without any right to a trial by jury, except at its discretion. *Hingham & Quincy Bridge v. Norfolk*, 6 Allen, 353. *Salem Turnpike & Chelsea Bridge v. Essex*, 100 Mass. 282. *Haverhill Bridge v. County Commissioners*, 103 Mass. 120. *Scituate v. Weymouth*, 108 Mass. 128.

1. The statute allows any party aggrieved by the award of the commissioners to appeal to a jury, and expressly declares that the award of the commissioners “ shall be binding upon all parties interested,” except for such appeal, and, if neither party so appeals within a limited time, “ shall be absolutely binding upon all the parties interested therein.” If the appeal to a jury is by the

proprietors of the bridge, like proceedings are to be had as upon the ordinary laying out of a highway; the application for a jury is to be made to the county commissioners, and questions of law arising at the trial before the jury may be decided by the Superior Court, and, upon bill of exceptions or appeal for matter of law apparent on the record, by this court. If the appeal to a jury is by the county commissioners, (as it may be, in behalf either of the county or of any town affected by the award,) the Legislature seems to have considered it not fitting that the county commissioners, being the nominal appellants, should hear the application for a jury, and has provided that the appeal shall be to this court; and, upon a trial by a jury summoned for the purpose by this court, questions of law might be raised and decided. St. 1871, c. 177, §§ 2, 3.

The Legislature having thus afforded a method of reviewing, at the appeal of either party, the award of the commissioners as to the amount of damages to be paid to the proprietors of the bridge, or by the county or any town therein; and declared that, if neither party so appeals, the award of the commissioners shall be absolutely binding upon all parties interested; has clearly manifested its intention that any question of law or fact, involved in such estimate of damages by the commissioners, should be decided by them, and not be open to revision in this court by way of exception to their award. The commissioners in the present case, having ruled upon all such questions as they arose, and returned their award accordingly, had exhausted their authority in the premises, and their attempt to submit the correctness of their rulings to this court was nugatory. *Peabody v. School Committee of Boston*, 115 Mass. 383. The objections made to the award of the commissioners, and the motion based upon those objections, must therefore be overruled.

In the case of *Salem Turnpike & Chelsea Bridge v. Essex*, 100 Mass. 282, on which the appellants rely, the only questions of law, entertained by the court on the return of the award of the commissioners, related to the constitutionality of the statute under which they were appointed.

2. The remaining question, reserved by the report of the justice before whom the present case was heard, is whether the appeal of the county commissioners to a jury was in time.

It was argued by the learned counsel for the appellants, that as the statute requires the award and decree of the commissioners to be "made in writing and reported to the Supreme Judicial Court for the county of Hampshire," it must be returned at a regular term of the court, and that the time limited for an appeal cannot begin to run until it is so returned.

But the statute requires the award to be made and reported in writing, not only to this court, but also to the proprietors of the bridge, to the towns charged, and to the county commissioners. Either party, whether it be the proprietors of the bridge, whose application for a jury must be made to the county commissioners, or the county commissioners acting in behalf of the county or towns, whose appeal lies directly to this court, is required to "appeal to a jury within sixty days," not after the return of the award to this court or to the county commissioners, but "after receiving the award and decree of said commissioners as aforesaid." And it is only the taking or claim of an appeal by the party, requiring no judicial action for its allowance, which is to be within the sixty days. The only reasonable construction of the statute is, that the award of the commissioners, as soon as made in writing, is to be reported at once to the clerk's office of this court, to the proprietors of the bridge, to the towns affected by the award, and to the county commissioners, without waiting for a regular term, either of this court or of the county commissioners; and that the claim of an appeal must be filed in the clerk's office of this court within sixty days thereafter.

Neither the county commissioners, nor any other party interested, having taken any steps towards appealing from the award for more than sixty days after receiving it, it must, by the express terms of the statute, be held to be absolutely binding.

Award accepted.

ALONZO V. BLANCHARD vs. JAMES G. ALLEN, administrator.

Hampden. Sept. 21, 1874. — Jan. 6, 1875. WELLS, J., did not sit.

MORTON & ENDICOTT, JJ., absent.

The operation of the Gen. Sts. c. 97, § 5, limiting actions against an administrator to two years from the time of his giving bond, is not suspended by the Gen. Sts. c. 99, §§ 20, 25, relating to insolvent estates of deceased persons.

If commissioners, appointed under the Gen. Sts. c. 99, to take proof of claims against the insolvent estate of a deceased person, make no return to the Probate Court at the expiration of the time allowed for the performance of that duty, they may be compelled by that court, on motion of any party interested, to make their return.

The estate of a deceased person was represented insolvent, and commissioners were appointed under the Gen. Sts. c. 99, who passed upon all the claims of the creditors which were presented, and disallowed the plaintiff's claim. No return of their proceedings was made to the Probate Court. Further assets were received by the administrator, and all the debts were paid in full, except the plaintiff's. These payments absorbed the assets. After this, and more than two years after the administrator had given bond, the plaintiff brought an action of law against the administrator, whom he had notified of his claim within said two years. No new assets had come into the hands of the administrator. *Held*, that the action was barred by the special statute of limitations.

CONTRACT upon an account annexed for sawing lumber for Harvey Strong and Chester Strong. Writ dated October 12, 1872. Answer: 1. A general denial; 2. The general statute of limitations; 3. The special statute of limitations of actions against executors and administrators. Trial in the Superior Court, before *Aldrich, J.*, who by consent of the parties before verdict withdrew the case from the jury, and reported it for the consideration of this court, in substance as follows:

Harvey Strong died May 16, 1862, and Chester Strong died February 27, 1863. They were copartners, and the sawing was done for the copartnership, in 1861. The defendant was appointed administrator of both estates on March 7, 1863, and filed his bond in both cases on that day, and gave due notice of his appointment within three months thereafter, and filed his affidavit of notice given as required by the order of the Probate Court. Harvey Strong left no individual assets; but his estate was not represented insolvent. The estate of Chester Strong was duly represented insolvent, February 2, 1864, and commissioners were appointed by the Probate Court the same day, and creditors were.

by the successive orders of the court, allowed one year within which to prove their claims. The commissioners received the claims of creditors and passed upon all that were presented to them, but they never made any return of their doings to the Probate Court. The defendant annexed to his petition to the Probate Court for leave to mortgage the real estate of his intestates, December, 1864, what he called in that petition a copy of the commissioners' report, by which it appeared that the claim now in suit was presented to the commissioners, and that nothing was allowed thereon. It did not appear affirmatively that the claim was disallowed. No appeal was claimed from the action of the commissioners in relation to this claim. The commissioners were never required by any special order of the Probate Court, except so far as such order was contained in their commission, to make any return of their doings, and nothing more than what has been already stated was done in or by the Probate Court in relation to the doings of said commissioners.

At the time of the death of the defendant's intestates, there was pending in the Supreme Judicial Court a bill in equity in their names for the redemption of certain real estate from a mortgage, the intestates claiming to be the owners of the equity of redemption. That suit was terminated in favor of the present defendant as administrator, by a decree passed at September term, 1864. As the result of the favorable termination of that suit the estate of Chester Strong proved to be solvent.

In December, 1864, leave was granted by the Probate Court to the administrator to mortgage the real estate aforesaid to pay all debts of the estates represented by him. The administrator did not avail himself of the leave granted, and the mortgage was not executed. In March, 1865, upon a petition presented for that purpose, the Probate Court granted leave to the administrator to sell real estate of his intestates to pay debts and expenses of administration, and a sale was effected for these purposes, May 24, 1865, sufficient to pay debts and expenses as represented in said petition. The proceeds of that sale have been absorbed in the payment of said debts and expenses. The assets belonging to the estate of Chester Strong and the said partnership, including the proceeds of said sale, proved more than sufficient to pay all the debts due from said Chester and the said partnership; and all

such debts, unless the plaintiff's present claim is a debt payable by said estates, were paid in full. No new assets of either estate have come into the hands of the administrator. This suit was not commenced until some time after the assets proved more than sufficient to pay all debts and expenses as aforesaid, and not until after all other debts had been paid and the insolvency proceedings ceased to be prosecuted. The defendant was notified, within two years after his appointment as aforesaid, by the plaintiff, that he claimed the account, here sued, to be due. If upon these facts the Supreme Judicial Court hold that the action cannot be maintained, judgment is to be entered for the defendant; if otherwise, the case is to stand for trial.

C. L. Gardner, for the plaintiff.

A. L. Soule & E. H. Lathrop, for the defendant.

GRAY, C. J. The plaintiff's right of action against the defendant as administrator of Harvey Strong is clearly barred by the statute limiting actions against executors and administrators to two years from the time of their giving bond. Gen. Sts. c. 97, § 5.

It is equally barred against the defendant as administrator of Chester Strong. Neither § 20 of c. 99 of the Gen. Sts., prohibiting the maintenance of an action against the administrator after the estate has been represented insolvent, unless the assets prove more than sufficient to pay all the debts allowed by the commissioners; nor § 25 of the same chapter, allowing any creditor whose claim has not been presented to the commissioners to bring an action thereon against the administrator, if it is not ascertained at the end of eighteen months after the granting of letters of administration whether the estate is or is not insolvent in fact; suspends the operation of the special statute of limitations. *Aiken v. Morse*, 104 Mass. 277. *Tarbell v. Parker*, 106 Mass. 347.

The commissioners were required by law, at the expiration of the time allowed by the Probate Court for the proof of claims before them, to make their return to that court. Gen. Sts. c. 99, § 4. Performance of that duty might be compelled, on motion of any party interested, by the order of the Probate Court which appointed them. If the commissioners did not seasonably make their return, the only remedy of the plaintiff was by application

to the Probate Court for such an order, and, if aggrieved by the decision of that court upon that application, by appeal to this court as the Supreme Court of Probate under the Gen. Sts. c. 117, § 8; and, if the return of the commissioners showed a disallowance of his claim as presented to them, by appeal to a court of common law under c. 99, § 8.

Judgment for the defendant.

ALEXANDER H. G. LEWIS vs. J. W. WEBBER & another.

Hampden. Sept. 22, 1874. — Jan. 6, 1875. MORTON & ENDICOTT, JJ.,
absent.

Goods of a partnership were attached in an action against one of the members thereof, and were delivered to a receiptor who signed a receipt reciting the value of the goods and that they were free from incumbrance, and agreeing to keep the goods without expense to the attaching officer, to deliver them to him as he should appoint, and to save and keep him harmless from all cost, trouble and expense that should arise to him through default in consequence of his entrusting the goods to the receiptor. At the time of the attachment the partnership had not enough property to pay the partnership debts, and more than four months afterwards the members of the firm went into bankruptcy and received their discharge. A special judgment was obtained against the property attached in the original action and a demand made upon the receiptor. *Held*, in an action by the attaching officer against the receiptor that the latter was not estopped to set up the bankruptcy proceedings, and that the action could not be maintained.

CONTRACT on the following receipt, signed by the defendants:
“Hampden, ss. July 24, 1871. Whereas A. H. G. Lewis, deputy sheriff, has this day, at my request, delivered into my hands the following property, to keep, namely: The stock, machinery and goods in the mill of Ahi Peace & Co., in Springfield, attached by him on a writ which issued from the Superior Court for said county, returnable to said court on the fourth Monday of October next. The stock and goods being valued at \$600, and said goods being free from any incumbrance, in consideration that said Lewis has delivered the same to me, I promise safely to keep said property without expense to said Lewis, until the said Lewis or his order, shall call for it; then to deliver it to him, or his order, at

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| 116 | 450 |
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| 116 | 450 |
| 156 | 144 |

such time and place as he shall appoint , and I do further promise that I will save and keep harmless the said Lewis from all cost, trouble and expense, that shall or may arise to him through default, in consequence of his entrusting said property in my hands."

Trial in the Superior Court, before *Aldrich, J.*, who, by consent of the parties before verdict, reported the case for the consideration of this court, in substance as follows :

The making of the agreement by the defendants is admitted by them. It is also agreed that the plaintiff, a deputy sheriff of Hampden County, attached the property named in the receipt, on a writ sued out by George Harley against Ahi Peace, on July 21, 1871, which writ was duly entered in the Superior Court for said county, and a special judgment thereon against the property attached was obtained by the plaintiff at June term, 1873. The plaintiff testified that he made a demand upon the defendants for the property named in the receipt, July 21, 1873 ; that they did not deliver the property to him ; that the property when attached was in the mill of Ahi Peace & Co., and a keeper was appointed by the plaintiff and placed in charge of the property ; that the manufactured goods, named in the receipt, were by direction of the plaintiff packed in five cases and conveyed to the railroad depot in Springfield for the purpose of being shipped thence to New York, as the best market in which to sell the goods ; that at the depot the goods were placed by the plaintiff in the keeping of the freight agent of the railroad, and were there in his possession at the time the receipt was given by the defendants to the plaintiff, July 24, 1871 ; that when the receipt was given to him, he directed the keeper to give up the property, and that the property went back into the possession of Ahi Peace & Co. ; that he did not personally return the property, but gave to one of the defendants a note addressed to the keeper, instructing him to give it up. There was no evidence contradicting this testimony of the plaintiff, except that Webber, one of the defendants, testified that he never saw the property attached, that his co-defendant did not go to the depot or to the mill ; that no note to the keeper was given to him by the plaintiff, nor to his co-defendant, to his, Webber's knowledge, in relation to the delivery of the property to him. He further testified that he receipted for the property

at the request of Ahi Peace, and that he understood at the time that Peace would send the goods to New York and sell them there, and with the proceeds of the sale pay the help of the firm of Ahi Peace & Co., the firm consisting of Ahi Peace and his brother.

The defendants contended, and the plaintiff did not contradict it, that the property attached belonged to Ahi Peace & Co., and that the suit in which the attachment was made was against Ahi Peace alone. They further contended, which was controverted by the plaintiff, that the attachment was invalid for the reason, that the property of a partnership is not attachable to secure an individual debt of one of the partners ; and that even if the attachment was valid, the taking of the receipt dissolved it, and that therefore the subsequent proceedings in bankruptcy of Ahi Peace & Co., hereinafter mentioned, operated to discharge any lien the attaching officer or creditor had on the property attached ; also that the property attached was covered by three personal mortgages at the time the attachment was made ; two of which mortgages given by Ahi Peace were duly foreclosed before the judgment was obtained in the suit of Harley against Peace. The other was given by the firm and was not foreclosed. Two of the mortgages were given by Ahi Peace before he formed the partnership with his brother, and the third was given by the firm.

Ahi Peace testified that the firm, at the time the said goods were attached, would not have been able to pay all their debts in full if they had been required to pay them at once ; that neither he or his partner had any property except what belonged to them as partners ; that the mortgages were not paid ; that the cases of goods attached, which were balmoral skirts, were manufactured in part of stock included in the mortgage given by the firm ; that about one fourth of the stock used in the manufacture of the said skirts was included in that mortgage, and not in the other mortgages ; and that there was no mortgage on these goods *eo nomine*.

The petition of Ahi Peace and of his brother and partner, Alfred Peace, in bankruptcy as partners and as individuals, was filed June 18, 1872. They were adjudged bankrupts, June 21, 1872. An assignee of their estates was chosen July 15, 1872. No assets came into the possession of the assignee, and the as-

signee made the affidavit of no assets. The bankrupts obtained their discharge in June, 1873.

The plaintiff objected to all evidence offered by the defendants tending to control or contradict the written receipt or agreement signed by them, upon which this action is brought, and contended that they could not avail themselves of said mortgages and proceedings in bankruptcy, or of the fact that the goods attached belonged to the firm, in defence of this action.

If upon the undisputed facts of the case and such parts of the defendants' evidence as the court shall hold to be admissible, the action can be maintained for the whole or any part of the property named in the receipt, judgment is to be rendered for the plaintiff, and the case remitted to the Superior Court for the assessment of damages. If in the judgment of the court the action cannot be maintained, judgment is to be entered for the defendants.

M. P. Knowlton, for the plaintiff.

A. L. Soule, for the defendants.

COLT, J. At the time the contract or receipt upon which this action is brought was executed the property therein described had been actually attached in a suit against Ahi Peace. It was then in charge of keepers appointed by the plaintiff, part of it at the mill of Ahi Peace & Co., where it was attached, and part at the depot to which it had been afterwards taken. Upon the giving of the receipt it was surrendered to the firm of Peace & Co., by the plaintiff's written order on the keepers. The property attached was the property of the firm. There was evidence that the firm was not then able to pay the partnership debts, and that accordingly there would be nothing left of its assets for the separate creditors of the individuals composing it. The firm was in fact declared bankrupt shortly after, but not till after this receipt had been given. The property was also subject to prior mortgages.

The defence is that upon the facts agreed, and upon the facts testified to, which by the terms of the report are to be taken as true if competent, there was no valuable interest in the property which could be taken by a creditor of Ahi Peace. To which the plaintiff replies that the defendants are estopped from setting this up in their action on the contract.

The question of the defendants' liability is to be settled by ascertaining from the terms of the contract, as applied to the circumstances under which it was executed, whether it is to be regarded as a contract of indemnity only, or as a receipt for specific articles actually attached with an agreement for their safe keeping and return. If it be the latter, then by repeated decisions the defendants are not estopped from showing in defence that the goods attached were all subject to prior mortgages, or to the prior right of the partnership creditors, and were or ought to have been applied to the payment of those debts. It was early held that if an officer had wrongfully attached the goods of a third person as the property of the debtor, and had bailed them, the bailee might protect himself by a delivery to the true owner, for by such a delivery the officer would be discharged from liability to the creditor, the debtor, and the real owner. *Learned v. Bryant*, 13 Mass. 224. And it is even held that the receiptor is not in all cases estopped to assert his own right of property in the goods attached, merely by reason of having executed an accountable receipt for it to the officer. To have that effect there must be the element of such conduct or such declarations as induced the officer to alter his condition or to forego some advantage which he might have had. *Dewey v. Field*, 4 Met. 381. *Barron v. Cobleigh*, 11 N. H. 557.

We are of opinion that under the circumstances disclosed the defendants are not estopped under their receipt from setting up the defence relied on. It is not like a receipt, such as is often given purposely to avoid an attachment, without regard to whether the property recovered in it is attachable or not, or is even in existence. Such a contract is a mere substitute for the security by attachment, and is in effect but an agreement to indemnify the officer for not making an attachment. In such case, the receiptor assumes the absolute liability, and would be estopped to set up that the articles were not the property of the debtor. *Thayer v. Hunt*, 2 Allen, 449. In this case, an attachment of specific property was actually made and the goods placed under keepers. Upon the giving of the receipt, the defendants were entitled to its custody. We cannot discover anything in the terms of the contract itself, which requires us to regard it as an agreement to indemnify the sheriff. There is no express stipulation in it that the property belongs to the debtor, or is liable for

his debts, or that he has a good title. It is indeed valued at a fixed sum, and is described as free from any incumbrance; but this last clause, if it has any meaning, cannot by estoppel defeat the defendants' right to show that the debtor had no title whatever to it, or that his interest has been absorbed by the creditors of the partnership. It is only a promise for the redelivery of the property, when called for, at such time and place as the bailee or promisee should appoint.

The proceedings in bankruptcy against the firm of Peace & Co. defeated this attachment. The partnership creditors have a prior right to the partnership property, and the assignment in bankruptcy was a transfer by operation of law of the partnership property for the benefit of the partnership creditors. *Allen v. Wells*, 22 Pick. 450, 453. This is sufficient to show, without considering the mortgages, that the property has gone to the use of the persons entitled to it. *Shumway v. Carpenter*, 13 Allen, 68. *Bursley v. Hamilton*, 15 Pick. 40. *Hayes v. Kyle*, 8 Allen, 300. *Penobscot Boom Corporation v. Wilkins*, 27 Maine, 845. .

Judgment for defendants.



STANTON S. CLARK & another vs. INHABITANTS OF
RUSSELL.

Hampden. Sept. 21, 1874. — Jan. 7, 1875. MORTON & ENDICOTT, JJ.,
absent.

A town made a contract with A. to keep its highways and bridges in repair for a year, appropriated money for such work, and took a bond from A. for the performance of his contract. A. refused to perform his contract, and notified the selectmen thereof, and they made a contract with B. to do the work. *Held*, that the selectmen could not, without express authority, make such a contract, although the contract with A. was not available, the roads were out of repair, and the selectmen were left with no other means for putting the roads in repair, except by employing some person to work thereon.

CONTRACT for keeping the highways and bridges of the defendant town in repair, in 1870. At the trial in the Superior Court, before *Allen, J.*, there was evidence tending to show the following facts:

At the annual town meeting of said town on March 14, 1870, Newman Bishop, a responsible person, offered to keep said highways and bridges in repair for one year for \$1000; the town, by vote, accepted the offer, and, at the same meeting, voted "to raise, for repairs of highways and bridges, \$1000;" and on April 2, 1870, took a bond from Bishop conditioned for the performance of his agreement. On the same day Bishop refused to perform his contract, and notified the selectmen. No available means existed for the repair of the roads, except to hire some one to repair them. No surveyors were chosen for the year in controversy, and no provision was made for the repair of roads, except the contract with Bishop.

On said April 2, after the delivery of the above mentioned bond, the plaintiffs made a contract with the selectmen of the defendant town, to keep one half of its highways and bridges in repair for the year 1870, for \$500. They performed their work.

The defendant asked the judge to instruct the jury as follows: "1. If the town of Russell, at its town meeting in March, 1870, contracted the work for which the plaintiffs sue in this case, to Bishop, the selectmen had no power, without authority by vote of the town, to release Bishop from his contract, or to make a contract for the same work with other parties; and the plaintiffs cannot recover.

"2. If the work for which the plaintiffs claim pay in this suit was performed by virtue of a contract made with the selectmen, and the selectmen were not authorized by vote of the town to make such contract, and the town itself had already contracted with another party for the same work, which contract the town itself had not rescinded or annulled, the plaintiffs cannot recover."

The judge did not so instruct the jury; but instructed them that they were to determine whether or not the selectmen did employ the plaintiffs, and if so, whether or not they were authorized, as hereinafter specified, so to do; that if the town had made a contract with Bishop, and that contract was in force and available for the purpose of obtaining the repairs of the roads, the selectmen would have no right to make the contract with the plaintiffs; but if Bishop had refused to perform his contract, and had notified the selectmen thereof, and the contract with him was not available for the obtaining the repair of the roads, and

the selectmen were left with no other means for procuring the roads to be put in repair than to employ some person to work thereon, and the roads were out of repair, then the selectmen would be authorized to make the contract with the plaintiffs.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

H. B. Stevens, for the defendant.

M. B. Whitney, (*G. M. Stearns* with him,) for the plaintiffs.

COLT, J. The obligation of towns to repair highways is created, and the mode of fulfilling it provided for, by statute. The duty may be performed by surveyors regularly chosen, or by work done under contracts with the surveyors, or with others, provided the surveyors or other agents are first duly authorized by the town to make such contracts. Gen. Sts. c. 44, §§ 11, 13.

The plaintiffs worked in repairing highways under a contract with the selectmen of Russell, by which they were to be paid a fixed sum for keeping one half the highways and bridges of that town in repair for the current year. No highway surveyors had been chosen, and under the instructions given the jury must have found that there was no sufficient provision made by the town, by contract or otherwise, for the duty required, and that the roads were in fact out of repair at the time the contract was made. But there was no vote of the town authorizing the selectmen to make a contract.

The judge ruled, in substance, that upon this state of facts they were authorized to make this contract. This is the only question open upon these exceptions.

The powers and duties of selectmen are not distinctly defined by statute. They can only exercise the powers which are incident to the limited authority conferred upon them by their office; they are not general agents, clothed with all the powers of the corporate body for which they act; they are to be regarded rather as special agents, with power to do such acts as are required to meet in the ordinary way the exigencies that may arise in town affairs. The extent of this authority may indeed depend largely upon long continued usage and custom. It is not necessary here to define carefully its limits, or to say that in a case where no other provision is made, the selectmen, in a temporary emergency, may not employ labor in the repair of highways, in order to

secure the safety of the public, and the protection of the town from liability. It is enough that, without express authority, they cannot make contracts like this. The statute provisions make it plain that such contracts, to be binding on the town, can only be made by surveyors of highways, or agents expressly authorized. *Smith v. Cheshire*, 13 Gray, 318. *Hawks v. Charlemont*, 107 Mass. 414. *Goff v. Rehoboth*, 12 Met. 26. *Loker v. Brookline*, 13 Pick. 843, 850. *Butler v. Charlestown*, 7 Gray, 12. *Walpole v. Gray*, 11 Allen, 149. *Exceptions sustained.*



116 458
140 46

WASHBURN & MOEN MANUFACTURING COMPANY vs. CITY OF WORCESTER.

Worcester. Oct. 2, 1874. — Jan. 4, 1875. COLT & MORTON, JJ., absent.

A bill in equity against a city to abate a nuisance alleged the conversion by the city, under authority of the Legislature, of the channel of a natural stream into a sewer, and the opening into it of other sewers and drains into which all the sewage of the city was received; that it flowed thereby into another natural stream and was discharged upon the plaintiff's land, thereby creating a nuisance and causing special damage to property of the plaintiff. *Held*, upon demurrer, that, in the absence of any allegation of negligence on the part of the city, either in the mode of discharging the sewage, or in omitting to take proper precautions to purify it, the bill could not be maintained.

BILL IN EQUITY to abate a nuisance, alleging the following facts:

1. The ownership by the plaintiff, a manufacturing corporation, of a tract of land in the southerly part of Worcester, in the village of Quinsigamond, lying on both sides of Blackstone River, having thereon a rolling mill, and tenement houses used by the workmen in the mill, and a dam across said river, and a pond of water for supplying water power for working said mill.

2. That the river is a natural stream of water, and the plaintiff is entitled to have the same flow through its estate pure and uncorrupted, and that it used the water thereof for the purpose of generating steam for the use of the mill.

3. That on April 16, 1867, the voters of the city of Worcester accepted the St. of 1867, c. 106, entitled, "An act concerning sewers and drains in the city of Worcester."

4. That Mill Brook, mentioned in said act, is a natural stream of water flowing through the populous parts of the city, and empties into Blackstone River a short distance above the premises of the plaintiff.

The bill then set forth various orders of the city council whereby the channel of Mill Brook had in some places been changed, and it had been laid out and appropriated as a main sewer, connected with and emptying into which were about thirty-one miles of sewers. The bill then proceeded as follows:

"From the sewers and drains entering Mill Brook channel as aforesaid, great quantities of sewage matter and filth, both solid and liquid, are discharged and carried into the water of said brook in the new channel, and the same, flowing through said new channel, are discharged and carried into said river, and are thence deposited upon the plaintiff's said premises.

"By means of this filthy and deleterious matter, the water of said river flowing through the plaintiff's premises is fouled and corrupted, and the plaintiff's mill-pond filled up, and the most noisome, offensive and unwholesome smells, vapors and gases are emitted and discharged upon said premises.

"Thereby the plaintiff's said premises are rendered filthy, unwholesome and inconvenient, and the plaintiff and those occupying the premises are greatly annoyed and incommoded, and the water of said river is rendered unfit for the plaintiff's purposes, and the plaintiff is otherwise injured, and its said estate diminished in value.

"All which acts and doings of the defendant and its officers and agents are unauthorized by law and in violation of the rights of the plaintiff, and constitute a nuisance both private and public, from which the plaintiff derives special damage as aforesaid, and the defendant intends to continue and maintain the same."

The prayer of the bill was that the city be required to abate said nuisance, and discontinue said wrongful acts, and for further relief.

The defendant demurred for want of equity; and the case was heard by *Gray*, C. J., and reserved for the consideration of the full court.

G. F. Hoar & *T. L. Nelson*, for the plaintiff. 1. The plaintiff concedes that the city is not liable for such injuries to the stream below, caused by the construction of public works like sewers and streets, as would result to the riparian owner from the reasonable use of the stream above him by the inhabitants of a populous city, nor liable as a wrongdoer for any consequences of the execution with due care and skill of the lawful orders of the city council for the construction and maintenance of such works. The ground of the complaint is not the injury to the purity of the stream; but the injury to the atmosphere and the land, by discharging upon the plaintiff's estate, by artificial means, the sewage of a large city, to an extent which creates both a public and private nuisance. The demurrer confesses that by means of the defendant's structure "great quantities of sewage matter and filth, both solid and liquid, are deposited upon the plaintiff's premises;" that "thereby the plaintiff's mill-pond is filled up, the most noisome, offensive and unwholesome smells, vapors and gases are emitted and discharged upon said premises," the same "thereby rendered filthy, unwholesome and inconvenient, and that this constitutes a public nuisance." Such acts are not within the right of the upper owner to a reasonable use of the stream. The upper riparian owner cannot do to the land of the lower what he could not do to his own. It is not within the power of the city council to authorize them. *Haskell v. New Bedford*, 108 Mass. 208. *Child v. Boston*, 4 Allen, 41. *Merrifield v. Worcester*, 110 Mass. 216. *Wheeler v. Worcester*, 10 Allen, 591. *Emery v. Lowell*, 104 Mass. 13. *Richardson v. Boston*, 19 How. 263. *Perry v. Worcester*, 6 Gray, 544.

2. The power to deposit upon the lands of private individuals the sewage of a city is not conferred by the St. of 1867, and has never been conferred by any sewer act within this Commonwealth. If the defendant can maintain this power, it can authorize the construction of a drain terminating in the cellar of an individual, or on a hillside above his dwelling.

B. F. Thomas & *W. A. Williams*, for the defendant.

GRAY, C. J. Where a city, or a board of municipal officers, is authorized by the Legislature to lay out and construct common sewers and drains, and provision is made by statute for the assessment, under special proceedings, of damages to parties whose

estates are thereby injured, the city is not liable to an action at law or bill in equity for injuries which are the necessary result of the exercise of the powers conferred by the Legislature. But if by an excess of the powers granted, or negligence in the mode of carrying out the system legally adopted, or in omitting to take due precautions to guard against consequences of its operation, a nuisance is created, the city may be liable to indictment in behalf of the public, or to suit by individuals suffering special damage. *Haskell v. New Bedford*, 108 Mass. 208. *Merrifield v. Worcester*, 110 Mass. 216. *Brayton v. Fall River*, 113 Mass.

The case at bar, as now presented, does not require the court to define the limits of the application of either of these rules to the discharge of the Mill Brook sewer into the Blackstone River. The only acts charged against the city of Worcester in the bill before us are the converting of the channel of Mill Brook into a sewer, and the opening of other sewers and drains into the same. These acts were expressly authorized by the St. of 1867, c. 106. *Butler v. Worcester*, 112 Mass. . The only further allegations in the bill consist of a conclusion of fact, that a nuisance to the plaintiff was thereby created; and a conclusion of law, that the acts of the city were unauthorized and in violation of the plaintiff's rights. The bill does not allege any negligence of the city, either in the manner in which the sewage was discharged from the mouth of the sewer, or in omitting to take proper precautions to purify it. The necessary result is that the
Demurrer must be sustained.



SARAH W. BROWN vs. WILLIAM W. COWELL.

Worcester. Sept. 30, 1874. — Jan. 5, 1875. COLT & MORTON, JJ.,
 absent.

Land was conveyed by an absolute deed, and the grantee made and delivered a bond by which it appeared that he took it only in trust to sell it and account to the grantor for the proceeds. The trust was afterwards executed. *Held*, that the grantor might maintain an action for money had and received, and that it was immaterial whether the bond was given at the time of the deed, or afterwards.

A contract by which a trustee purchases trust property directly from the *cestui que trust* will not, if fairly made, be set aside because of the relation of the parties, and whether such contract was fairly made is a question of fact for the jury.

A trustee, authorized by his *cestui que trust* to sell land and receive one half in cash and to take a mortgage for the balance, is liable to the *cestui que trust* for the whole amount, although the note is not due, if he gets the mortgage note discounted and uses the proceeds himself.

CONTRACT for breach of an agreement to sell certain land for the plaintiff and return the proceeds to her. There was also a count for money had and received.

At the trial in the Superior Court, before *Allen, J.*, the plaintiff testified that she conveyed the land in question to the defendant, she having a life estate therein, by a deed of quitclaim on February 14, 1871; and that no paper in writing in relation to said land was ever delivered to her, or to any person for her, by the defendant. She was also allowed to testify, against the defendant's objection, that before and at the time of the delivery of the deed to the defendant, he told her that he would sell the land for her, and return the proceeds to her, to the extent of her interest in it.

The defendant put in evidence tending to prove that at the time the deed was delivered, he was the guardian of a minor who owned one undivided half of the fee in the land, and that he executed a bond, whereby he agreed to sell the land and pay the plaintiff and the owner of the fee of the other undivided half their respective proportions; that he and the plaintiff agreed that the bond should be deposited with James E. Pollard as the property of the plaintiff and the grantors in the deed and obligees in the bond, and that it was so deposited soon after in accordance with the agreement.

The defendant also offered evidence tending to show that a few weeks after the deed was executed he sold the interest of all the parties in the estate for \$1200; that after he had made the bargain, but before the deeds had been passed, and before he had obtained leave from the court to sell the interest of his ward, the plaintiff knowing that the bargain had been made for \$1200, one half to be paid when the title should be made good and leave to sell the minor's interest obtained, the remainder to be secured by mortgage payable in one year from that time, consented to its being sold for that price and on those conditions, and expressed

herself satisfied therewith, and asked the defendant what he, the defendant, would give for her interest in the property and pay her the money then; that the defendant told her she had better wait till he got the pay for the property as she would get more out of it than he would then give; that she insisted that the defendant should make an offer, which he did; that the plaintiff then asked him if that was the best he would do, to which he replied he would give \$23 more, making in all his second offer \$323; that she then told him she would accept his proposition; that he told her he had not the ready money, but could get it from Benjamin Cowell, who lived a few miles distant, and he would like to have the bond assigned to said Cowell as security for the money, and he would get the money that night, if the plaintiff would go with him to said Cowell, who lived a few miles distant; that he, in the presence of the plaintiff, wrote an assignment of the bond to said Cowell, and immediately thereafter she said she would rather take the defendant's note than go to Cowell's, and the defendant at once gave his note for the amount, and at the same time the assignment was delivered to the defendant by the plaintiff; that the plaintiff was about fifty years of age and of usual intelligence.

The defendant also offered evidence tending to show that at the time this suit was commenced the deed had been given and mortgage taken to which the plaintiff had assented, but that the defendant had received only \$600 on account of the sale, the mortgage being then unpaid and not due. There was evidence tending to show that the defendant had received \$600 in cash at the time of the sale, and a note dated June 1, 1871, for \$600, payable in one year; that said note was indorsed by the defendant and the money obtained on it by him from a bank in June, 1871.

The defendant asked the judge to instruct the jury as follows: "1. That if the defendant at the time the deed was executed delivered to her, or, for her, to some one else, the bond produced by him; and subsequently the plaintiff, with a full knowledge of all the facts and by a clear and distinct contract sold to the defendant all her interest in the bond for a consideration by an instrument under seal, and it was assigned to Benjamin Cowell at the defendant's request in trust for him, and at the time of delivery the plaintiff knew it was for the benefit of the defendant, and it was

delivered to the defendant, and no advantage was taken by the defendant of any information he had either as trustee or otherwise, and no influence was exerted by the plaintiff over the defendant, the plaintiff cannot recover. 2. That if no bond or instrument in writing was executed by the defendant at the time the deed was given, then the plaintiff cannot recover. 3. That if the bond was given at the time the deed was executed and the money had not all been collected at the time suit was commenced, then the plaintiff cannot recover."

The judge refused to give these instructions, but instructed the jury that the contract, by which the defendant claimed to have taken the assignment of the bond to Benjamin Cowell, was one which from his relation to the plaintiff he could not make, and the jury must not consider the evidence on that point; that, after deducting, from the amount the defendant had received before the commencement of this suit, his expenses and services in the matter, the plaintiff would be entitled to her interest in the balance; and that if the defendant got the mortgage note discounted and used the proceeds himself at the bank and indorsed it himself, he would be accountable to the plaintiff for her life estate in the sum he received therefor, although the mortgage note was not collected.

The jury returned a verdict for the plaintiff for \$383.63, and the defendant alleged exceptions.

F. T. Blackmer, for the defendant.

S. A. Burgess, for the plaintiff.

ENDICOTT, J. The defendant received the conveyance of the land from the plaintiff without payment of the consideration, and for the purpose of selling it for her and those interested with her. He therefore took it in trust. This trust was proved by the bond which was afterwards drawn up by the defendant and deposited in the hands of Pollard, reciting the character and terms of the transaction. The trust having been executed by a sale and conveyance of the land, this action may be maintained for the money so received by the defendant. *Jackson v. Stevens*, 108 Mass. 94.

The evidence offered in chief by the plaintiff, that the defendant told her when he took the deed that he would sell the estate for her and return the proceeds to her to the extent of her inter-

est, was competent as offered to show in what manner he was to pay to her the consideration for the deed.

The defendant contended, and offered evidence to prove, that after he had bargained for the sale of the estate for the sum of \$1200, but before the deeds had been passed and before he had obtained leave to sell the interest of one of the parties, who was a minor, he purchased of the plaintiff all her interest in the estate, gave his note therefor, and she thereupon assigned for his benefit to one Benjamin Cowell all her interest in the bond deposited with Pollard.

The presiding judge ruled that the contract by which the defendant took the assignment of the bond to Benjamin Cowell was one which, from his relation to the plaintiff, he could not make, and the evidence on that point was not to be considered by the jury. This ruling was undoubtedly based upon the well settled and familiar law, that a person holding the property of another as trustee, or in any other fiduciary capacity, cannot purchase the property himself. He cannot act in the double capacity of seller and buyer, and the law does not permit the two characters to be united in one person. See *Dyer v. Shurtleff*, 112 Mass.

This rule applies to all dealings, direct or indirect, with himself in regard to the property; but it does not necessarily apply to all dealings with the person for whom he holds it, and towards whom he bears the relation of trustee. He may purchase the property of such person; and if the whole transaction, and the circumstances under which it took place were fair and open, and no advantage was taken by him of the *cestui que trust*, by concealment, misrepresentation or omitting to state any important fact, and no undue influence was exercised, and the *cestui que trust* understood what she was doing and the effect of it, such a contract will not be set aside because of the relations of the parties. *Farnam v. Brooks*, 9 Pick. 212, 231. *Perry on Trusts*, § 195, and cases cited. *Downes v. Grazebrook*, 3 Mer. 200. *Ex parte Lacey*, 6 Ves. 625. *Coles v. Trecothick*, 9 Ves. 284. We are of opinion, therefore, that the evidence offered was competent. The case was, very properly, tried by the parties and ruled upon by the court, as if it involved the equitable considerations, and called for the application of the rules of law, which determine the rights and powers of trustee and *cestui que trust*, when the trustee be-

comes a purchaser, and the defendant was entitled to go to the jury upon the question whether he had made a fair and clear contract with the plaintiff. The first ruling asked for by the defendant should have been in substance given, with such modifications or enlargement as would be necessary for a clear understanding by the jury.

The second prayer for instructions was properly refused. It was immaterial whether the bond was given at the time of the deed, as it was only evidence of the character of the previous transaction.

The ruling asked for in the third prayer was properly refused. The instruction given, that if the defendant had discounted the mortgage note and received the proceeds he would be accountable to the plaintiff, although the mortgage note was not collected, was correct and adapted to the facts as presented by the evidence.

New trial ordered.

WILLIAM RICE vs. WALTER R. CUNNINGHAM & another.

Worcester. Oct. 2, 1874. — Jan. 5, 1875. COLT & MORTON, JJ.,
absent.

On the issue whether the conveyance of a parcel of land was void, as being in fraud of creditors, evidence that the deed was not recorded until ten months afterwards, that the grantor continued to occupy and exercise acts of ownership upon the land, and that the grantee made an oral promise to support the grantor, is sufficient to support the inference of a secret trust, and render the conveyance void, without proof that such a promise attached itself to the land in any other manner.

On the issue whether a conveyance was made in fraud of creditors, evidence that the grantor, ten months after making the conveyance, appropriated other property to the payment of his debts, is incompetent.

WRIT OF ENTRY, to recover a farm in Lancaster. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows :

The farm was alleged to be held by the tenants by a title fraudulent as against the creditors of John Cunningham, the tenants' father. The tenants derived their title by deed from the said John Cunningham, bearing date November 28, 1871.

The farm was subject to a mortgage, given by John Cunningham, at the time of this conveyance, which mortgage is still outstanding. Some years prior to November, 1871, John Cunningham had been in the habit of indorsing notes for the firm of Cunningham Brothers, which notes Cunningham Brothers were in the habit of getting discounted at banks, or of selling to individuals, and which, as they matured, were paid or retired by new notes of similar amounts and similarly indorsed. The firm of Cunningham Brothers consisted of three nephews of John Cunningham; and all notes indorsed by John Cunningham bore the prior indorsement of their father, whom John Cunningham testified he believed was a man of substantial property. The amount of these indorsements during all the time in question was about \$4000, which amount was at all times outstanding against the partners down to August 4, 1872, when Cunningham Brothers failed, and shortly after instituted proceedings in bankruptcy. At this time the plaintiff was the holder of their note for \$2400, indorsed by John Cunningham (some time after this conveyance), which matured September 5, 1872, and upon which he instituted a suit against John Cunningham, attached the farm in question, obtained judgment, levied his execution upon the land, which was sold by the sheriff and bid off by the plaintiff, and this action was brought to recover possession of the premises, claiming title under the sheriff's deed. At the time of the failure of Cunningham Brothers, the said John Cunningham was indorser on their paper to the amount of \$3700.

There was evidence tending to show that in November, 1871, the entire property of John Cunningham consisted of the farm in question and the stock upon it, all of which was valued by him at about \$5000, a government bond of \$500, and about \$300 in the Savings Bank at Lancaster; that on November 28, he made and executed the deed to his two sons, the tenants; the eldest, Walter, being then about twenty-five years of age, and the other about eighteen years of age; and he also, by a verbal agreement, sold to Walter all the stock, tools, implements, and personal property of which he was possessed, except the government bond and money in the savings bank, and the demandant contended that the evidence tended to show that the only consideration for these conveyances was that the tenants

were to support their father and mother during their lives. The deed of the farm was not recorded until August 21, 1872, and there was evidence tending to show that from the time of that conveyance down to the time of the failure of Cunningham Brothers, John Cunningham continued to exercise acts of ownership and control over all this property conveyed, treating it as his own property, and that during all the time he continued to indorse for Cunningham Brothers, as he had before done, and that the notes he was liable on for them at the time of their failure were indorsed by him within four months prior to August 1, 1872. The tenants offered evidence to explain or control the effect of the demandant's evidence.

The demandant contended and argued to the jury that upon this evidence they would be warranted in finding that said property was conveyed to the sons upon a secret trust to support the said John and his wife during their lives, and asked the judge to rule that if it were so conveyed the conveyance would be void. The judge refused so to rule, but instructed the jury that, although this evidence, unexplained, might be strong presumptive evidence of fraud, it would not warrant them in finding that the conveyance was upon a trust, as claimed by the demandant, unless there was something more than a mere promise to support the grantor and his wife in consideration of the conveyance; that a mere personal promise of this kind would not create what is known as a secret trust, but that it must attach itself in some way to the land, and carry with it an obligation to hold, manage or dispose of the land or its proceeds, in whole or in part, for the purpose named.

The judge gave full instructions "as to the general law in relation to voluntary and fraudulent conveyances;" and no exception was taken to any of the instructions given, except to the refusal to give the instruction prayed for as to a secret trust.

There was also evidence tending to show that the tenants had knowledge of their father's indorsement for Cunningham Brothers, as before stated.

The tenants called John Cunningham as a witness at the trial, and were permitted to show by him, against the demandant's objection, that after the failure of Cunningham Brothers he used the government bond and the money in the savings bank to pay, as far as it would go, two notes, amounting to \$1300, indorsed by

him for Cunningham Brothers, and then held by the Lancaster Bank, where the same had been discounted.

The jury returned a verdict for the tenants, and the demandant alleged exceptions.

G. F. Verry, for the demandant.

G. F. Hoar, for the tenants.

AMES, J. We must infer from this bill of exceptions that the instructions given at the trial upon the general subject of voluntary and fraudulent conveyances were correct. But there is reason to apprehend that when the presiding judge went on to remark upon the subject of a secret trust for the support of the grantor, and to give a definition of such a trust, and to say that it could not be created by a mere personal promise, but must attach itself in some way to the land, an element of uncertainty and confusion was unnecessarily brought into the case, which had a decided tendency to mislead the jury, and to impair the effect of other instructions which were in themselves correct. A secret trust or confidence, created for the purpose of defeating or delaying creditors, may always be proved by parol, and when so proved renders wholly inoperative the formal transactions which may have been adopted for such purposes by the parties. *Hills v. Eliot*, 12 Mass. 26, 31. If there was, in fact, any such trust, not apparent on the face of the conveyance, it would be a matter of no consequence how it was created or expressed. We do not understand the demandant to have requested the learned judge to rule that the jury would be warranted in finding the existence of a trust bearing any close analogy to such as is recognized and enforced in courts of equity. If a debtor, in failing circumstances, makes a conveyance of his property, purporting on its face to be absolute and without reservation, and at the same time there is a concealed agreement between the parties to it, inconsistent with its terms, intended to secure a benefit or advantage to the grantor at the expense of those whom he owes, a trust thus secretly created is a fraud upon creditors, because it places the right of possession beyond their reach. Thus in *Lukins v. Aird*, 6 Wall. 78, a parol reservation by the grantor, of a right to occupy for a year, was held to be a secret trust, sufficient to make void the deed as to creditors. In *Coolidge v. Melvin*, 42 N. H. 510, it was held to be immaterial whether the trust is express and apparent

on the face of the deed, or is implied from extrinsic circumstances. "Such a trust is proved to exist where the conveyance is absolute on its face . . . but where use and possession are retained by the vendor, or the consideration, in whole or in part, is an obligation for the future support of the grantor." "In short any secret trust whatever, either express or implied, by which the property is to be held in any way for the benefit of the vendor, is inconsistent with an absolute sale, and makes it void in law as to creditors." However vague and indefinite might be the agreement of the grantee, if the real purpose of the transaction was to lock up the property out of the reach of the creditors, and at the same time to secure some advantage to the grantor from its use, or its proceeds, it would present a case of a secret trust and confidence within the case of *Hills v. Eliot*, *supra*. *Banfield v. Whipple*, 14 Allen, 13. *Giddings v. Sears*, 115 Mass. 505. The delay in the registration of the deed, the fact that the grantor continued to occupy and exercise acts of ownership upon the property, and still more the personal promise of support by the grantees, would furnish evidence to support the inference of a secret trust, without any proof that such a promise "attached itself to the land," in any other manner.

It was also a mistake, in our judgment, to allow the tenants to show that since the date of the alleged fraudulent conveyance, the grantor had made use of other securities in the payment, as far as they would go, of certain notes at the Lancaster Bank. This transaction throws no light upon the question as to the purpose which he had in view, at an earlier point of time, in making the deed of his farm. The fact that he used part of his property in paying part of his debts is not in the least inconsistent with an attempt, at a previous time, to place another part of his property beyond the reach of his creditors by means of a fraudulent conveyance. The report discloses no such connection in time and purpose as to render it competent. All that was decided in *Winchester v. Charter*, 97 Mass. 140, upon this point, was that the admission of similar evidence, with some qualifications, was "sufficiently favorable" to the party claiming under such a conveyance.

Exceptions sustained.

ATHOL MUSIC HALL COMPANY vs. JOHN CAREY.

Worcester. Oct. 8, 1874. — Jan. 5, 1875. COLT & MORTON, JJ., absent.

Upon a contract in writing by which the subscribers agree "to and with each other" to associate themselves into a corporation for a specified purpose, the name of which is to be determined by the members thereof, and to "pay to the treasurer of said corporation" the amount set against their respective names, an action may be maintained in the name of the corporation, after it is organized, against a subscriber, upon the allotment to him of the shares subscribed for.

The directors of a corporation voted that the treasurer be authorized and instructed to obtain the assistance of A. B. in making collections of unpaid subscriptions to the capital stock. Afterwards, they voted that the treasurer be authorized and instructed to obtain such legal counsel as he should see fit as to the proper legal manner to be pursued to collect unpaid assessments to the capital stock. *Held*, that these votes indicated sufficient authority for the institution of a suit by A. B. in the corporate name and behalf against a subscriber to the capital stock.

CONTRACT on the following agreement :

"We, the undersigned, severally promise and agree to and with each other that we will associate ourselves into a corporation, the name whereof shall be determined by the members thereof, and pay to the treasurer of said corporation the amount of the several shares set against our respective names, for the purpose of purchasing the homestead of Washington H. Amesen, in Athol, on Main Street, and erecting a public hall thereon. The amount of the capital stock of said corporation to be not less than twenty thousand dollars.

| Names. | No. of shares. | Amount. |
|-------------|----------------|---------|
| John Carey, | One, | \$100." |

The declaration alleged that the defendant entered into and signed the above contract, (a copy whereof was annexed,) and thereby agreed, in consideration of other parties signing similar agreements, to pay to the treasurer of the Athol Music Hall Company, the sum of \$100, for one share in the capital stock of said corporation when it should be organized. It then alleged the organization, the purchase of the homestead of Amesen, the building of a public hall thereon, a demand for the \$100, readiness to deliver the stock, and the refusal of the defendant to pay.

At the trial in the Central District Court of Worcester, the defendant asked the judge to rule that the action could not be

maintained on the pleadings. This request was refused. It appeared in evidence that the action was commenced August 11, 1873, under the instructions of the treasurer, by George W. Horr. The only authority therefor was the following votes of the board of directors:

" May 15, 1873. Voted that the treasurer be authorized and instructed to obtain the assistance of George W. Horr, Esq., in making collections of unpaid subscriptions to the capital stock."

" June 10, 1872. Voted that the treasurer be authorized and instructed to obtain such legal counsel as he may see fit as to the proper legal manner to be pursued to collect unpaid assessments to the capital stock, and also as to the legal status of the corporation." The defendant, at the close of the evidence, moved to dismiss on the ground that the suit was not authorized by a vote of the directors of said company, or by any legal authority. This motion was overruled by the judge.

There was evidence tending to show that in December, 1870, the defendant signed the agreement declared upon; that the act of incorporation was passed on March 3, 1871; that the corporation was duly organized on March 18, 1871, and that the name of the defendant was entered on the books of the corporation as a stockholder and notices were issued and directed to him of all the meetings.

The defendant then asked the judge to instruct the jury that if they were satisfied upon the evidence that the defendant never attended any meeting of the corporation at the time of its organization, or after its organization, the action could not be maintained, although the corporation still retained his name upon its books, and sent him notices of the meetings; that it was not enough for the plaintiff to show that it retained Carey's name upon its books, and otherwise considered him as entitled to a share in the capital stock, unless they are also satisfied that Carey did some act after its organization in ratification of his agreement.

The judge refused to give these instructions, but instructed the jury that if the plaintiff entered the defendant's name on the books of the corporation, as a stockholder, issued and directed notices to him of all its meetings, and gave him the same opportunities to attend the meetings and participate in the proceedings thereof as

were given to other stockholders, they were authorized to find that the defendant's offer was accepted, and that he was received as a member of the corporation. The jury found for the plaintiff, and the defendant alleged exceptions.

H. L. Parker, for the defendant.

W. W. Rice & F. T. Blackmer, for the plaintiff.

WELLS, J. In agreements of this nature, entered into before the organization is formed, or the agent constituted to receive the amounts subscribed, the difficulty is to ascertain the promisee, in whose name alone suit can be brought. The promise of each subscriber, "to and with each other," is not a contract capable of being enforced, or intended to operate literally as a contract to be enforced between each subscriber and each other who may have signed previously, or who should sign afterwards, nor between each subscriber and all the others collectively as individuals. The undertaking is inchoate and incomplete as a contract until the contemplated organization is effected, or the mutual agent constituted to represent the association of individual rights in accepting and acting upon the propositions offered by the several subscriptions. When thus accepted, the promise may be construed to have legal effect according to its purpose and intent, and the practical necessity of the case; to wit, as a contract with the common representative of the several associates.

In *Thompson v. Page*, 1 Met. 565, and *Ives v. Sterling*, 6 Met. 310, individuals subsequently selected by voluntary associations to receive and expend subscriptions, in accordance with the terms of the agreement of association, were allowed to maintain actions against individual subscribers for the amount of their several subscriptions. Being thus constituted the payees, they were construed to have become also the promisees under the written agreement. The same principle applies where the agreement contemplates the organization of a corporation, and refers the payment of the subscriptions to the proper officers of such corporation. See *People's Ferry Co. v. Balch*, 8 Gray, 303, 311.

In this agreement the treasurer of the corporation to be established is expressly made payee. The corporation is the aggregate of the several individuals entering into the agreement, one of whose terms was that they should thus associate and confer their individual rights upon the corporation. We are of opinion that

the corporation, and the corporation alone, is the proper party to bring an action upon such an agreement.

The corresponding agreements of the other subscribers, the organization of the corporation, and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was originally voluntary, or in the nature of a mere open proposition, yet having been accepted and acted on by the party authorized so to do, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation. The votes of the corporation indicate sufficient authority for the institution of this suit in the corporate name and behalf.

These considerations dispose of all the objections, taken in various forms, to the maintenance of the action.

Exceptions overruled.



EDMUND O. BACON *vs.* MAHLON M. DANIELS & another.

Worcester. Oct. 8, 1874. — Jan. 5, 1875. COLT & MORTON, JJ., absent.

Where goods attached as the property of A. are delivered to a receptor who agrees in writing that the goods are the property of A., and that he will on demand return them to the attaching officer, or pay him the amount of the debt and costs recovered in the suit against A., evidence is inadmissible, in defence to an action on the receipt, that some of the goods were not the property of A. at the time of the attachment, and that the others were not attachable.

CONTRACT against Mahlon M. Daniels and Welcome A. Thayer, on a receipt signed and sealed by them, which, after reciting the attachment by the plaintiff, a deputy sheriff, of three cows, on a writ dated December 22, 1870, in an action by John M. Daniels against the first named defendant, and the value of the cows, proceeded as follows: "Now in consideration of the premises, and of said E. O. Bacon allowing the above property, so by him attached, to remain in the charge and possession of the said Mahlon M. Daniels, we hereby jointly and severally promise and agree that said property is the lawful property of the said

Mahlon M. Daniels, and is of the aforesaid value, and that we will, on demand, deliver the said property to the said E. O. Bacon in like good order and condition as the same is now in, and of its present value, or in case of our neglecting or refusing to deliver the property as aforesaid, we will pay on demand to the said E. O. Bacon, or his lawful representatives, the amount of debt and costs which shall be recovered in the said suit, together with all lawful fees upon such execution or executions as may be placed in the hands of said E. O. Bacon, or his legal representatives."

The declaration set out the contract, and alleged the entry of the original action in court, judgment thereon in favor of the plaintiff, issue of an execution, demand of the property attached, and the refusal of the defendants to deliver up the property, and a further demand and refusal of the defendants to pay the amount of the debt and costs recovered, together with the fees on the execution.

Trial in the Superior Court, before *Brigham*, C. J., without a jury, who allowed a bill of exceptions in substance as follows :

The contract annexed to the declaration was made under the circumstances and upon the considerations therein set forth, and judgment was obtained in the action of John M. Daniels against Mahlon M. Daniels, execution issued thereupon, and the plaintiff proceeded in the matter of said execution, as is alleged in the declaration. When the plaintiff made the attachment, Mahlon M. Daniels was residing with his family and with Abigail Alexander, his mother-in-law, on her farm in Blackstone, and was conducting the business of that farm, under some arrangement, the details of which did not precisely appear, by which he and his family obtained a maintenance, and Abigail Alexander more or less of the products of the farm, and the control of the same. At the time of the attachment, there were upon the farm seven cows, all of which had been the property of Mahlon M. Daniels. Three of these cows were under mortgage to the defendant, Welcome A. Thayer, at the time of making the contract declared on. Three of the other cows were, on March 30, 1869, sold by Mahlon M. Daniels to Abigail Alexander, and the other was the property and the only cow of Mahlon M. Daniels not under mortgage. Among the three cows attached by the plaintiff at the time of making the contract declared on, were two of the three cows sold by Mahlon M. Daniels to Abigail Alexander as aforesaid.

There was evidence on the part of the plaintiff tending to prove that the sale to Abigail Alexander was colorable and not *bona fide*, and that, at the time of the attachment, Mahlon M. Daniels pointed out the three cows attached and declared them to be his property, but the judge did not find these facts proved.

The plaintiff contended, and requested the judge to rule, that under the pleadings the plaintiff was entitled to recover upon said contract, and that the defendants were estopped to deny that the attached cows were the property of Mahlon M. Daniels; but the judge ruled that the defendants might prove, in defence of the action, that the cows, when attached, were not the property of Mahlon M. Daniels, and admitted evidence to that effect, against the objection and exception of the plaintiff's counsel.

The judge ruled that two of the three cows attached as aforesaid were not, at the time of their attachment, attachable as the property of Mahlon M. Daniels, although in his use and possession, being then the property of Abigail Alexander, and that the third cow thus attached was exempt from attachment, being the only cow of Mahlon M. Daniels not under mortgage; that evidence of these facts was competent, notwithstanding the recitals and admissions of the defendants in the contract declared on, and that upon the facts found the plaintiff could not maintain this action, and found for the defendants; and the plaintiff alleged exceptions.

S. A. Burgess, for the plaintiff, was stopped by the court.

T. G. Kent, for the defendants, cited *Learned v. Bryant*, 13 Mass. 224; *Dewey v. Field*, 4 Met. 381; *Butterfield v. Converse*, 10 Cush. 317; *Thayer v. Hunt*, 2 Allen, 449; *Shumway v. Carpenter*, 13 Allen, 68; *Fisher v. Bartlett*, 8 Greenl. 122; *Sawyer v. Mason*, 19 Maine, 49; *Scott v. Whittemore*, 7 Foster, 309.

WELLS, J. In defence to the action upon this agreement, the court below admitted evidence that the property therein mentioned was not attachable, two of the cows having been previously sold by the debtor, and the other being exempt by law; and, upon such proof, gave judgment for the defendant. This was erroneous. Even if there had been in the writing only the recitals and agreements respecting the property, the express promise and agreement "that said property is the lawful property of the said" debtor, would preclude the defendants from setting up title in another, in contravention of their undertaking and warranty.

The cases relied on to sustain the defence are all cases in which there was no agreement except to return the specific chattels attached and released, and where the transaction was regarded substantially like a bailment. But wherever the form of the receipt or the circumstances under which it was given are such as to show that it was intended as an absolute assurance for a certain amount or value of attachable property, the parties are never allowed to defeat its purpose by proof that the debtor's title to the particular property mentioned in it was defective. *Dewey v. Field*, 4 Met. 381. *Wentworth v. Leonard*, 4 Cush. 414, 419. *Thayer v. Hunt*, 2 Allen, 449, 451.

This writing contains absolute agreements in the alternative, either to deliver to the officer, on demand, certain property named, as attached on the writ, and which they agree to be the debtor's lawful property, or to pay the judgment that may be recovered in that suit. There having been a failure to deliver the property on demand therefor, the alternative promise to pay the amount of the judgment recovered has become operative and binding. It is that for which this action is brought, and not damages merely for non-delivery of the property. The release of the property by the officer to the debtor, at the request of the defendants, is a sufficient consideration to support that promise; and besides, the instrument is under seal. The evidence offered and admitted furnished no defence to the action. *Hayes v. Kyle*, 8 Allen, 300.

The case of *Shumway v. Carpenter*, 13 Allen, 68, was decided upon the ground that, the attachment having been dissolved by the insolvency of the debtor, the officer had no longer any interest in the subject matter of the contract, and therefore no right to enforce it in either form. No such defence exists in this case.

Exceptions sustained.

CHARLES H. VALENTINE vs. JOHN WHEELER.

Worcester. Sept. 29, 1874. — Jan. 9, 1875. COLT & MORTON, JJ., absent.

In an action against a surety on a bond, bearing in the appropriate place a signature apparently that of the principal above that of the surety, the answer was a general denial. The surety, at the trial, admitted his signature to the bond, but objected to the admission of the bond in evidence without proof of its execution by the principal. *Held*, that the bond was rightly admitted in evidence.

The production of a bond by the obligee from his own possession is competent evidence that it has been duly delivered to him.

In an action against a surety on a bond, conditioned for the payment by the principal of all demands, acceptances or indorsements and obligations for which the obligee should in any way become responsible on account of a firm of which the principal was a member, and for the saving the obligee harmless from any loss on account of any debt or liability of the firm, evidence that the principal obligor purchased goods of a third party; that the obligee accepted a draft purporting to be drawn by the firm; that the principal obligor said that he drew it; that it was indorsed by the third party as collateral security for a debt; is competent to show that the signature of the firm was genuine, and, in the absence of evidence that a draft was drawn against funds in the hands of the acceptor, sufficient to prove that the acceptance was given under the bond.

A. gave a bond, with sureties, to B., in a penal sum, conditioned to hold B. harmless from liability for any acceptances made by B. for A. After this, B. accepted a draft drawn by A., and the holder of it sued B. and recovered judgment. B. paid a sum less than the face of the judgment, and the judgment was entered as satisfied. *Held*, in a suit on the bond against one of the sureties, that B. was entitled to judgment for the penal sum.

CONTRACT upon a joint and several bond in the sum of \$40,000, alleged to have been executed by John P. Wheeler, as principal, and the defendant and Edward H. Valentine, as sureties, the condition of which was that John P. Wheeler should pay all demands, acceptances, or indorsements and obligations for which Charles H. Valentine is in anywise responsible for or on account of the firm of John P. Wheeler & Co., and hold and save said Valentine harmless and free from loss or inconvenience on account of any debt, claim, demand or liability of the firm of said John P. Wheeler & Co. Answer: A general denial.

At the trial in the Superior Court, before *Allen, J.*, the defendant admitted his signature to the bond, and the plaintiff then offered the bond in evidence, without any proof of its execution by John P. Wheeler, the alleged principal. The defendant ob-

jected to the admission of the bond in evidence, but the judge admitted it.

The plaintiff then called George M. Chapman, who testified in substance as follows: "I knew of John P. Wheeler buying of Isaac L. Hunt, in 1859, about \$2000 worth of goods." (Two drafts were shown the witness, one dated February 10, 1859, for \$1074.74, and the other dated February 24, 1859, for \$1074.75, both payable six months after date, and drawn on Charles H. Valentine, and purporting to be signed by John P. Wheeler & Co., and accepted by said Valentine.) "John P. Wheeler said he drew them. I was at my desk when I saw the drafts. It was after the purchase of the goods. Wheeler, Valentine, Hunt and a clerk were present. Hunt indorsed them. I think they were signed and accepted at my desk. They were accepted and indorsed at my desk, with my ink. I think I saw them accepted. I lent money to Hunt on the drafts. They were delivered to me, and were duly protested. I have had control of the acceptances ever since. Prior to August 31, 1860, Isaac L. Hunt assigned his property and effects to Samuel I. Hunt, in trust, for the benefit of his creditors under the laws of the State of New York. In September, 1860, I directed a suit to be brought against C. H. Valentine in the Supreme Court for the county of New York, in the name of Samuel I. Hunt, on said drafts, and obtained judgment." (A copy of the record of judgment was here put in, showing a judgment in said court on September 21, 1860, for \$1862.25, against Valentine, in favor of Samuel I. Hunt, assignee of Isaac L. Hunt.) "Valentine assigned the bond in suit to me on February 18, 1861. In 1867, Valentine paid me \$500. I never received anything to pay the drafts except the bond and the \$500. The bond assigned was delivered to me as security for my debt. Valentine requested me to collect it for my own and his benefit, and other parties. In 1867, I directed Samuel I. Hunt to enter satisfaction of the judgment, and it was done. The \$500 was paid to obtain satisfaction of the judgment. The bond had been in my possession since 1861." This was all the evidence in the case.

The defendant asked the judge to direct a verdict for the defendant, on the ground that no breach of the bond was shown. The judge declined so to direct the jury, and instructed them

that they might find on the evidence a breach of the bond. The jury found for the plaintiff, and the defendant alleged exceptions.

F. P. Goulding, for the defendant. 1. The bond was not shown to have been duly executed and delivered. The bare admission of the defendant Wheeler's signature did not amount to an admission of the execution and delivery of the bond so as to bind him, because proof of the execution by the principal was essential. *Russell v. Annable*, 109 Mass. 72. *Bean v. Parker*, 17 Mass. 591. *Wood v. Washburn*, 2 Pick. 24. Otherwise it would not appear that the defendant ever entered into the contract declared on. The surety might sign first, and leave the instrument to be signed by the principal afterwards. The order of the signatures is not material, if the bond has been fully executed by all who purport to be parties to it. *Rundell v. La Fleur*, 6 Allen, 480. *Non constat* that the name of the principal was not forged after the surety signed. [WELLS, J. Is not the signature of the surety some evidence that it was executed by the principal?] I do not understand that it is.

2. The execution of the drafts was not proved. If there was any evidence to go to the jury tending to show the acceptance, there was no evidence whatever, as against the defendant, that they were the drafts of John P. Wheeler & Co. The rule that the acceptance is an admission by the acceptor of the genuineness of the drawer's signature, has no application in this case. It is a rule adverse to the acceptor, and not in his favor. 1 Pars. Notes & Bills, 320, and cases cited.

3. There was no evidence that the acceptances were within the terms of the bond. They do not appear to have been accommodation acceptances. The presumption is that the acceptor had funds of the drawer, and in the absence of proof the acceptances would seem to be the proper debt of Valentine. There is nothing to control the presumption that the drafts were drawn against funds. 1 Pars. Notes & Bills, 323. *Prima facie*, an acceptor is liable for his acceptance upon his own account, and not on account of the drawer. If the acceptances were for the accommodation of the drawer, that was open to proof. The whole condition of the bond shows that it was intended as an indemnity against liability for the debts of John P. Wheeler & Co. As the proof stands, Valentine was obliged to pay in part his own debt.

4. There was no breach of the bond, the judgment obtained against Valentine having been discharged before suit. *Hayden v. Smith*, 12 Met. 511. *Wallis v. Carpenter*, 110 Mass. 347.

F. A. Gaskill, for the plaintiff.

DEVENS, J. The facts which it was necessary for the plaintiff to prove in order that he might recover were established by competent, and, in the absence of contradiction thereof, sufficient evidence.

1. Assuming that it became necessary, inasmuch as the defendant executed the bond as surety for the plaintiff, to show also that there was an execution thereof by the principal, yet, when the signature of the defendant was proved by his own admission of its authenticity, the fact that there was a signature above his own, apparently that of the principal, and in the appropriate place for such signature, upon the bond produced by the obligee, furnished some evidence, as against the surety, that the bond had been executed by the principal. The production of the bond by the obligee from his own possession also tended to show that it had been delivered to him.

2. There was evidence of the purchase of goods by J. P. Wheeler of Hunt, of his presence with the plaintiff and Hunt at the time the drafts were indorsed and accepted, and of his admission at this time that he had drawn them, and these facts were competent in order to prove that the signature upon such drafts, purporting to be that of J. P. Wheeler & Co., was genuine.

3. The evidence that drafts were given by J. P. Wheeler & Co. to the seller of goods to them, which drafts were accepted afterwards, was competent in order to prove that the acceptances were given under the bond. As, by the terms of the bond which the obligors executed, it was to be void only upon payment by J. P. Wheeler & Co. of all "demands, acceptances," &c., for which "said Valentine is in anywise responsible for or on account of said firm of J. P. Wheeler & Co.," it could not be presumed, as against Valentine, that the drafts were drawn against funds of J. P. Wheeler & Co. in his hands.

4. The nominal plaintiff, Charles H. Valentine, who assigned the bond in suit to the holder of the acceptances after judgment thereon, and further paid the sum of \$500 upon such judgment, has been made responsible upon the acceptances, and has suffered

loss to the extent, at least, of the \$500 paid by him. There has been, therefore, a breach of the bond, and judgment should be entered for the penal sum; but the inquiry for how much of the penal sum execution should issue is not here presented. Gen. Sts. c. 133, §§ 9, 10. *Exceptions overruled.*

FRANCES S. YORK *vs.* SAMUEL H. JOHNSON.

Worcester. Oct. 1, 1874. — Jan. 9, 1875. COLT & MORTON, JJ., absent.

The defendant, a member of a church, was appointed, with the plaintiff and other members of the church, on a committee to prepare a Christmas festival for the Sunday-school. He declined to serve, and being asked his reason by a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it, said he did not know, but that "he had been with the plaintiff," who was a woman. *Held*, that this was not a privileged communication.

If a demurrer to the different counts of a declaration is wrongly overruled as to one count, and the jury render a general verdict for the plaintiff, and the counts upon which their verdict is rendered cannot be determined from the bill of exceptions, the verdict will be set aside.

A count in a declaration for slander alleged that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of adultery, by words spoken of her substantially as follows: I (meaning the defendant) was speaking to a certain lady about Mrs. Y. or Mrs. Y.'s case, (meaning the accusation that Mrs. Y., the plaintiff, had a loathsome venereal disease of some kind and had given it to a married man by the name of C. W.) *Held*, that the count did not set forth such circumstances as would show an accusation by the defendant that the plaintiff had committed the crime of adultery, and that the want of such averment was not cured by the innuendo; and that it was bad on demurrer.

TORT for slander. The third count of the declaration was as follows: "The plaintiff further says that the defendant publicly, falsely and maliciously accused her of the crime of adultery, by words spoken of the plaintiff substantially as follows: 'I (meaning the defendant) was speaking to a certain lady about Mrs. York or Mrs. York's case, (meaning the accusation that Mrs. York, the plaintiff, had a loathsome venereal disease of some kind and had given it to a married man by the name of Charles Walton,) and I said, what should you think of a lady who be-

longs to the Congregational Church (meaning the Congregational Church in Shrewsbury) if she should give the pox (meaning a loathsome venereal disease of that name) to a married man, and he should give it to his wife. She (meaning the person with whom he was talking) replied that she should not think her fit to belong to the church, and I, (meaning the defendant,) in answer thereto, said that is the case or our case,' (meaning the above accusation against the plaintiff.)"

The defendant demurred on the ground that the allegations in the third and fourth counts did not constitute a charge of an accusation on the part of the defendant that the plaintiff had committed the crime of adultery.

The demurrer was overruled, and the defendant filed an answer containing a general denial, and also alleging that whatever words were spoken were true and privileged.

At the trial in the Superior Court, before *Allen, J.*, it appeared that the plaintiff and the defendant were members of the same church, that the plaintiff was a singer in the choir and a teacher in the Sunday-school, that the defendant was one of the board of stewards in the church but not a member of the Sunday-school.

There was evidence tending to show that the plaintiff, for several months prior to the time of the alleged slander, had by her conduct and deportment shown an intimacy with Charles Walton, who was also a singer in said church, and that there were rumors in the neighborhood of her sustaining relations with him of an improper character; and that one Foster, a physician, who was also a member of the same church, had told the defendant and others in the church that he was doctoring Walton for a venereal disease, and that he had no doubt he had contracted it from the plaintiff; that he told the defendant that he did not know where Walton did contract the disease, but that he, Walton, had been with the plaintiff. It further appeared that a short time before Christmas, 1872, an effort was made to have a Christmas festival for the Sunday-school of the church, and that at a meeting of those interested a committee was chosen for that purpose; that at that meeting the plaintiff nominated Walton as one member of said committee, and Walton nominated the plaintiff as another; that they together with the defendant, Dr. Foster, Mrs. Sarah J. Newton, another member of the church, and others were chosen

on the committee. The defendant declined to serve with them on the committee. A few days after, Mrs. Newton asked the defendant why he declined to serve on the committee, to which he replied that he did not choose to answer. The next day she inquired again his reason, asking if Rev. Mr. Ben is, the pastor, and his wife were not good enough for him to serve with. The defendant, however, did not then give his reasons; and the following day she urged him again to give her a reason for his not serving, saying that she knew that the fact that Walton and the plaintiff were on the committee was the reason, and with a good deal of feeling wanted to know what he knew with reference to them why they were not suitable persons to be on the committee. In answer the defendant said to her, "Walton has got the clap." Mrs. Newton asked the defendant where he, Walton, got it, to which the defendant replied, "My informant said he did not know, but that he, Walton, had been with Mrs. York."

The defendant contended and asked the judge to rule that under the above circumstances the communication to Mrs. Newton was a privileged one, and that if made in good faith, believing it, and in the discharge of a duty which he believed he owed to the members of the committee and to himself, it would not be actionable, without proof of express malice.

The judge ruled that the communication to Mrs. Newton was not a privileged one, and instructed the jury that if the words used by the defendant to Mrs. Newton, in answer to her question where Walton got the disorder, to wit, "My informant said he didn't know, but that he, Walton, had been with Mrs. York," meant that he had been informed that the plaintiff had had criminal intercourse with Walton, such words would be actionable.

The jury returned a verdict for the plaintiff for \$1400; and the defendant alleged exceptions.

G. F. Verry & F. A. Gaskill, for the defendant.

B. W. Potter, for the plaintiff.

DEVENS, J. The ruling requested by the defendant that the communication made by him to Mrs. Newton was a privileged one, and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of defamatory charges against the plaintiff, and no interest of his own which required

protection that justified it. He had declined to serve upon the same committee with Mrs. York, but he was under no obligation to give any reason therefor, however persistently called upon to do so; and even if Mrs. Newton had an interest in knowing the character of Mrs. York as a member of the same church, it was an interest of the same description which every member of the community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous. *Krebs v. Oliver*, 12 Gray, 239.

There is, however, a ground upon which the verdict must be set aside. The defendant demurred to two of the counts of the plaintiff's declaration, and as the verdict was general and no means exist of determining upon which count it was rendered, or whether rendered upon all, it necessarily follows that if it cannot be sustained upon each, it must be set aside.

Applying to the third count the well settled rules of pleading in actions of this nature, a verdict upon it cannot be sustained. Where words are of doubtful import and not in themselves necessarily actionable, averments, prefatory or otherwise, must be made of those facts which are essential, in order to render them intelligible; and further, these facts should be connected with the words set forth as the substantial slander by a distinct averment that it was in a conversation in reference to such facts or in connection with them that such words were uttered, in this manner affixing to them their slanderous character. *Brettun v. Anthony*, 103 Mass. 37. Gen. Sts. c. 129, § 87. These facts should be the subject of distinct recitals, as they constitute allegations traversable in their nature, which must therefore be so stated that the defendant may in his answer have the proper opportunity to negative them if he desires. Nor can such substantive averments be made merely by the innuendoes; the office of the innuendo is not to introduce new facts, but to affix a meaning to the words used in their connection with facts elsewhere formally set forth in the declaration, and the innuendo is explanatory only of matters sufficiently expressed before. *Bloss v. Tobey*, 2 Pick. 320. If it were permitted to introduce new facts only by alleging a meaning to the words uttered such as they do not naturally import, such facts would not be asserted except inferentially. The defendant,

in meeting that part of the declaration which recites the utterance of the words and the meaning which the plaintiff attributes to them, is to meet these two things only, and not new matter thus introduced.

In the third count, after the words "Mrs. York or Mrs. York's case," alleged to have been used by the defendant, the plaintiff adds, "meaning the accusation that Mrs. York, the plaintiff, had a loathsome venereal disorder of some kind, and had given it to a married man by the name of Charles Walton," and thus attempts to enlarge the sense of the words "Mrs. York or Mrs. York's case," by introducing a new fact, the existence of an accusation of the kind in question, which is nowhere else asserted nor even here with distinctness and certainty. The rule that there must be a distinct recital of such antecedent facts as are necessary to give the words the meaning alleged, is not met by merely asserting that they have such a meaning. The fact sought to be introduced by this innuendo must therefore be rejected from the declaration, it not being properly pleaded; and if this is done, no cause of action is set forth. If there were no such accusation as that "Mrs. York, the plaintiff, had a loathsome venereal disease of some kind, and had given it to a married man by the name of Charles Walton," the whole statement might have been made by the defendant as set forth by the plaintiff, and yet no slander have been uttered in reference to her. So far as anything would then be shown by the count, it might be that she was the wife to whom the husband communicated the disorder which he contracted, as it is not alleged that she was the "lady who belongs to the Congregational Church" from whom the alleged slanderous words charged him with contracting the disorder. It is necessary to show in what way those words, taken in their ordinary sense, imported a slander, and the third count fails to meet this requirement.

The demurrer to the third count should have been sustained, and therefore there must be a *New trial.*

DAVID B. MORRILL vs. JOHN NORTON.

Worcester. Oct. 2, 1874. — Jan. 9, 1875. COLT & MORTON, JJ., absent.

Pending a2 action on a recognizance, the court may permit the magistrate by whom it was taken to file a new and corrected certificate thereof in place of the certificate previously returned by him, and may allow the declaration in the action to be amended to correspond with the new certificate.

A poor debtor duly presented himself for examination at the time and place to which a hearing pursuant to a notice given under a recognizance entered into in accordance with the Gen. Sts. c. 124, § 17, had been adjourned. The magistrate was absent, and the proceedings were not continued by any other magistrate, under the St. of 1870, c. 77. The debtor took no further steps towards an examination. *Held*, that there was a breach of the recognizance.

Where a debtor arrested on an execution enters into a recognizance under the Gen. Sts. c. 124, § 17, to appear for examination, and duly presents himself for examination at the time and place appointed, but is prevented from proceeding in the examination by the absence of the magistrate, statements made by the officer who arrested him are inadmissible in an action for breach of the recognizance, either to relieve the debtor from the penalty of such breach, or to show that there had been an adjournment of the examination by the magistrate.

CONTRACT on a recognizance entered into under the Gen. Sts. c. 124, § 17, by Michael Collins as principal, and the defendant as surety, and conditioned that Collins, who had been arrested on an execution in favor of the plaintiff, should appear on December 7, 1872, at 10 A. M., at the office of the magistrate taking the recognizance in Spencer, being the time and place fixed by the magistrate at the debtor's request, for his examination as poor debtor, and from time to time until the examination was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon.

The case was submitted to the Central District Court of Worcester on an agreed statement of facts in substance as follows :

Collins entered into the above recognizance on December 8, 1872, and gave due notice of his intention to take the poor debtor's oath on December 7, 1872. The examination was duly continued by the magistrate, from December 7 to December 18, 1872, when the hearing was begun and continued, at the debtor's request, to enable him to procure further testimony in his behalf, to December 31, 1872, at 10 A. M., at the magistrate's office in Spencer. At the debtor's request, the hearing and examination

was again adjourned from December 31, 1872, to January 30, 1873, at 10 A. M., to be continued before the magistrate at his office in Spencer. At the last named time and place Collins was present, but the magistrate was absent from the state. The debtor remained at the office of the magistrate for over an hour. No continuance or hearing was had in the case on January 30, 1873, or at any subsequent time. Collins has neither been refused nor admitted to take the oath for the relief of poor debtors by the said magistrate, or any other magistrate. The debtor did not obtain any continuance or adjournment of the hearing or examination from January 30, 1873, to any other time, and has never notified the creditor or his attorneys of any subsequent time to which the examination and hearing was continued. No other trial justice was then resident in Spencer, but several justices of the peace were resident near the office of the magistrate. The creditor, or his attorneys, had no notice of any other time appointed for the hearing or examination subsequent to January 30, 1873. The execution on which the debtor was arrested was returned into court unsatisfied prior to the date of the writ in this action.

Subject to the right of objection on the part of the plaintiff, as to its materiality or admissibility in this action, it is agreed that on January 30, 1873, the debtor Collins went to the deputy sheriff who arrested him on execution, and informed him in regard to the absence of the magistrate, and was told by the deputy sheriff that the creditor's attorney had been notified that there would be no hearing there on that day, and he might go home, and he would notify him when the examination would proceed.

The certificate of the recognizance declared on was an amendment of the certificate of the recognizance originally filed in the Central District Court of Worcester, and upon which the hearing on the case was begun before that court, which amended certificate was filed, by leave of that court while the suit was there pending, by the magistrate before whom the contract of recognizance was entered into, the defendant objecting to the filing of the amended certificate by the magistrate.

Judgment was rendered in favor of the plaintiff for the amount of the penalty expressed in the recognizance; and the defendant appealed to the Superior Court, where the judgment was affirmed he then appealed to this court.

L. M. Child, for the defendant.

C. A. Merrill & W. A. Gile, for the plaintiff.

DEVENS, J. It was entirely competent for the District Court wherein this cause was pending to permit an amendment of the certificate of the recognizance, as originally returned by the magistrate to that court, to be made by filing a new and corrected memorandum thereof, and also to permit the declaration in the action to be amended to correspond with the recognizance as thus corrected. *Cook v. Berth*, 108 Mass. 73. *Commonwealth v. Cheney*, *Id.* 83.

The recognizance sued on was for the appearance of the principal debtor upon a day and at a place named, and from time to time until his examination was concluded. On the 30th of January, 1873, to which time the examination had been adjourned, the magistrate failed to attend; and although any magistrate named in the Gen. Sts. c. 124, § 1, could have attended and adjourned the proceeding, making certificate thereof, (St. 1870, c. 77,) no such magistrate was called in, no adjournment took place, and the proceedings have since slumbered. By permitting the examination thus to fall through, and taking no further action, it must be deemed that a breach of the recognizance has been incurred. The burden of doing the necessary preliminary acts, such as providing for the presence of a competent magistrate, is upon the debtor, and all omissions which disable him from keeping his engagement to deliver himself up for examination in conformity with his recognizance, are at the peril of himself and his sureties. *Thacher v. Williams*, 14 Gray, 324. *Adams v. Stone*, 13 Gray, 396. *Millett v. Lemon*, 113 Mass.

Nor were the statements made by the deputy sheriff admissible either to relieve the debtor from a breach of the recognizance, or to prove that there had been any adjournment of the examination by the magistrate. This officer was in no way, so far as appears, authorized to act or speak for either the plaintiff or his attorney, and his own duty as deputy sheriff was for the time at an end, the debtor having by the recognizance been discharged from his custody.

Judgment for the plaintiff.

GEORGE WHITNEY, administrator, vs. ELIZABETH WHEELER.

Worcester. Oct. 5, 1874. — Jan. 9, 1875. COLT & MORTON, JJ., absent.

A *donatio causa mortis* from a husband to his wife is valid, notwithstanding the Gen. Sta. c. 108, § 10.

On the issue whether a *donatio causa mortis* was made, statements of the alleged donor, tending to show a continuous and apparently fixed state of mind and purpose in him, inconsistent with the alleged gift, and existing previously thereto, are admissible to contradict the testimony of the donee.

TORT for the conversion of a United States bond, of the denomination of \$500, alleged to belong to the estate of Jonathan Wheeler, the plaintiff's testator. The answer was a general denial. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions in substance as follows:

The defendant contended and introduced evidence tending to show that she was the owner of the bond in question, and that it had been given to her by her husband, the said Jonathan, as a *donatio causa mortis*.

The plaintiff requested the judge to rule that there could be no valid *donatio causa mortis* from a husband to his wife, and that such a defence could not be sustained. But the judge, for the purposes of the trial, ruled that a valid *donatio causa mortis* could be made by the husband directly to the wife.

The plaintiff introduced evidence tending to show that no such gift was ever made by the testator to the defendant. It was in evidence that, at the time of his marriage, Jonathan Wheeler was a man seventy-four years of age, had been twice before married, and had a family of four adult children living, and that the defendant was then a widow with five children, and that an antenuptial contract was executed between them, by which Mrs. Wheeler retained her own property, and at the decease of the testator was to receive the use and improvement of one third of his real and personal estate so long as she should live, in lieu of dower and all claim whatsoever upon his estate, and that shortly after the marriage a will was executed by Wheeler, disposing of his property in conformity with the terms of this contract.

The plaintiff offered evidence to show that the testator, at different times from the year 1866 to the day of his decease in 1872, had declared his intention to adhere to the disposition of the prop-

erty made by the will and marriage contract; that not long previous to his death, but before the alleged *donatio*, he had expressed his fear that his wife had been secreting money obtained from his property, and had deposited it in the Fitchburg Savings Bank, and that he requested the witness, his son-in-law, to go there to ascertain if such was the fact; and also that on the day preceding his death, and a few days after the alleged gift, he had stated to this witness that he feared his wife and her friends, after his death, would take all there was of his estate, and begged that he would look after his estate and see that his children were not defrauded. He also offered to prove that, only a few hours previous to the time of the alleged gift, Jonathan Wheeler had expressed himself confident that he should recover; also, that on the Sunday succeeding the Friday on which the alleged gift was made, Wheeler, in conversation with the witness, in answer to an inquiry as to his health, stated that he was doing well, and believed he should ultimately recover; and, that from the Thursday preceding the alleged gift, to the Sunday succeeding, there had been no material change in his physical condition.

The defendant had previously introduced evidence that, at the time of the alleged gift, Wheeler had stated that he considered it doubtful if he should live long.

The judge ruled that all the above evidence was incompetent for any purpose, and rejected the same. The case was submitted to the jury upon full instructions, which were not objected to. The verdict was for the defendant, and the plaintiff alleged exceptions.

C. H. B. Snow, for the plaintiff.

F. F. Fay, for the defendant. The finding of the jury is conclusive upon the question whether the gift was made, unless evidence to control the fact of such gift was improperly excluded. The evidence offered by the plaintiff, which was excluded, was simply the declarations of the plaintiff's testator in his own favor, and these were not competent to control positive evidence of the gift. The plaintiff's testator is the real plaintiff in this action, and any declarations made by him in his own favor, not in the presence of the defendant, either before or after the gift, are inadmissible for any purpose. *Emmons v. Westfield Bank*, 97 Mass. 230. *Baxter v. Knowles*, 12 Allen, 114. *Lucas v. Trumbull*, 15

Gray, 306. *Beecher v. Mayall*, 16 Gray, 376. *Kimball v. Leland*, 110 Mass. 325.

WELLS, J. Before the recent statutes, securing to married women their separate rights of property, gifts *causa mortis* from a husband to his wife were sustained. 2 Redf. Wills, c. 12, § 42, pl. 13. *Lawson v. Lawson*, 1 P. Wms. 441. *Miller v. Miller*, 3 P. Wms. 356. *Walter v. Hodge*, 2 Swanst. 92. The proviso that nothing in those statutes shall authorize the husband to convey or give property to his wife, Gen. Sts. c. 108, § 10, does not operate to render invalid what was before held to be valid.

Gifts *mortis causa*, like testamentary gifts, express the state of mind and disposition of the donor towards the donee, and his purpose in regard to the bestowal of his estate. When there is any ground for doubt as to the intent with which a delivery of property was made, or whether in fact its possession was obtained by delivery as a voluntary gift or in some other mode, evidence tending to show a continuous and apparently fixed state of mind and purpose, inconsistent with such alleged gift, existing previously thereto, may have a legitimate bearing upon the case to affect the inferences to be drawn from the facts and circumstances attending the transaction.

The precise state of the testimony in this case is not disclosed upon the bill of exceptions. It appears merely that "the defendant claimed and introduced evidence tending to show" that the bond "had been given to her by her husband" "as a *donatio causa mortis*;" and that the plaintiff "claimed and introduced evidence tending to show that no such gift was ever made." In this position of the case, we see nothing to justify the exclusion of evidence offered to show the existence of a state of mind and purpose in the supposed donor inconsistent with the alleged gift.

Exceptions sustained.

JOHN B. BURR & another *vs.* GEORGE CROMPTON.

SAME *vs.* SAMUEL MAWHINNEY.

SAME *vs.* AURIN WOOD & others.

SAME *vs.* JOSEPH B. SARGENT & another.

Worcester. Oct. 7, 1874. — Jan. 11, 1875. COLT & MORTON, JJ., absent.

A contract, made by a book publisher with A., recited that the publisher was about to publish a book to be sold by subscription, through agents, in the United States and in Canada, and agreed to publish an advertisement of A. in the book, he paying a certain sum "for each and every copy sold and delivered to agents and others." A similar contract was made by the publisher with B., except that B. agreed to pay a certain sum "for every copy sold" by the publisher. Both contracts contained the clause that the publisher was to furnish, if requested, his certificate under oath as to the number of copies sold and delivered. Payments were to be made every three months from the date of publication, and A. and B. were not to be liable for copies sold after two years. In actions on these contracts by the publisher, he put in evidence that he had between 1500 and 2000 agents selling the work in the United States and in Canada, and that over 60,000 copies had been delivered by him to agents. There were also put in evidence the written requests of the agents for copies of the book, reports from agents of books subscribed for, charges made by the shipping clerk of books consigned to the agents, and carriers' receipts of books so consigned. There was also evidence that this was the usual way of selling books by subscription. There was no evidence of delivery into the hands of the individual subscribers. *Held*, that this evidence would warrant a verdict for the plaintiff for every copy sent to the agents; but not for copies sold to editors of newspapers in payment of advertising bills of the publisher.

Where a person agrees with a publisher to pay a certain sum for every copy of a book sold, payments to be made at stated intervals, and he makes payments on statements furnished him by the publisher which include copies not properly comprehended among books sold, but do not indicate the fact, he may, in an action to recover the balance due, have so much of the money paid as was not properly chargeable to him, applied in payment of said balance.

FOUR ACTIONS OF CONTRACT by John B. Burr and George M. Hyde to recover money alleged to be due from the respective defendants under agreements in writing signed by the plaintiffs and the defendants respectively.

The agreement in the first case was as follows :

"This agreement, made this 15th day of September, 1871, by and between J. B. Burr & Hyde, book publishers, of Hartford, Conn., of the first part, and George Crompton of Worcester, Mass., of the second part, witnesseth: That whereas, said Burr

& Hyde are about to publish a standard work to be entitled 'The Great Industries of the United States,' which will be sold by subscription through their authorized agents in the United States and in Canada; it is agreed by said Burr & Hyde, that said book shall contain from 720 to 1000 pages octavo, and of such a quality of paper and binding that the subscription price thereof shall not be less than two dollars and fifty cents per copy, in cloth, nor exceed the same, save as by superior style of binding; and whereas, the prospectus of said work, together with certain exemplary articles, has been duly exhibited to and examined by said Crompton, as presented by the authorized agent of said Burr & Hyde, in which work is to appear an article on Looms and Loom Building, or Fancy Looms, or some similar title to occupy a space of six pages as reading matter, in the same style of type as shown in the said articles, and in which, according to the general intent of the work, may properly be published the name and biography, in part, of said Crompton: now, therefore, in consideration of said Burr & Hyde's so incorporating in said book said article, biography, &c., to the acceptance of said Crompton, and publishing the same in the forthcoming editions of the said work, said Crompton agrees to pay to said Burr & Hyde the sum of two cents for the space occupied by the said article, for each and every copy of said work sold and delivered to agents and others. Said Burr & Hyde agree to furnish to said Crompton their certificate, properly subscribed and certified to before a justice of the peace (if so required,) as to the number of copies of said work so sold and delivered.

“It is understood and agreed that said Crompton shall pay to said Burr & Hyde the sum of indebtedness on his part which may become due under this contract, at the end of every three months after the publication and sale of the first copy of the work named, containing the article herein before mentioned. It is also agreed that said Crompton shall not be indebted to said Burr and Hyde, under the terms of this contract, for any copies of the work that shall be sold after two years from date of issue of the first copy containing said article, (it being the intent and agreement of said Burr & Hyde to give to said Crompton, in consideration of his contribution of the aforesaid article, the benefit of the same in all copies of 'The Great Industries' aforesaid, sold

after two years from date of the first copy issued.) Said Burr & Hyde agree to furnish to said Crompton two bound copies of the work containing said article."

The agreements in the other cases were similar, except that in the last two cases the stipulation was that "the subscription price thereof shall not be less than two dollars and fifty cents per copy," and the defendants agreed to pay "two cents for every copy of said work sold by said Burr & Co."

The answer in each case contained a general denial, and alleged that within two years from the date of issue of the said book, the plaintiffs sold and delivered the same to persons other than subscribers, offered the same for sale otherwise than by subscription, and sold and delivered the same for a larger sum than they were entitled to under any contract with the defendant.

The cases were sent to an auditor, who found that the plaintiffs had performed their part of the contracts, and had sold and delivered a certain number of books amounting to over 60,000. The report stated the whole number sold, and also the number sold to editors of newspapers in payment of advertising bills, and stated the account between the parties. The evidence before the auditor was stated in the report in substance as follows:

The plaintiffs, for the purpose of showing their modes of carrying on the business of publishing and selling books by subscription, and particularly the book referred to in the contracts, and to prove their performance of the contracts, and the number of books published, sold and delivered by them, offered in evidence voluminous books of account and papers. These were objected to, but admitted.

Frank W. Cooper, called by the plaintiffs, testified: "I am book-keeper for the plaintiffs; have been in the business of publishing books by subscription five years; the books were sold by subscription. We send circulars to parties as agents; we furnish canvassing books at the expense of the agent; he reports at the end of each week the number of subscribers he has obtained and the different styles of binding he has orders for." (A large file of these weekly reports is exhibited.) "The agents usually report by printed blanks, but sometimes by letter. They do not return to us the canvassing books; here are all we have, but they are not all that were sent out; the agents keep their books." (A lot

of canvassing books is exhibited, showing the names and residence of subscribers, and style of binding ordered.) "Next they order the books they want to be delivered to them, sometimes by letter, sometimes by printed blanks." (A large file of these is exhibited.) "I next draw off the order and hand it to the shipping clerk to pack, and the shipping clerk pastes my orders in a book, called an invoice book, kept in form of a scrap-book. This invoice book was filled up March 31, 1873, and thereafter my orders are on files exhibited.

"The shipping clerk packs the goods, returns to me a copy of my order, and enters on a book called the shipping book his shipments; I have shipped some of them, and they are in my handwriting, and some by the plaintiff, Burr; most of them were shipped by Blakely, the shipping clerk. Having received these duplicates from the shipping clerk, I made out the bills and charged on the book of original entry to the agents, on the journal. These accounts with agents and credits on the journal are posted to the ledger; all appear on the ledger.

"Some books were delivered to other parties, some to editors, and some given away; sometimes through agents, and sometimes direct. I have examined the books of account to ascertain the number of 'Industries' sent to agents and editors, and given away; the account books show the number given away; the shipping book and ledger show it; also the number sent to editors and to canvassers. I have made this statement so as to show the number of books—1st, given away; 2d, delivered to editors; 3d, to canvassers, including editors." (Statement put in.)

"The books furnished to editors were paid for in advertising. The price generally was \$1.80 per book. The price to agents was usually \$1.80 per book, or 40 per cent. off. The plaintiffs had some contracts with editors as to other books; in the majority of cases, 'Industries' were advertised; sometimes other books were advertised with them."

All the foregoing evidence was admitted against the defendants' objection.

The following questions and answers were admitted against the defendants' objection.

"Qu. Is there any custom uniformly and generally observed in the book trade, relating to the publication of books by subscrip-

tion, as to how books are delivered by the publisher to subscribers? Ans. Yes.

"Qu. What is it? Ans. The custom is to furnish the books to the canvassing agent, who delivers to his subscribers, on receipt of a printed blank or letter ordering them; the custom is the same as ours and as stated before, as to receiving orders and delivery to canvassers.

"Qu. Is there a uniform custom of the trade known to you in regard to furnishing books published by subscription to editors? Ans. Yes.

"Qu. What is it? Ans. It is to sell them to editors and take their pay in advertising.

"Qu. Does it extend to the prices? Ans. No, the custom is never to charge them more than it retails for by agents,—no custom to charge them same as agents."

Cross-examined. "Our accounts are kept with the agents; in some cases we sell on credit to agents; no established rule; do not sell on credit to all agents; say to one in fifty or seventy-five, sell on credit; the others sometimes pay in advance, or the books are sent by express, marked 'C. O. D.' and they pay on delivery, and the express charges; their commission is 40 per cent., or we sell them to agents for \$1.80 per book in cloth, \$2.10 in leather, \$2.40 in half morocco binding, \$3.00 for half calf, and \$1.50 for marble binding. I do not know what price the agents sell for. I have no dealings with subscribers than as before stated. Editors sign no subscriptions except by the contracts agreeing to receive a certain number of books in pay for advertising. We have no store for sale of books; only one office; occasionally sell at the office; a person may come from some town where there is no agent and we furnish it to him; he buys, does not subscribe; sell to such at retail price; we might have sold a few of those 'Industries' in that way, cannot tell how many. I do not know whether it has been sold at book stores; there have been cases of retail booksellers applying at our office for 'Industries;' whether we filled the order depended upon the number ordered; if he ordered 100 copies, we should refuse; should not furnish any for him to put on his shelves to sell again; it would depend on the use he wanted to put them to; if he wanted a copy for his own use we should furnish to him, or a

friend of his, if we were acquainted with the bookseller and knew where it was going. I don't think we ever furnished more than one copy at a time; fifteen copies in all would be the whole; at agents prices, 40 per cent. off; we did not care what he sold it for; we sold with a distinct understanding he should not put it into his store to sell again; we let him have it at the agent's price, because he extended to us the same courtesy.

"Those given away were some of them complimentary; some by our agents to influential persons to exert an influence on their sales by the agents and to make more money out of it. I have no personal knowledge that these books were sold by the agents to subscribers, except as I may have seen the canvassers' books, say 2500 names.

"We had, say 1500 to 2000 agents. I do not recollect of having sold to editors for cash, or that they have applied to purchase for cash."

Wilbur H. Blakesly, called by the plaintiffs, testified: "Was formerly in employ of J. B. Burr & Hyde as shipping clerk and receiving clerk." (Shipping book shown the witness.) "This was principally in my charge." The following evidence from this witness was admitted against the defendants' objection.

"First, I received the order from the book-keeper, and packed the books according to the order, and checked the order to show it was packed, then made a duplicate of it and posted the original in this invoice book and gave the duplicate to the book-keeper, and made an entry in the shipping book from this original order, then made out a receipt for the express or railroad or boat to be signed by the carrier; the goods were then taken by the carman for the railroad or boat; if by express, their team took them.

"Most of the entries in the shipping book are in my handwriting. I marked the cases." (Carriers' receipts are exhibited in books in the usual blank forms of railroad and express company's receipts.)

John B. Burr, one of the plaintiffs, testified, against the defendants' objection: "My mode of business is as described by my clerks on the stand. I have examined my books and made memoranda so that I can give the same statement of total amounts as given by my clerks. Of the six hundred books given away one hundred, or one hundred and fifty were given away under

the contracts with contributors; there were, say fifty or seventy-five contracts. The regular publishing business is to the trade. Subscription publishing is selling to agents, who solicit subscriptions, and also publisher obtains subscriptions himself by circulars sent out, as to ministers, newspaper editors, school-teachers, and those applying for circulars in answer to our advertisements. We send them what they order, but do not fill orders from booksellers even if they send us the cash. If we sell a copy to a bookseller it is by courtesy, at agent's prices.

"In ninety-nine cases out of one hundred, the orders from editors were received in advance of the publication of the 'Industries' ordered. Editors' charges for advertising varied; their orders and advertising did not always balance; balanced by cash. None of those books have been sold to the trade. I have furnished sworn statements when called for."

Cross-examined. "We advertised this work extensively, and for agents. If an editor ordered a number of copies we should send them, if it did not interfere with agents. In case of advertising, we frequently sold them at retail prices and they charged retail prices. We sometimes made discounts."

The defendants called H. Vincent Butler, who testified: "I live in Boston; am a subscription publisher and bookseller of the firm of Butler & Fleetwood, and represent D. Appleton & Co., of New York, and Lee & Shepard, of Boston. We have the principal control of D. Appleton & Co.'s subscription book business in New England; and of Charles Sumner's Works in the United States, from Lee and Shepard."

Qu. "What is the signification of the term 'sale by subscription' in the trade?" Ans. "Only one, by personal application by the canvasser soliciting their subscriptions at publisher's list of prices per volume."

Qu. "What does the term mean, 'by authorized agents?'" Ans. "Sales by authorized canvassers appointed by the publisher or general agents."

Qu. "Suppose a sale of 67,000 volumes, of them 20,000 are sold to editors at wholesale prices in payment of advertisements, is the sale of the 20,000 a sale by subscription?" Ans. "It is not. A single copy might be, unless the editors are canvassers; usually one copy is given for literary notice and review. Such a sale

would have the effect to injure the sale by subscription. A book adapted to subscription sale would have a larger sale by subscription than in way of the trade, ten to one. I think the 20,000 through the editors would naturally reach a different class from what they would by subscription."

Cross-examined. "We ourselves publish no subscription books; have published a book jointly with a New York party; my experience has been in selling. D. Appleton & Co. is a subscription house in one department; they ship to us at Boston the 'Encyclopedia' and 'Picturesque America,' by orders from our office; they do not know the subscriber in New England. Lee & Shepard have a subscription department, and have a party in Boston to run it; these works spoken of are published solely by subscription. You cannot be supplied with the 'Picturesque America,' in bookstores, nor with Charles Sumner's Works at the office of Lee & Shepard, except you are asked to subscribe, and we are notified of it. The books are to be kept from the book-sellers' shelves. Subscribers may take more than one copy, but at subscription prices. We have a delivery agent, not the canvasser, to whom we charge the books, and he is to return the books or pay cash at list prices; this course we adopted two and a half years ago. I think this course is uniform, especially when published in parts or numbers. A great many continue to supply the books, by discounts to canvassers, mostly in cases where the book is a single work like this. I should say our system is uniform with the largest publishers, as D. Appleton & Co., Lee & Shepard, Johnson & Frye, Samuel Walker & Co., of Boston."

Re-examined. "Delivery by canvassers is subject to get the books into trade. It is not the custom for canvassers to send in the names of subscribers where they deliver the books. It depends on the honesty of the canvasser whether the books get into the trade."

It was agreed that no affidavit by the plaintiffs, as specified in said contracts, had been requested, except one by said Crompton, which was made and sent to him by the plaintiffs.

The defendants had made payments on statements furnished them quarterly, which included copies sold to editors, though this fact did not appear in the statements, and it was not con-

tended that the defendants knew to whom the books were delivered.

At the trial in the Superior Court, before *Brigham*, C. J., the cases were tried together. The plaintiffs offered the evidence set forth in the report of the auditor, the defendants objecting, and the same was admitted.

The defendants asked the judge to rule: 1. That the evidence was not competent or sufficient to prove such sale and delivery of the books or any of them as is required by the contracts. 2. That the books sold to editors were not sold to subscribers within the meaning of the contracts. 3. That the plaintiffs offering to sell and actually selling to editors as aforesaid, the book was not sold by subscription within the terms of the contracts, and that the defendants therefore were not liable for any of said books. 4. That the jury were at liberty on the evidence to find that the sale and delivery of the books, as they were claimed by the plaintiffs to have been made, were not a sale by subscription, and so that none of the books were sold by subscription, within the terms of the contracts, and that no liability attached therefor. 5. That the payment being made generally on account, and in ignorance that books sold to editors were included in the accounts rendered on which payments had been made, the defendants were entitled to apply such payments in the present suit toward sums due for books actually sold to subscribers.

The presiding judge ruled as requested in the second and fifth prayers, and refused the other prayers of the defendants. The jury returned verdicts for the plaintiffs for the balance due for such books as were claimed to have been sold and delivered to persons other than editors.

The defendants alleged exceptions to the refusal to give the first, third and fourth instructions; and the plaintiffs alleged exceptions to the giving of the second and fifth instructions.

The cases were reported after verdict for the consideration of this court, under the following agreement:

“If the evidence received by the auditor is insufficient to support the verdict, judgment shall be for the defendants. If the jury would have been at liberty to find for the defendants, in accordance with the fourth prayer, the verdicts shall be set aside. If the second or fifth prayers ought not to have been granted,

the verdict shall be amended accordingly ; otherwise judgment for the plaintiffs on the verdict."

W. S. B. Hopkins, for the plaintiffs.

G. F. Hoar & T. L. Nelson, for the defendants.

DEVENS, J. The contracts in these several cases, made between the plaintiffs and the defendants, were in effect on the part of the plaintiffs to advertise the business of the defendants respectively in a certain book to be published and sold by them, and on the part of the defendants to pay therefor at the rate of two cents for each copy of the book so sold. As all the contracts contemplate that the advertisements of the defendants are to be distributed by means of a book published and sold by subscription, it was competent for the plaintiffs to show in what manner, according to the usage of the trade, such works were published and sold and the business in relation thereto conducted, and thus prove that the method adopted by them was in conformity with the usual mode which both parties must have intended by their contract. They were further entitled to show that in conformity with such usage agents were employed by them to canvass the country for subscriptions, that orders were sent by such agents, which orders were filled by the plaintiffs by placing the books in the hands of carriers to be transmitted in accordance with them, and that such orders were accompanied by the money, except when the books were directed to be sent to be paid for on delivery, on which orders payment had subsequently been made.

As from the mode in which the business was to be conducted, according to the evidence of the plaintiffs, the defendants must have known that the publisher was not brought in immediate contact with the subscriber, and did not deliver the book to him personally, the books of account kept by the plaintiffs with such agents, and the recollection of witnesses as refreshed by them, (which evidence was admitted by the auditor,) were competent to prove a business conducted according to the usage of the trade, the transmission of the books in answer to orders on them by agents, and the payment therefor, which would justify a finding for the plaintiffs. Although this evidence fails to show directly that the books were delivered into the hands of the individual subscribers, it is the only evidence which is reasonable and practicable in ascertaining the liability of the defendants. As be-

tween them and the plaintiffs, it should be considered that there has been a sale and delivery of the books when the plaintiffs prove that they have done everything to place them in the hands of individual subscribers, which the contract contemplated that the publisher should do.

Nor would the evidence by which the defendants undertook to control that of the plaintiffs justify the jury in finding that the mode adopted was not a sale by subscription within the terms of the contract. The mode of delivery testified to by the defendants' witness related to subscription books published in numbers, and his testimony recognizes that many of the trade supply the books to canvassers as the plaintiffs did in the present case where the work is a single volume only.

The first and fourth prayers of defendants were therefore rightly refused.

It appears, by the plaintiffs' evidence, that a considerable number of books were sold to editors, and that the books so sold were paid for in advertising. This transaction was not, however, such a sale as was intended by the contracts, but an exchange for the commodity of the editor. The sale of a book by subscription being by personal solicitation of individuals through canvassers, those advertising might expect that the book would thus reach most directly those who would be interested in what was there advertised, and who might be those not usually resorting to bookstores. Whether the books distributed to editors would equally reach those whom by means of the subscription the advertisers were endeavoring to influence, we cannot determine. The language of the written contracts varies: in two of the cases the agreement is to pay "for each and every copy of the work sold and delivered to agents and others," and in the other two it is to pay "for each and every copy of said work sold by said Burr & Co.;" but each contract is a bargain in reference to sales by subscription only, and the copies so delivered to editors cannot be deemed such sales.

While, however, the defendants are not to be held liable on account of the sales to editors, the fact that such were made should not prevent the plaintiffs from recovery upon those actually made by subscription. There is no stipulation in the contracts, expressly forbidding the plaintiffs from disposing of the

book otherwise than by subscription, nor was it shown to be against any usage of the trade; and such a disposition of the books as would enable the plaintiffs, in the usual course of their business, to obtain by means of them the advertising which they desired, is not necessarily inconsistent with the objects intended to be attained by sales by subscription. Indeed it may have been a positive advantage to the defendants to have the books containing their advertisements thus disposed of, they being held to no payment therefor.

The second prayer of the defendants was therefore rightly granted by the presiding judge, and the third rightly refused.

The instruction, in answer to the fifth prayer of the defendants, that the payments having been made by them generally on account, and in ignorance that the books sold to editors were included in the accounts rendered on which payments had been made, the defendants were entitled to apply such payments in the present suits towards sums due for books actually sold to subscribers, was also rightly given. The money thus paid was paid under a mistake of fact which may in this way be corrected.

Exceptions overruled.



FRANK J. CLARK vs. CHAUNCEY BROWN.

Worcester. Oct. 1, 1874. — Jan. 12, 1875. COLT & MORTON, JJ.,
absent.

It is no defence to an action for slander by words imputing larceny of the defendant's property, that the plaintiff, by taking the property in jest, has caused the defendant to believe that the words uttered were true.

In an action for slander by words imputing larceny, the jury were instructed that "the plaintiff must prove that the defendant used the words alleged, or some of them sufficient to charge the crime of larceny as alleged." *Held*, that the defendant had no ground of exception.

Where the declaration in an action of slander charges two distinct utterings of similar words in separate counts, the first of which is a privileged communication, evidence of the words charged in the second count is competent to show express malice under the first count; and the plaintiff may recover under each count for the slander charged therein.

In an action of slander, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation is bad, and may also show that his gen-

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eral reputation is bad in respect to the charges made by the alleged slanderous words.

In an action of slander, the jury returned a verdict for \$11.75. The defendant's exceptions were overruled, except one as to the exclusion of evidence offered in mitigation of damages. *Held*, that the plaintiff might retain his verdict if he should elect to have it amended to one for nominal damages.

TORT for slander. The words alleged in the first count were (omitting the innuendoes): "Joséph, I accuse Frank of stealing my iron bar, and I can prove it. By God, I can prove it. He has stole my iron bar, cart pin and ox-yoke. By God, it is no secret, I am going to publish it." The words alleged in the second count were, "By God, Frank stole my iron bar, and I can prove it. There ain't no privacy about it, and I am going to spread it." Answer: 1. A general denial; 2. That the words were true; and 3. That the communications were privileged.

At the trial in the Superior Court, before *Allen, J.*, the evidence tended to show that the defendant had, before the speaking of the words, lost his iron bar, ox-yoke and cart-pin, and that he went to the house of the plaintiff's father, where the plaintiff, who was a minor, resided, and there uttered the words alleged in the first count to the plaintiff's father. The defendant's evidence tended to show that he did not use the words alleged, but words substantially different. The evidence tended to show that the words alleged in the second count were uttered to one Vinton, after the occasion above referred to.

The defendant offered evidence tending to show that the plaintiff had admitted that he took the defendant's iron bar, ox-yoke and cart-pin, but did not take them to steal them, but to bother or plague the defendant. The plaintiff controverted this evidence, and denied that he took or admitted the taking the property.

The defendant, upon the question of damages, called witnesses who testified that the plaintiff's reputation for honesty and integrity was bad. The defendant offered to prove by the same witnesses that the plaintiff's reputation in respect to thieving was bad. This evidence was excluded, and the defendant alleged exceptions.

The defendant asked the judge to instruct the jury as follows: "1. The words of the defendant are to be taken in connection with the extraneous facts, and the question is whether, in connection

with those facts, the words spoken were intended and understood to impute the crime of larceny. 2. If the plaintiff took the defendant's iron bar, ox-yoke and cart-pin without right, with the intent to deprive the defendant of the use of them, the defendant is not liable for saying he stole them. (Or, if the judge should decline to give the last, then) 3. If the plaintiff took without right the iron bar, ox-yoke and cart-pin of the defendant, with intent to deprive the defendant of their use, the defendant is not liable for saying the plaintiff stole them, unless the defendant knew the plaintiff intended to return the articles taken, or only intended to annoy him, without wholly depriving him of the property. 4. Evidence that the defendant, at the time of the utterance of words otherwise privileged, had ill-feeling or ill-temper against the plaintiff, would not tend to prove express malice, unless such ill-will or ill-temper did not arise from the occasion itself, but was wholly independent of the occasion. 5. The words uttered to Vinton, which are relied on as the substantial slander declared on in the second count, are not to be considered as evidence to show malice in uttering the words spoken to the father."

The judge declined to give any of the above instructions, but instructed the jury in substance as follows: "The plaintiff must prove that the defendant used the words alleged, or some of them sufficient to charge the crime of larceny as alleged. The words used are to be taken in their natural and ordinary meaning, unless there was something in the language or circumstances to indicate that a different meaning was intended. The word 'steal' might or might not import a felonious taking, according to the context in which it was used. The jury must find that the defendant intended and was understood, by the words used, to charge the plaintiff with larceny. The occasion of speaking the words charged in the first count was privileged, and the plaintiff must prove express malice in the defendant, to recover on that count. If the words were spoken by the defendant in good faith, believing them to be true, and for the protection or vindication of his rights, they would not be malicious. If the defendant believed them to be true, but uttered them from motives of ill-will toward the plaintiff, and for the purpose of injuring him, they would be malicious. To sustain this count, it must appear that the charge of larceny was made, not for the protection of the de-

defendant's rights, but from motives of ill-will toward the plaintiff and a desire to injure him. Evidence of the speaking of similar words on other occasions is competent on the question of malice. The manner of speaking the words on this occasion, though not of itself sufficient to prove malice, is competent to be considered by the jury in connection with the other evidence, so far as it tends to show the motive of the defendant in uttering the words. To justify by proof of the truth of the words, if the defendant charged a larceny, he must prove a felonious taking; if the plaintiff took the articles in joke or to plague the defendant, not intending to deprive him of the property in them, it would not be larceny."

The jury found for the plaintiff, for \$11.75. To all the rulings of the judge, excepting the ruling that the occasion of speaking the words to the father was privileged, and the burden on the plaintiff to show malice, and to the refusal to admit the evidence as to the reputation of the plaintiff in respect to thieving, and to the refusal to give the instructions requested, the defendant alleged exceptions.

F. P. Goulding, (*J. M. Cochran* with him,) for the defendant.
A. J. Bartholomew, for the plaintiff.

DEVENS, J. It is argued for the defendant that, while one may be justly held responsible for slanderous utterances in respect to an innocent person wrongfully defamed, yet that if such person, by some misconduct of his own, has contributed to produce a belief in the truth of the words thus uttered, he cannot complain of the person expressing it; and that, therefore, if the plaintiff wantonly took the property of the defendant as an idle jest or for the purpose of annoyance, the defendant is not liable for saying that he stole the articles, unless he knew that the plaintiff intended to return them, or only took them thus to annoy him. But in order to justify the defendant in the utterance of words otherwise slanderous, it is necessary that the facts proved by him should be coextensive with the charge; and he cannot protect himself from the consequences of having made it by showing that he believed it to be true, even if such belief was induced by misconduct or impropriety on the part of the plaintiff, which fell short of that which he had seen fit to impute. *Parkhurst v. Ketchum*, 6 Allen, 406, and *Watson v. Moore*, 2 Cush. 133, 140, are deci-

sive of this point, and the defendant has no ground of complaint in reference to the ruling upon it.

2. The ruling that "the plaintiff must prove that the defendant used the words alleged, or some of them sufficient to charge the crime of larceny as alleged," was a ruling that the plaintiff must show that the charge of larceny had been made against him by proof of the words alleged, or some of the words alleged in the declaration, sufficient to impute to him the crime of larceny, as the plaintiff alleged that it had been imputed to him. To meet its requirements, it was necessary to show by evidence that the charge had been made substantially as the plaintiff alleged it to have been made, so far as the words were concerned. If, therefore, words were set out in the declaration descriptive of the slander, and necessary to identify it, those must have been proved in order to show that the defendant had imputed to the plaintiff the crime of larceny, as the plaintiff alleged that he had imputed it. The rule given by the presiding judge was sufficiently favorable to the defendant. *Doherty v. Brown*, 10 Gray, 250. *Payson v. Macomber*, 3 Allen, 69, 72.

3. The ruling that the words uttered to Vinton, which constituted the subject matter of the second count, could be used to show malice in the utterance of the words to the plaintiff's father, which were set forth in the first count, was in accordance with the law as repeatedly decided. *Robbins v. Fletcher*, 101 Mass. 115. *Baldwin v. Soule*, 6 Gray, 321. *Markham v. Russell*, 12 Allen, 573. No damages were to be recovered under the first count for the words used to Vinton; but they furnished evidence of the spirit in which the words set forth in that count were uttered, for the utterance of which alone the plaintiff was there to recover. As no damages were elsewhere recovered for the words uttered to Vinton, there was no reason, therefore, why the plaintiff should not recover for them under the second count. When, however, evidence is given under one count of the utterance of words, which utterance is made the cause of action under another count, it would be highly proper that the jury should be cautioned that the damages under each count should be confined to the injury from the slander charged therein. *Pearson v. Lemaitre*, 5 Man. & Gr. 700. The defendant requested much more than this, and the ruling asked by him was properly refused.

4. Upon the question whether the defendant should have been permitted to introduce evidence that the plaintiff's general reputation was bad as to thieving, we are of opinion that its exclusion by the learned judge who presided was erroneous. While there has been much discussion upon the question whether, in actions of this nature, the defendant might show that the general reputation of the plaintiff was bad, and different results have been reached by some of the courts of other states and in England, it is well settled in this Commonwealth that such evidence is admissible in mitigation of damages. *Bodwell v. Swan*, 3 Pick. 376. *Stone v. Varney*, 7 Met. 86. *Leonard v. Allen*, 11 Cush. 241. *Parkhurst v. Ketchum*, *supra*. The reason upon which it has been thus held would seem to require the admission of such evidence as to the plaintiff's general reputation in those respects in which it has been assailed by the alleged slander. The action is for injury to the position and standing of the plaintiff among his fellows by the utterance of slanders tending to degrade him in their estimation, and perhaps expose him to punishment; and the defendant may show that the plaintiff's general reputation is already bad, with a view of showing that no serious injury can have been inflicted upon him. When, therefore, the plaintiff alleges this injury to have been occasioned by slanders affecting his character in any particular respect, it would fairly tend to mitigate the damages if it were shown that, at the time of the utterance of the slanders alleged, his general reputation in that respect was already bad. As he is expected to be always ready to defend his general character, so also he should be ready to defend it in reference to that matter wherein he alleges it to have been wrongfully assailed. *Stone v. Varney*, *supra*. *Leonard v. Allen*, *supra*. *Wright v. Schroeder*, 2 Curtis, 548. *M'Nutt v. Young*, 8 Leigh, 542. *M'Cabe v. Platter*, 6 Blackf. 405. *Sanders v. Johnson*, *Ib.* 50. *Regnier v. Cabot*, 2 Gilm. 34, 40.

In *Peterson v. Morgan*, *ante*, 350, the offer of the defendant was not to show as an independent fact the general bad character of the plaintiff in those respects which had relation to the charge made against her, but to establish this fact by proof of rumors which had been circulated about the plaintiff as to the offence charged upon her.

Even in some of the courts which have declined to admit evidence of general bad reputation in mitigation of damages, it has been recognized that evidence was admissible of general bad reputation in regard to the point upon which the plaintiff's character had been assailed. *Williston v. Smith*, 3 Kerr, 443. *Anthony v. Stephens*, 1 Misso. 254.

As the exclusion of this evidence is the only error we find in the conduct of the trial, and as it was admissible only upon the question of damages, the plaintiff is entitled to retain his verdict, if he shall elect to have it amended to one for nominal damages; if he shall not so elect, the *Exceptions are sustained.*



ALBERT SMITH vs. GUSTAVUS B. WILLIAMS & another.

Worcester. Oct. 5, 1874. — Jan. 26, 1875. COLT & MORTON, JJ.,
absent.

Where the persons interested in the subject matter of a suit in equity are numerous, it is within the discretion of the court to determine whether or not they should be made parties.

Land subject to dower had been taken by a railroad, and the sum of \$500 paid to a trustee in trust to pay the income to the widow for life and on her death to divide the principal among the heirs of the husband of the widow. After the death of the widow, one of the heirs, whose interest was 3-192, brought a bill in equity "for himself, and in behalf of all others interested in the subject of the suit to enforce the trust." The bill set forth the names and residences of the other heirs; and showed that six persons residing in this Commonwealth were entitled to 56-192; sixteen persons residing in various parts of New England to 75-192; two in Albany, New York, to 4-192; and three persons in Wisconsin to 54-192. *Held*, on demurrer, that the bill could not be maintained, for want of proper parties thereto.

BILL IN EQUITY, alleging that in 1857 certain land of John Southwick, deceased, intestate, which had been set off to his widow for her dower, was taken by a railroad corporation for its railroad, and the entire damages for such taking, amounting to the sum of \$500, assessed and awarded, without any apportionment thereof, and paid to Dan Hill, a trustee appointed by the widow and heirs, to invest the same, and pay the income thereof to the widow for life, and the remainder to the heirs; that the

income was accordingly paid to the widow until the death of the trustee in 1864, leaving a will by which he made one of the defendants executor and the other residuary devisee and legatee; that the executor took possession of all his testator's estate and of the trust fund, and paid the income of the latter to the widow of Southwick until her death in 1867; that nothing had since been paid to any one as income or otherwise upon said entire damages; that said executor had kept, or ought to have kept said entire damages invested for the benefit of said heirs; and that the same, with the income which had accumulated, or ought to have accumulated thereon, belonged absolutely to the heirs at law of Southwick, and ought to be apportioned, distributed and paid over to and among them according to their respective interests; but the said executor refused to account for or pay over the same.

The bill was filed by the plaintiff, an heir at law of John Southwick, "for himself, and in behalf of all others interested in the subject and object of this suit, heirs at law of said deceased, their respective names, residences, lineal descent, and extent of said interest," being set forth in detail in the bill, by which it appeared that the plaintiff was entitled to $\frac{1}{3}$; six persons residing in different towns in this Commonwealth to $\frac{1}{6}$; sixteen persons residing in various parts of New England to $\frac{1}{6}$; two residing at Albany in the State of New York to $\frac{1}{3}$; and three persons residing at different places in the State of Wisconsin to the remaining $\frac{1}{3}$.

The bill prayed for process, an answer not under oath, an account, the appointment of a receiver to receive the trust fund from the defendants and apportion and distribute it to and among the said heirs at law according to their respective interests therein, and for further relief.

The defendants demurred to the bill for want of equity, 1st. Because each of the persons named in the bill as interested in the estate of John Southwick, deceased, ought to be made parties thereto; 2d. Because the plaintiff had a plain, adequate and complete remedy at law. The questions arising upon the demurrer were reserved by *Ames, J.*, for the determination of the full court.

G. F. Hoar, for the defendants.

S. A. Burgess, for the plaintiff. The bill sets forth ground for relief in equity, under the Gen. Sts. c. 113, § 2, cl. 6, there being more than two parties having distinct rights or interests which cannot be justly decided and adjusted in one action at the common law. *Carr v. Silloway*, 105 Mass. 543, 549. *Hale v. Cushman*, 6 Met. 425, 431. The land damages were a trust fund in the hands of Hill and his executor, the annual income of which was payable to the widow of John Southwick, during her lifetime, and upon her decease the remainder "to be paid over absolutely" to the persons entitled to the same. Gen. Sts. c. 63, § 25; c. 43, §§ 17, 18. It appears upon the face of the bill that all persons interested in the subject and object of the suit are made parties. Story Eq. Pl. §§ 76-106. A distributee of a trust fund may sue in behalf of himself and all others; the court will exonerate the trustee from all liability in respect to payments made pursuant to its decree; and the remedy of the absent parties is against those who get more than their share, and not against the trustee, his executors or administrators. Story Eq. Pl. §§ 106 & notes, 207 a, 207 b. *Stevenson v. Austin*, 3 Met. 474, 481.

GRAY, C. J. The plaintiff sues in behalf of himself and of all other persons having like interests in the alleged trust fund. How far such persons should be made parties to the suit depends largely upon the discretion of the court, considering on the one hand the difficulty and expense of joining them, and on the other the paramount importance of having such a representation of the interests concerned as may enable the question at issue to be fairly tried. *Stevenson v. Austin*, 3 Met. 474. *Harvey v. Harvey*, 4 Beav. 215, and 5 Beav. 184.

It appears upon the face of the bill that the names and residences of all the parties in interest are known to the plaintiff, that the owners of more than one fourth of the fund reside in this Commonwealth, and of more than three eighths in other parts of New England, and that his own share is only one sixty-fourth part, and less than ten dollars in value. Upon such a state of facts, it would be unjust to try the merits of the case, or to express an opinion upon the main question made by the demurrer, without giving any of the other parties an opportunity to be heard.

The plaintiff does not seek to maintain this bill for the protection of his own interest only. And it would be inconsistent with the settled practice of a court of chancery, and the rights of suitors whose causes are more worthy of its attention, to entertain a claim so trifling in amount. Story Eq. Pl. §§ 500-502. *Cummings v. Barrett*, 10 Cush. 186, 190. *Demurrer sustained.*

BERNETTE H. WILLIAMS vs. WILLIAM T. HART & others.

Worcester. Oct. 2, 1874. — Jan. 30, 1875. COLT & MORTON, JJ.,
absent.

Where a deed to a railroad corporation contains a stipulation that the grantee shall erect a convenient bridge over the granted premises, at a spot to be afterwards designated by the grantor, but is silent as to the time for performance, the law implies an agreement by the grantor to perform his part within a reasonable time; and a neglect for twenty years to call upon the grantee for performance amounts to such laches as to preclude the grantor from maintaining a bill in equity for specific performance.

BILL IN EQUITY, filed February 25, 1873, for the specific performance of a provision in a deed conveying two parcels of land in Millville, executed May 14, 1853, by Dan Hill, of Blackstone, of whom the plaintiff is heir at law, and accepted by the Southbridge & Blackstone Railroad Company, grantee in the said deed. The granted premises were conveyed by the grantee to the Boston, Hartford & Erie Railroad, and were mortgaged by it to the defendants in this suit as trustees, who were in possession of the road for breach of condition in the mortgage. The nature of the bill appears in the opinion.

The defendants demurred for want of equity, and for laches on the part of the plaintiff. The case was heard and reserved by *Gray*, C. J., upon the demurrer, for the determination of the full court, the parties agreeing that, if the demurrer was sustained, the bill should be dismissed; if the demurrer should be overruled, the bill should be taken for confessed, and it should be decreed accordingly.

H. B. Staples & F. P. Goulding, for the defendants.

G. F. Hoar & T. L. Nelson, for the plaintiff.

ENDICOTT, J. The deed recites that the conveyance is made to enable the grantee to build its railroad over the land described, subject to certain provisions which are set forth. One of the provisions is that the grantee shall furnish to the grantor two crossings over the land conveyed and the railroad to be built thereon; one at grade and the other by a bridge at or near certain stations which are named, but "the precise spots (where they shall be constructed) to be hereafter designated" by the grantor. The bill alleges that the crossings were intended to provide passages across the railroad for the benefit and improvement of the adjoining land of the grantor, on each side of the parcels conveyed. The deed is dated May 14, 1853. The railroad was built in 1855. The grantor owned the adjoining lands till his death in 1864, but never designated the spots where the crossings should be constructed by the grantee. The plaintiff, who is the heir at law of the grantor, has been in possession of the adjoining lands since his death, and, having designated to the defendants the spot where she desires the bridge to be built, and they having neglected to construct it, she filed this bill February 25, 1873, for specific performance of this provision of the deed. It does not appear that any spot has ever been designated for the grade crossing, or that it has ever been constructed.

It is not necessary to consider many of the questions argued at the bar. The point taken, that the spot was not designated within a reasonable time is decisive of the case.

The fair construction of the deed is that the grantee shall not be obliged to furnish or construct the bridge till the spot is designated by the grantor. Where there is a condition to do a thing upon the performance of an act by the grantor, which is secret and lies within his own breast, the performance is excused till the grantor gives notice of the act. Com. Dig. Condition L. 8. When the notice is given, the obligation on the grantee in this case would be complete, and the bridge must be built within a reasonable time. As where a grantee, by a condition in a deed, is to do some act, as to build a school-house for the public, or a dwelling-house for the grantor, he must do the act within a reasonable or convenient time; if not, there is a breach. *Hayden v. Stoughton*, 5 Pick. 528. *Hamilton v. Elliott*, 5 S. & R. 375.

Taking the peculiar facts of this case, the purposes of the grant and the uses to which this land was to be subjected, we are of opinion that the same rule applies. The particular act which the grantor here undertook to do, and which it was necessary he should do, to render the obligation to build the bridge complete on the part of the grantee, depended solely upon himself; he could select his own mode and time for carrying out his agreement; no time being limited, the law implies an agreement to do it within a reasonable time under the circumstances. *Atwood v. Cobb*, 16 Pick. 227, 231. *Gardner v. Corey*, 11 Gray, 30. *Ford v. Cotesworth*, L. R. 4 Q. B. 127, 133.

The spot was not designated within a reasonable time. The demurrer must be sustained, and, by the terms of the reservation, the entry will be *Bill dismissed.*

FRANK FRIEND vs. C. J. PETTINGILL & another.

Plymouth. Oct. 20, 1874. — Jan. 30, 1875. AMES & MORTON, JJ., absent.

By a verbal agreement between A. and B., A. was to work for B. in the manufacture of bricks, and to have in consideration therefor one third of the profits of such manufacture, and the option of taking a conveyance of one third of B.'s farm, on which the brick-works stood, in case A.'s share of the profits amounted to one third the first cost of the farm. A. worked as agreed, and there were no profits. *Held*, in an action by A. to recover for his services, that the agreement to receive a share of the profits was a defence to the action, although the agreement in connection therewith as to the conveyance was invalid under the statute of frauds.

Where the answer to an action upon an account annexed alleges that all the charges were furnished under a special contract, and the plaintiff files a replication alleging that such contract, if made, is invalid under the statute of frauds, the only issue is as to the existence and validity of the contract, and the plaintiff cannot prove that the account annexed was also for other items outside the contract.

CONTRACT upon an account annexed for labor performed, services rendered and a horse and tools used by the plaintiff in the service of the defendants. The answer alleged that the labor and services were performed and rendered and the horse and tools used under a special agreement between the plaintiff and the defendants, and that under such agreement nothing was due the plaintiff therefor. The plaintiff filed a replication alleging that

such contract, if made, was a part of an agreement with reference to the sale and conveyance of certain real estate to the plaintiff by the defendants, and that such agreement, not being in writing, was invalid under the statute of frauds.

At the trial in the Superior Court, before *Brigham, C. J.*, the jury found for the defendants, and the plaintiff alleged exceptions. The facts appear in the opinion.

H. Kingman, for the plaintiff.

J. White, for the defendants.

ENDICOTT, J. This action is brought to recover the value of labor performed and services rendered to the defendants in the manufacture of bricks. The defence is that the services were rendered under a special contract, whereby the plaintiff was a partner with the defendants in the business, and was to receive a share of the profits. The replication, after denying that the plaintiff made such a contract, alleges that such contract, if made, was coupled with and part of an agreement for the conveyance of land, which agreement was not in writing, and constituted no defence to the action.

There was evidence at the trial, tending to show that in May, 1873, an oral contract was made by these parties that the plaintiff should work for the defendants and devote his whole time, labor and skill to the manufacture of bricks upon the defendants' farm, and receive as compensation for his services one third of the net profits of the manufacture. It was also agreed that the defendants should convey to him one third part of the farm and the brick-works, whenever the plaintiff would pay them one third the cost thereof; provided, that the plaintiff's profits of the manufacture for the season amounted to one third of the first cost of the farm, and provided, also, that such payment should be made on or before April 1, 1874. The plaintiff worked on the farm, and was engaged in the manufacture of bricks during the season from May 1 to October 27, 1873. In reply to specific questions propounded to the jury, they found that the defendants did contract to convey to the plaintiff one third of the farm, provided the profits to the plaintiff in one season amounted to one third of the first cost of the farm; and that this was not an independent contract, but a part of the contract in relation to brick-making, made at the same time, and founded on that as a consideration.

No question is made by the plaintiff that the agreement to receive a share of the net profits would in itself be a good defence to this action ; but he contends that it was part of the agreement to convey the land, could not be separated from it, and that the whole was one contract within the statute of frauds.

The only question therefore is, whether, as matter of law, that part of the agreement relating to the manufacture of bricks and the compensation therefor, which could be enforced if it stood alone, may be or is so separate and distinct from that portion which cannot be enforced relating to the conveyance, that it is a defence to this action. We are of opinion that it is. The agreement to convey is dependent upon the execution of the agreement to labor ; but the agreement to labor is in no wise dependent upon the agreement to convey. The agreement to labor must be executed, as it was in this case, and completed as a distinct and separate portion of the whole contract and its results ascertained, before any question can arise as to the execution of the agreement to convey. Indeed the question may never arise. Its execution is optional with the plaintiff, and that only in the event that his share of the profits amounts to one third the cost of the farm. If there are no profits, or an insufficient amount, the plaintiff would have no right to demand a conveyance, and in no event could he be compelled to take one. Whether therefore the agreement to convey would ever become an operative portion of the contract, depended upon the results of the season's labor, and the option of the plaintiff.

It was not therefore an entire agreement, incapable of division. It comes within that class of cases, where the contract contains several stipulations, having reference to distinct objects, and imposing distinct duties, some of which can and some cannot be enforced. *Pierce v. Woodward*, 6 Pick. 206. *Brackett v. Evans*, 1 Cush. 79. *Preble v. Baldwin*, 6 Cush. 549. *Rand v. Mather*, 11 Cush. 1. *Page v. Monks*, 5 Gray, 492. *Troubridge v. Wetherbee*, 11 Allen, 861. *Wetherbee v. Potter*, 99 Mass. 354.

The plaintiff, having executed this portion of his contract, with no profit as the result of his season's work, cannot be relieved from the obligations thereby imposed, because another subsequent and separate stipulation may become invalid, by the refusal of the defendant to perform it, if the occasion for its execution should

ever arise. The rulings requested by the plaintiff on this part of the case were properly refused.

The answer alleges that all the labor, performed or furnished by the plaintiff and charged in the several items of his account annexed, was performed and furnished under the express agreement which is set forth in detail. The replication voluntarily filed by the plaintiff denies the contract, but alleges that if made, it was invalid by reason of the agreement to convey not being in writing; but does not deny the allegation of the answer that all the charges in the account annexed were furnished under the contract. The only issue then presented by the pleadings was whether there was such a contract, and if so, was it valid? The question was not raised by the pleadings, or open to the plaintiff, whether any portion of the items charged in his account annexed were for other services than those rendered under the contract. The prayers for instructions on this point were properly refused. Gen. Sts. c. 129, §§ 23, 27. *Murphy v. People's Equitable Ins. Co.* 7 Allen, 239. *Stevens v. Parker*, Ib. 361.

Exceptions overruled.



EDMUND H. BENNETT, Judge of Probate, *vs.* ALICE S. WOODMAN & another.

Bristol. Oct. 27, 1874. — Jan. 9, 1875. COLT & AMES, JJ., absent.

In an action on an administrator's bond, for not accounting, the administrator is not entitled to contest the validity of the order of the Probate Court authorizing it.

It is no defence to an action upon a probate bond, brought in the name of the judge of probate for breach of its conditions in not accounting, that the person upon whose representation the action was brought will receive no benefit from a recovery upon the bond.

The fact that one, who has been duly appointed an administrator, is the executor and sole legatee of the estate under a will afterwards discovered, does not relieve him of the duty of making a proper settlement of his account as administrator; and is no defence to an action on his bond for not accounting.

CONTRACT, on the probate bond of the administratrix of Brownell W. Woodman. The breach alleged was failure to account. The answer admitted the execution of the bond and

denied any breach, and set up that the action was begun and instituted at the suggestion and for the benefit of Cornelia M. Remington, an adopted daughter of the intestate and the first named defendant; that after the taking out of administration upon the estate of Brownell W. Woodman by Alice S. Woodman, and the execution and approval of the bond declared on, the said Alice discovered a will of said Brownell W. Woodman, which will was afterwards duly proved, approved and allowed by the Probate Court for the county of Bristol; that by the terms of said will all the personal estate of Brownell W. Woodman was given to the said Alice S., and that Brownell W. Woodman, at the time of his decease, left no real estate; that Cornelia M. Remington was adopted by Brownell W. and Alice S. Woodman after the execution of said will by Brownell W. Woodman; that Brownell W. died in 1859, not intending to make any provision in his will for Cornelia M. Remington; and that Cornelia M. has no such interest in and to the estate of Brownell W. Woodman as to entitle her to cause said bond to be put in suit, or to maintain an action thereon.

At the trial in this court, before *Devens, J.*, the defendants admitted that no account had been rendered, and offered evidence in support of the allegations in their answer. The judge ruled that the evidence was inadmissible; a verdict was rendered for the plaintiff; and the case was reported for the consideration of the full court.

J. M. Morton, Jr., for the defendants.

E. Williams & T. M. Stetson, for the plaintiff.

WELLS, J. The administratrix has no such interest in the matter of granting leave to bring an action upon her bond, as to give her a right to resist the application therefor, or to be heard upon it. *Fay v. Rogers*, 2 Gray, 175. *Richardson v. Oakman*, 15 Gray, 57. We think it must follow from the same considerations, that, when a suit has been brought upon the bond, the administratrix and her sureties are not entitled to contest the validity of the order of the Probate Court authorizing it. When the suit is brought for the especial use and benefit of any one, the interest or right of that person must be established in order to maintain the action, because it is necessarily involved in the breach assigned. But in an action for the general benefit of the

estate, as for not accounting, the obligees in the bond ought not to defeat all recovery upon it by showing merely that the person upon whose representation it was allowed to be put in suit will in fact fail to receive any benefit from such recovery. Although the writ is indorsed by the person "at whose request the action is brought," (Gen. Sts. c. 101, § 25,) and, in case of failure to maintain it, the execution for costs issues against him, and not against the judge, yet he is not otherwise the party whose rights are represented in the suit, or to be investigated for its determination. The object of the suit is to secure the rights and protect the interests, not merely of the person instigating it, but of all parties having claims to or upon the estate. The judge of the Probate Court, and not the indorser of the writ, represents the rights upon which the action is to be maintained, if at all. *Richardson v. Oakman*, *supra*. *Jones*, appellant, 8 Pick. 121. *Robbins v. Hayward*, 16 Mass. 524. *Loring v. Kendall*, 1 Gray, 305, 313.

It is contended that the evidence offered would have shown that there was no one who had any interest in the estate except the administratrix herself, as sole legatee under the will discovered subsequently to her appointment; and therefore that the suit ought not to be maintained against her; or at most that judgment should be for nominal damages only.

But the suit is for not accounting as administratrix. It may be that the avails of any execution that may be awarded would be paid over to herself as executrix; or, if it shall appear upon the hearing in chancery that she has already charged herself, in her account as executrix, with the full value of the assets, that execution for nominal damages only will be awarded. The only proper settlement of her account, for the satisfaction of her bond as administratrix, and the discharge of her sureties, must be such as to make her chargeable as executrix for whatever estate has at any time come into her hands, and has not already been otherwise legally appropriated. *Newcomb v. Williams*, 9 Met. 525, 534. As administratrix, she cannot make any legal appropriation of the estate in execution of the provisions contained in the will. She cannot therefore justify any appropriation of the estate to her own use on that ground. The disposition of the estate under the will pertains to another form of administration.

What rights may be established under that form, and to what extent, we have no occasion in this action to consider. There having been a breach of the conditions of the bond, judgment must be entered for the amount of the penalty; and, upon a hearing in equity, execution will be awarded generally for the full value of all the estate that has come to the hands of the administratrix for which she shall not satisfactorily account.

Judgment on the verdict.

WILLIAM V. HUNTSMAN vs. JOHN F. NICHOLS.

Bristol. Oct. 28, 1874. — Jan. 9, 1875. COLT & AMES, JJ., absent.

The admission in rebuttal of evidence to corroborate the plaintiff's testimony in chief is within the discretion of the judge presiding at the trial, and affords the defendant no ground of exception.

On the issue whether an indorsement on a promissory note is genuine, evidence is competent that the alleged indorser had business transactions with the maker, and indorsed a note signed by him corresponding in date and amount to the note in suit.

On the issue whether an indorsement on a promissory note was genuine, the maker of the note testified that he had had business transactions with the defendant, who had indorsed notes for him, and, among others, one corresponding in date and amount to the note in suit; that these transactions were entered in his books of account which were in the possession of the defendant. *Held*, that if the defendant did not put the books in evidence, the plaintiff might comment on the omission in his argument to the jury.

The holder of a promissory note agreed with A., whom he sought to charge as indorser thereon, to submit the question of the genuineness of A.'s indorsement to referees, who decided that the indorsement was not genuine. The evidence was conflicting whether the parties intended their decision to be final. The judge, declining to instruct the jury, as requested by A., that the holder of the note was estopped by the decision of the referees to make any claim upon the note against him, instructed them that if the agreement was that if the referees decided the signature was not genuine, the plaintiff should take up the note and make no claim on A. for the amount, and the referees, so understanding it, and acting thereon, decided that the indorsement was not genuine, and the holder, after notice of their award, took up the note, relinquishing any claim against the defendant, they might consider the award as conclusive against the plaintiff's claim; but if the submission was not intended by the parties to be final, but was only to obtain their opinion whether the holder should pay and take up the note at maturity, but without relinquishing his claim against A., then the award, though evidence in the case, was not conclusive. *Held*, that these instructions were sufficiently favorable to A., and not open to exception by him.

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The testimony of a referee, under an oral submission to arbitration, that "he had no idea the reference was final," is admissible in evidence as a statement that he had not rendered final judgment upon the rights of the parties.

CONTRACT upon a promissory note for \$300 dated October 7, 1871, made by C. M. Fairbanks, payable to the defendant four months after date, and alleged to be indorsed by him to the plaintiff. The answer denied the making and indorsing of the note, and alleged that the plaintiff had agreed with the defendant to submit the case to referees, who decided that the alleged indorsement by the defendant was not genuine, and that the plaintiff was therefore estopped to prove the indorsement genuine.

Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows :

The plaintiff proved demand on the maker, and notice to the defendant, and put in evidence of the genuineness of the defendant's signature, and rested his case.

The defendant testified that the signature was not his, and called D. A. Chapin, cashier of the National Union Bank of Fall River, who testified that the plaintiff and the defendant submitted to himself and C. J. Holmes, cashier of the Second National Bank of Fall River, the question of the genuineness of the indorsement, and they decided it was not the defendant's indorsement, and he was of the same opinion still; he also pointed out the differences between the signature in question and admitted signatures of the defendant. This was substantially all the testimony introduced by the defendant on this point.

After the defendant had rested, the plaintiff was permitted to testify in rebuttal, against the objection of the defendant, that the signature in question was the defendant's genuine indorsement. The plaintiff also offered in rebuttal the deposition of C. M. Fairbanks, the maker of the note. Among the interrogatories proposed by the plaintiff to Fairbanks was the following: "If in the course of your business transactions with the defendant he indorsed notes for you, state what notes, giving the date and the amount of each note that he so indorsed." This was objected to at the time of filing and also at the trial; the defendant contending that it was incompetent and also not in rebuttal. The defendant having, upon cross-examination, admitted that he had had business transactions with Fairbanks, and had indorsed notes

for him, the judge overruled the objection, and permitted the interrogatory and answer to be read to the jury. The answer was as follows: "In answer to the previous question, he indorsed several notes for me." A list of the notes was annexed. Two of them were dated October 7, 1871, one for \$300 at four months, the other for \$382.01 at four months.

The plaintiff was also permitted at the same time to read the following interrogatory and answer thereto to the jury, the defendant having objected to the same at the time of filing and at the trial, contending that the same was not competent in rebuttal or in chief: "Did you have business transactions with the defendant, at or about the time he resided in Fall River, and if so, state fully what those transactions were, and in detail so far as you can?" "I have had business transactions with John F. Nichols during the entire time of my residence in Fall River after forming his acquaintance in June, 1871. The first transaction consisted in my asking Mr. John F. Nichols to indorse a note for me, which he did; said note was for \$300, dated July 1st, 1871, for four months. He afterwards indorsed several notes for me, for purposes which are fully explained in a set of books kept by me at my place of business, while in Fall River, said books being delivered to John F. Nichols when I left Fall River, and not since seen by witness, and he having no knowledge of their present whereabouts, except supposing them to be still in the possession of John F. Nichols."

The plaintiff was also permitted, against the objection of the defendant, to ask the defendant, whether the books of C. M. Fairbanks had not been and were not in his custody, and whether he had examined them; and was also allowed, against the objection of the defendant, to argue upon the fact that they had been in his possession and were not introduced in evidence, the judge having, upon the objection of the defendant, ruled that the entries in said books were not admissible when attempted to be introduced by the plaintiff, and having also directed the references in the deposition aforesaid to the books to be excluded.

The defendant testified that he and the plaintiff agreed to leave the question of the genuineness of the indorsement to Chapin and Holmes; and if they decided it was his indorsement he was to pay the note, if not, that the plaintiff was to pay the

note, and that was to settle the matter; that the plaintiff chose Holmes, and he selected Chapin; that they went to Chapin, and said to him they had agreed to leave the genuineness of the indorsement to Holmes and himself; that Chapin told them he could not undertake to say absolutely that it was or was not defendant's signature, but could give his opinion, and was willing to do that if it would satisfy them; that the plaintiff said to Chapin, he did not want the defendant to pay the note if they came to the conclusion that it was not his signature, and the defendant said if it was thought by them to be his signature he would pay it; that after that they went to Holmes, and stated to him that they had come to leave the question of the indorsement to him and Chapin, and the defendant said to Holmes, in the presence of the plaintiff, that if they decided it was his signature he would pay the note. Chapin was called as a witness, and his testimony as to what took place between the plaintiff, defendant and himself, substantially agreed with the defendant's testimony as stated above. The plaintiff testified that the agreement was to leave to the referees the question of the genuineness of the indorsement so as to decide who should pay the note at the bank where it had been discounted, leaving to him the right of resort to the defendant, and denied that he said to Chapin that he did not want the defendant to pay the note if they decided it was not his signature; he admitted that Chapin and Holmes were to pass upon the genuineness of the indorsement, but only as aforesaid, and that Holmes was selected by him, and Chapin by the defendant. Holmes testified that the plaintiff and defendant came into his house, and the defendant asked him if he had agreed to sit on this matter, and he answered he had; that the plaintiff and the defendant then had some talk between themselves to which he paid no attention, and the defendant turned to him, and said that if they decided that the signature was his, he would pay the note; this was all the conversation. He was also permitted to testify, against the objection of the defendant, that he had no idea the reference was final; but stated on cross-examination that this was all the conversation he had with the plaintiff and the defendant, or with the defendant.

It appeared that the referees admitted in evidence genuine signatures of the defendant, and after comparing them with the

note in suit came to the conclusion that the indorsement in question was not the defendant's indorsement, and duly notified the parties of their decision.

Upon these facts, which were substantially all the testimony on this point, the defendant contended, and requested the judge to instruct the jury, that if they found that the plaintiff and defendant agreed to leave to Chapin and Holmes the question of the genuineness of the indorsement, and that if they decided that it was the defendant's indorsement, he was to pay the note, and not the plaintiff, and if they decided it was not the defendant's indorsement, the plaintiff was to pay the note, and not the defendant, and that was to settle the matter of liability ; then, inasmuch as the referees did decide that it was not the defendant's indorsement, the plaintiff is estopped to make any claim upon the note against the defendant, and is not entitled to recover. The judge declined to give the instruction prayed for ; and instructed the jury that if they found that the plaintiff and the defendant submitted the question of the genuineness of the indorsement to Chapin and Holmes, and if they decided the signature was genuine the defendant should pay and take up the note, but if they decided the signature was not genuine, the plaintiff should pay and take up the note, and make no claim on the defendant for the amount ; and that Chapin and Holmes understanding the submission as above stated, and both acting under it decided that it was not the genuine signature of the defendant, and communicated their decision as arbitrators to the parties, and that the plaintiff, in pursuance of their decision and award, performed it by paying and taking up the note, relinquishing any claim against the defendant, then they might consider the award as conclusive that the signature was not genuine, and the defendant not liable in this action ; but if the jury were not satisfied of this, but were satisfied only that there was a submission to Chapin and Holmes to ascertain their opinion whether the signature was genuine or not, that if they were of opinion it was genuine, the defendant should pay and take up the note, but if they were of opinion that it was not genuine, the plaintiff should pay and take up the note when it came to maturity, but without relinquishing his claim against the defendant as a prior indorser, when the parol submission and award, though evidence in the

case, was not conclusive and might be controlled by other evidence in the case.

The jury found for the plaintiff, and the defendant alleged exceptions.

J. M. Morton, Jr., for the defendant.

J. C. Blaisdell, for the plaintiff.

DEVENS, J. Several exceptions have been taken to the rulings of the presiding judge, and the evidence admitted by him, which may be considered in their order.

1. The admission of evidence in rebuttal of the defendant's case, which should more properly have been offered by the plaintiff in chief, was clearly within the discretion of the court, and the exceptions do not show that it was not thus admitted. The point is too well settled to require the citation of authorities.

2. Although only the authenticity of the note in suit was in issue, yet the business transactions between Fairbanks and the defendant had some bearing upon the probability of the indorsement having actually been made by the defendant, who had testified that there had been such transactions, and that he had indorsed notes for Fairbanks; and it was competent for the court to permit Fairbanks to state that, in the course of the transactions between himself and the defendant, several notes had been indorsed for him by the defendant, including among them one corresponding in date and amount with that in suit.

3. Fairbanks having stated that his business transactions, which included the giving of these various notes, were entered upon his books, the plaintiff was not permitted to prove what the entries therein were, but was rightly allowed to ask the defendant if these books were not in his possession, and if he had not examined them, and to argue upon his replies. If such books were in the possession of the defendant, it was competent for him to put them in evidence, if they tended to contradict the witness, and the fact that he did not do so was a proper subject of comment.

4. The question as to the authenticity of the signature of the defendant had been submitted to referees, but it was in dispute between the parties whether the decision of the referees was intended to settle and settled finally the liability of the defendant, so that there was no further claim upon him thereafter, or whether it settled only that the plaintiff should in the first

instance take up the note which was at a bank, not relinquishing thereby his remedy, if entitled to any, against the defendant whose name appeared as prior indorser. The ruling of the court upon this point was sufficiently favorable to the defendant, as the parties might have submitted the question simply with a view of determining which of them should first take up the note, and in such case the plaintiff would have fully complied with the award by taking it up and relieving the defendant from any danger of suit by the bank at its maturity, while he still retained his own right to sue the defendant upon it.

Nor can it be successfully contended that even if the referees were ignorant that their decision was to be final, if the parties intended it to be so, it should now be so treated. In order that the referees should have decided the matter with due regard to the rights of both parties, it was necessary for them to have understood the issue submitted to them.

5. The testimony of one of the referees that "he had no idea the reference was final" was a statement only that he had not understood that he had rendered any decision upon the question in controversy which finally determined the rights of the parties.

Exceptions overruled.

JOSEPH G. BRALEY vs. JOHN L. BOOMER & another.

Bristol. Oct. 28, 1874. — Jan. 9, 1875. COLT & AMES, JJ., absent.

An attachment made more than four months before proceedings in bankruptcy under the U. S. St. of 1867, c. 176, may be dissolved pending such proceedings, by giving bond under the Gen. Sts. c. 123, § 104.

CONTRACT upon an account annexed. The case was heard in the Superior Court, before *Allen, J.*, without a jury, upon the following agreed facts:

The action was commenced by a writ upon which there was an attachment of merchandise more than four months before the commencement of proceedings in the United States District Court by which the defendants were adjudged bankrupts, and the bankruptcy of the defendants was suggested at March term, 1874, of the Superior Court. The amount due the plaintiffs was agreed

upon at the following June term, at which term a bond, given under the General Statutes by the defendants, was approved by a master in chancery, and filed in the clerk's office, for the purpose of dissolving the attachment in the case, after the assignment of the defendants' property in bankruptcy.

"If said bond dissolves the attachment, or if the assignee in bankruptcy can dissolve the attachment by bond under the General Statutes, the action is to stand continued to await the decision of the question of the defendants' discharge under the bankruptcy proceedings; otherwise the plaintiff is to have judgment, to be satisfied out of the property attached in the suit only."

The Superior Court ordered judgment to be entered for the plaintiff, to be satisfied out of the property attached in the suit only; and the defendants appealed to this court.

J. C. Blaisdell, for the defendants.

W. H. Peirce, for the plaintiff.

DEVENS, J. The bankrupt act, U. S. St. of 1867, c. 176, § 14, by virtue of which the assignment vests in the assignee all the property, real or personal, of the debtor, even if the same is attached on mesne process as such, and dissolves any such attachment made within four months next preceding the commencement of the proceedings, permits the attachment to continue where it has been made for that length of time, and the lien created by it will be enforced by any requisite proceedings which do not involve a judgment *in personam*. *Bates v. Tappan*, 99 Mass. 376. But while, in such case, the lien is permitted to continue, no greater validity is imparted to it than it originally possessed, and it remains subject to be dissolved in the manner provided by the laws of the state where it is made.

The provision of the Gen. Sts. c. 123, § 104, enables any person, whose goods or estate are attached, to dissolve the attachment, at any time before final judgment, by giving bond in the manner prescribed, with condition to pay the plaintiff the amount which he may recover within thirty days after final judgment. This provision is not controlled in any manner by the bankrupt act, nor is an exception to be engrafted upon it because the defendant has been adjudged a bankrupt. Even if the object of the debtor were to release his property so that it might pass to his assignee, the creditor has all the security which the attach-

ment was intended to afford, as it was always liable to be defeated by the debtor, upon giving a bond such as was filed in the present case.

If the debtor obtains his discharge as a bankrupt, and this is pleaded, as no final judgment can be rendered against him, the bond given will indeed be discharged by the determination of the contingency upon which it is made to depend. *Carpenter v. Turrell*, 100 Mass. 450. *Hamilton v. Bryant*, 114 Mass. But if the debtor fails to obtain his discharge, and final judgment is rendered against him, the bond will become operative if such judgment remains unpaid for thirty days.

Judgment reversed ; case to stand continued.

AUGUSTUS CHACE vs. WILLIAM B. TRAFFORD.

Bristol. Oct. 28, 1874. — Jan. 11, 1875. COLT & AMES, JJ., absent.

Under the Gen. Sts. c. 155, § 13, an account stated, which is not supported by evidence of some writing signed by the party to be charged, will not prevent the running of the statute of limitations against the previously existing liabilities included therein.

CONTRACT on an account stated. Writ dated September 30, 1873. The answer was a general denial and the statute of limitations. Trial in the Superior Court, before *Rockwell, J.*, who, before verdict, at the request of the parties, withdrew the case from the jury and reported it for the determination of this court, in substance as follows :

It appeared that the parties had been in partnership as manufacturers for several years prior to 1860, at Fall River and at Westport, and that they dissolved about January 1, 1860, the plaintiff taking the property at Fall River, and the defendant that at Westport, each party assuming and paying the debts connected with each establishment, and that the same had all been adjusted ; but that the mutual accounts of the partners with the firm arising from a difference in the capital paid in, and the amounts drawn out by each prior to the dissolution, were not then adjusted.

There was evidence tending to show that about 1862 they both agreed that James M. Morton should examine and make up the accounts, and that he took the books and did so, the parties frequently appearing before him for the purpose of aiding him in preparing his statement; that he finished his examination about February or March, 1868, and notified the parties thereof, who appeared before him, and he rendered each party a detailed statement in writing of their accounts to January 1, 1860, by which it appeared that the defendant was, on January 1, 1860, indebted to the plaintiff in the sum of \$3384.55, arising from the two sources above stated; and that neither party objected to the statement. The plaintiff introduced evidence tending to show that the defendant then orally agreed to pay him the said balance in a few days, and also interest on it from the time of the dissolution in 1860, and made several subsequent oral promises to settle the account; but did not offer any evidence of an acknowledgment or promise in writing.

The defendant offered no evidence, but contended that the statute of limitations was a bar to a recovery, as more than six years had elapsed since the dissolution of the partnership in 1860.

The plaintiff contended that the statute began to run against the account stated at the time of the statement in 1868, and the oral promises of the defendant to pay the balance so found due. The parties agree that if the statute is a bar, judgment may be entered for the defendant; but if not, the case to stand for trial.

E. H. Bennett & H. J. Fuller, for the plaintiff. 1. The statute of limitations begins to run from the time the account is stated, and not from the time of the original debt. The stating of an account, with an express promise by the debtor to pay, or accompanied by a sufficiently long, silent acquiescence from which a promise is inferred, creates a new contract, on which the action is based. It alters the nature of the original debt, so that if the original remedy was only by the technical action of debt, or covenant, yet, after an account stated, *assumpsit* will lie. 1 Steph. N. P. 362. *Foster v. Allanson*, 2 T. R. 479. *Moravia v. Levy*, 2 T. R. 483 note. And it has been held that the creditor cannot rely upon his original cause of action, but must sue on an *insimul computassent*. *Milward v. Ingram*, 2 Mod. 43. Because it is a new contract, an infant is not bound by it, al-

though the items involved are necessities for which he might have been liable in an action for goods bargained and sold. *Trueman v. Hurst*, 1 T. R. 40, 42 n. For the same reason, a recovery can be had upon an account stated, although the original contract was void by the statute of frauds. *Seagoe v. Dean*, 3 C. & P. 170, and 4 Bing. 459. *Cocking v. Ward*, 1 C. B. 858. So, a surviving partner can recover in his own name for a debt due the firm upon an account stated after his partner's death, without any allegation of such partner's death, which he could not do upon the original cause of action. *Holmes v. D'Camp*, 1 Johns. 34. So if A. is indebted to B. alone, and also to B. & C., and states an account to B. & C. including both debts, B. & C. may recover both claims in an action on an account stated. *Moor v. Hill*, Peake Add. Cas. 10. So, although one partner cannot generally sustain an action at law against his partner for a share of the profits, yet after an account has been stated between them, said action may be maintained on an *insimul computassent*. A new contract exists between them. *Foster v. Allanson*, 2 T. R. 479. *Wray v. Milestone*, 5 M. & W. 21. It is unnecessary, in an action upon an account stated, either to allege or prove the original indebtedness. The stating of the account is the consideration for the new promise of the debtor. 1 Steph. N. P. 362. 1 Chit. Pl. 358; 2 Ib. 90. *Milward v. Ingram*, 2 Mod. 43. The statement of the account furnishes a new cause of action as much as a promissory note or an award of an arbitrator.

2. If the statement of the account furnishes a new cause of action, it necessarily follows that the statute cannot begin to run until such statement. 2 Greenl. Ev. § 126. *Ex parte Storer*, Daves, 294. *Toland v. Sprague*, 12 Pet. 300, 333. *Ashley v. Hill*, 6 Conn. 246. *Allen v. Stevens*, 1 N. Y. Leg. Obs. 359. *Smith v. Forty*, 4 C. & P. 126. *Ashby v. James*, 11 M. & W. 542. The converse of the rule is equally true; for if A. & B. have mutual accounts, and the account on one side is stated, the statute begins immediately to run against that account, and is not kept alive by the account of the other party, as it would have been had not the account been stated. By the statement the accounts are no longer mutual. Angell on Lim. § 150. *Farrington v. Lee*, 1 Mod. 268. *Webber v. Tivill*, 2 Saund. 124 note. *McLellan v. Crofton*, 6 Greenl. 307. *Union Bank v. Knapp*, 3 Pick. 96.

8. It is immaterial then that the plaintiff proved only an oral promise by the defendant. None at all was necessary. Long acquiescence is as good as an express promise. *Lockwood v. Thorne*, 1 Kern. 170. *Philips v. Belden*, 2 Edw. Ch. 1. *Wiggins v. Burkham*, 10 Wall. 129. 1 Story Eq. Jur. § 526.

T. M. Stetson, for the defendant.

WELLS, J. An "account stated" is an acknowledgment of the existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and independent cause of action, so far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results. Under the law as it existed prior to the St. of 9 Geo. IV. c. 14, in England, and the St. of 1834, c. 182, in this Commonwealth, the limitation of the right of action would run, in all cases, from the date of the account stated.

The original debt, though barred by the statute, in this case, at the time of the account stated, furnished sufficient consideration for the express promise relied on. *Little v. Blunt*, 9 Pick. 488, 492. That promise was oral merely; and we infer from the report that there was no promise or acknowledgment contained in any writing signed by the defendant. Here lies the difficulty in the plaintiff's case. It is provided by the Gen. Sts. c. 155, § 13, that "no acknowledgment or promise shall be evidence of a new or continuing contract whereby to take a case out of the operation of the provisions of this chapter," (relating to the limitation of personal actions,) "or to deprive a party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby." See St. of 1834, c. 182.

The promise, whether express or implied, which sustains and is involved in a declaration upon an *insimul computassent*, is such "a new or continuing contract." The statute does not forbid its proof by unsigned writings and oral promises or acknowledgments; but only provides that such proof shall not operate to take the case out of the general rule of limitation.

The argument for the plaintiff is that this provision applies only to suits brought upon the original cause of action, in which

the new promise is relied on to defeat the plea of the statute; and not to a case like the present, which is brought upon the new cause of action itself. But we think its application does not depend upon the order of the pleadings. It is a rule of evidence, not of pleading. In other cases, it is true, the suit is ordinarily brought upon the original cause of action without alleging the new promise. But when the new promise is proved, in reply to the plea of the statute, the suit is maintained only on the ground that the cause of action upon which the judgment is to be rendered has accrued within the period of limitation. Gen. Sts. c. 155, § 1. *Little v. Blunt*, 9 Pick. 488. The original cause of action is brought forward to the date of the new promise, which includes it as its subject matter. With proper recitals and allegations, the action might be maintained upon the new promise in all cases; at least, in all cases where it is expressed. Such a change in the form of the declaration would clearly not enable the plaintiff to avoid the plea of the statute, or to meet it with evidence which would not otherwise have availed him. *Penniman v. Rotch*, 3 Met. 216, 221.

The action upon an *insimul computassent* stands substantially upon the same footing in this respect. It is in effect a suit for the balance due upon an adjustment of the several claims between the parties. The form of the count as prescribed in the Gen. Sts. c. 129, § 87, is that the defendant owes the plaintiff a certain sum "for the balance found due to the plaintiff by the parties on accounting together." The accounting together does not change the character of the claim, but only settles the amount of the balance due. *Rundlett v. Weeber*, 3 Gray, 263. Any promise to pay a sum certain as and for the balance due from the defendant to the plaintiff would sustain this count. 1 Saund. Pl. & Ev. 44. *Charman v. Henshaw*, 15 Gray, 293. 2 Greenl. Ev. § 126.

On the other hand, every action upon an account, even though the plaintiff sets forth only his own charges without the corresponding credits, is regarded as brought to recover the balance of account due, so far at least as respects the application of the rules of law for the limitation of actions. *Cogswell v. Dolliver*, 2 Mass. 217. *Penniman v. Rotch*, 3 Met. 216. The application of the statute must depend upon the rights of the parties as established by the facts of the case, and not upon their formal position

in the suit. We are satisfied that the provision above quoted was intended and should be construed to require that any acknowledgment, promise or statement of account, relied on to sustain a claim for a balance upon previously existing liabilities, under an *in simul computassent*, must be supported by the evidence of some writing signed by the party to be charged, in order to avoid the defence of the statute of limitations, which would otherwise have been a bar to the claim for such balance. Such also appears to be the rule in England under the St. 9 Geo. IV. c. 14. Angell on Lim. § 274.

There being no such writing in this case, according to the terms of the report there must be

Judgment for the defendant.

NATHAN W. LEACH vs. ALBERT C. GREENE.

Bristol. Oct. 27, 1874. — Jan. 21, 1875. COLT & AMES, JJ., absent.

One who has purchased in another state choses in action belonging to the estate of a bankrupt cannot prosecute in this Commonwealth a suit thereon in his own name.

CONTRACT for goods sold and delivered. The declaration also contained a count for conversion of the same goods. Trial in the Superior Court, before *Allen, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff's counsel stated, in opening, that the original transactions with the defendant, out of which the suit grew, were with one William E. Brockway, of the city, county and State of New York, who had sold the defendant beer, and had sent it in barrels to the defendant, which barrels, to the number of thirty-eight, had not been returned; that subsequently, on January 17, 1871, Brockway was adjudged a bankrupt in the United States District Court for the Southern District of New York; that assignees were appointed and duly confirmed on February 13, 1871; that the assignees sold certain choses in action, forming part of the bankrupt's estate, at public auction on June 26, 1871, which sale was confirmed by the United States District Court aforesaid

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on May 1, 1872; that Nathan W. Leach, the present plaintiff, was the purchaser of the bankrupt's choses in action, among which is the present claim for the barrels declared on in the plaintiff's writ.

The plaintiff offered in evidence the certified copy of the assignment in bankruptcy of the estate of Brockway, showing the appointment of John M. Guitean and John Gordon, of the city of New York, as assignees of his estate, real and personal, including all the property of whatever kind of which he was possessed, or in which he was interested, or entitled to have on January 17, 1871, with all his deeds, books and papers relating thereto, and bearing date February 13, 1871; also a certified copy of the bill of sale from the said assignees to the plaintiff, dated June 26, 1871, conveying to the plaintiff, for the consideration therein named, his heirs, administrators and assigns forever, all the books, notes, books of account and choses in action of the said Brockway, previously conveyed to the said assignees and uncollected by them; also a certified copy of the approval of the United States District Court of New York, in bankruptcy, bearing date May 1, 1872, of the sale at public auction by the assignees, on June 26, 1871, of certain choses in action, forming part of the estate of the said bankrupt. These several papers were admitted by the judge.

The plaintiff then called as a witness the said bankrupt, who testified that before his bankruptcy he had sold beer to the defendant, and sent it to him in barrels which were to be returned, and that he had made demand for these barrels of the defendant before his bankruptcy in his own name, and since his bankruptcy and the sale of the choses in action sold by his assignees to the plaintiff, in the name of the plaintiff, before the present suit was brought; that he was authorized by the plaintiff to make this demand; and that the defendant said the state police had seized some of them, and that he would pick them up and send them back, but he never did so. These barrels constituted a part of the assets of the bankrupt's estate, and appeared in his book of accounts against the defendant. The plaintiff offered to prove, by letters of the defendant to Brockway, the promise to return the barrels before his bankruptcy. The number of barrels claimed as had by the defendant and not returned was thirty-eight, valued at \$4.50 each.

The judge ruled that the action upon these facts, if proved, could not be maintained in the name of the plaintiff, and the plaintiff alleged exceptions.

L. Lapham, for the plaintiff. The property in question consisted of barrels, not sold, but lent to the defendant, and to be returned by him to the original owner, Brockway, who was the owner of the barrels at the time of his bankruptcy. The assignment of the bankrupt passed and vested the title to these barrels to and in the assignees. They sold the same by order of court, and the sale was approved by the court. The title thereupon passed by operation of law, and they became the property of the plaintiff. He made a demand upon the defendant for his own property after its purchase, and before the present suit was brought, and the defendant promised to pick them up and send them back. He never did. Had they been stolen, they might have been described as the property of the plaintiff in an indictment against the thief. When a man becomes the owner of property by operation of law, he can maintain an action for it in his own name, after demand upon the person who withholds it from him illegally.

J. C. Blaisdell, for the defendant.

ENDICOTT, J. It is distinctly stated in the bill of exceptions that the plaintiff purchased certain choses in action belonging to a bankrupt's estate at public auction, among which was the claim for the barrels, declared on in the writ. It was not therefore a sale of the barrels, as now contended by the plaintiff, but of a chose in action.

It has been uniformly held in this Commonwealth, that the assignee of a chose in action cannot, in the absence of a promise to himself, maintain an action thereon in his own name, but may do so in the name of his assignor. *Usher v. D' Wolfe*, 13 Mass. 290. *Foss v. Nutting*, 14 Gray, 484. The same rule has been held to apply to a sale by an official assignee of a chose in action belonging to the estate of an insolvent debtor, and that, under the provisions of the insolvent law then in force, no right of action vested in the vendee of the assignee. *Hay v. Green*, 12 Cush. 282.

By the St. of 1859, c. 194, § 1, (Gen. Sts. c. 118, § 100,) it was expressly provided that any suit brought on a claim or demand sold by the assignee of an insolvent debtor shall be brought in the name of the purchaser, and that the fact of such sale should be set forth in the writ. See *Cushman v. Davis*, 3 Allen, 99.

An assignee under the bankrupt law of the United States, St. of 1867, c. 176, § 14, has the same power to deal with and dispose of choses in action vested in him, as the bankrupt might have had, if no assignment had been made. No special authority is given to the purchaser from such assignee to maintain a suit thereon in his own name.

There is no reason, therefore, for taking the case out of the settled rule in this Commonwealth, the *lex fori* must govern, and the ruling below is affirmed. *Exceptions overruled.*



MARY B. FRENCH vs. TAUNTON BRANCH RAILROAD.

Bristol. Oct. 28, 1874. — Jan. 21, 1875. COLT & AMES, JJ., absent.

In an action against a railroad corporation, for injuries occasioned by a train coming into collision, at a highway crossing, with a carriage in which the plaintiff was driving in the daytime, it appeared that the plaintiff, in attempting to cross the track, was struck by a car of a freight train which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's evidence tended to show that she was driving with care, and, in approaching the crossing, saw a train pass, but saw no flagman and received no warning that another car was coming. At a point forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the car came; at thirty feet from the crossing, she could have seen the track for more than half a mile, but she did not look in that direction from those points, and gave as a reason therefor that she did not suppose that one train would follow another so closely. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury.

TORT to recover for personal injuries sustained by the plaintiff and for injury to the plaintiff's horse, alleged to have been caused by the negligence of the defendant in the management of its train and by its failure to maintain a suitable flagman or signal to give warning of the approach of trains at a point upon a highway in Taunton which is crossed at grade by the road of the defendant. Trial in the Superior Court, before *Rockwell, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff testified: "I am sixty-seven years of age. The accident happened at about four in the afternoon. When I came to the bend in the road, several rods from the crossing, I saw

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the rear car of a freight train passing down over the crossing. I had a light, open carriage, and an old horse that I had driven for ten years. I was going four or five miles an hour. I was looking ahead, and went ahead without stopping; there was no obstruction in the way. When my horse stepped on to the track, I heard a man shout and looked round. I saw a car near me coming down the railroad; man on it. That's all I know. It was coming quite fast. I was unconscious for some time after. The next I knew I was lying in the road, with blood on my face, and severe pain in my head. I was holding the reins. My grandson was with me; he is thirteen years old. There was no warning in the highway; if there had been a bird there, I should have seen it; no person or flag visible; if there had been, I should have seen it."

Cross-examined: "I looked straight ahead all the time from the bend in the road till my horse got on to the crossing; I did not look up or down the track; I did not turn my head or eyes to the right or the left. I suppose if I had looked up the track just before I reached it, I might have seen the car; the reason why I did not was because I never knew one train to follow another so closely; that was the only reason; I presumed there would be nothing coming so close. There was nothing to prevent my looking up the track just before I reached it, that I know of."

Everett C. Pierce, the grandson of the plaintiff, testified as follows: "I am thirteen years old; was in the carriage with grandmother; coming round the bend of the road, I saw the rear end of the train, the last part of one car. The horse stepped on to the track, when I heard a man halloo, and the car was right on us. I found myself on the car, a flat car, loaded with scrap-iron; the car stopped; I saw my grandmother on the end of the car; saw no one in the road, no flag."

Cross-examined: "I did not look up or down the track; looked straight ahead. After I saw the last car of the train pass the crossing, I asked my grandmother if it was safe to cross, and she said 'Yes.' That was all either of us said."

The car struck the carriage and threw the plaintiff and her grandson on to the car with great violence, injuring the plaintiff severely. The car was a portion of a freight train, which before

reaching the crossing had been divided into three parts, for the purpose of making a "running switch," or of throwing the car, which was the middle of the three parts, on to a turn-out below the crossing by its own momentum. At a distance of forty-six feet from the centre of the track, a person could see forty-six feet up the track in the direction in which the car was approaching, and at a point thirty feet from the track there was, at the time of the accident, a clear and uninterrupted view up the track for a distance of over half a mile.

There was evidence tending to show that the defendant corporation had cut away some bushes from the angle made by the railroad and the highway, and which was between the plaintiff and the approaching car, at some time between the accident and the trial. There was a sign-board at the crossing, as required by statute, and there was usually a flag displayed at the crossing; but as to whether it was so displayed at this time, the evidence was conflicting. There was no evidence that a gate or flagman had been ordered or requested by the city or county authorities, according to the statute provisions, but it appeared that the defendant had maintained a flagman there for some time before the accident.

The above was all the evidence upon the question of the care or negligence of the plaintiff. The jury viewed the locality. At the close of the testimony, the defendant requested the judge to rule that, as matter of law, the plaintiff had shown such carelessness as to deprive her of her right to recover, and asked for specific rulings as follows: "1. If the jury believe from the evidence that the plaintiff approached the railroad crossing without looking along the track in either direction to see if a train or car was approaching, and that if she had so looked she would have seen the car in season to have avoided the collision, and might have so avoided it, she cannot recover. 2. It was incumbent upon the plaintiff to look along the track before she crossed, if she could do so by simply turning her eyes to one side, and her failure so to do would preclude her from recovery in this suit, if such failure contributed to the accident. 3. The presumption that no car would follow closely to the train which had passed the crossing afforded no excuse to the plaintiff for not so looking along the track. 4. There is no evidence for the jury that the plaintiff was in the exercise of due care."

The judge declined to give the third and fourth instructions requested, refused to take the case from the jury, and instructed them as follows: "By the uncontroverted evidence, it appears that the injuries to the person and property of the plaintiff in this case were caused by a car which had been cut off from its train, (the engine and four cars having passed the crossing,) and which car was following at some distance without an engine, and that the plaintiff saw the last of the said four cars in motion, and after it had passed the crossing. These being uncontroverted facts, I must decline to give you the following instructions requested by the defendant, which under other circumstances I might have given, viz.," (here the presiding judge read the first and second requests for rulings above set forth,) "but must leave the question of due care on the part of the plaintiff to the jury under the ordinary instruction, to wit: That, to sustain her action, the plaintiff must prove among other things affirmatively, the burden of proof being upon her, that she was in the exercise of due care, and that no want of due care on her part contributed to the injury."

The judge gave instructions as to what would constitute due care, to which no exceptions were alleged. The jury found for the plaintiff, and the defendant alleged exceptions.

G. A. Torrey, for the defendant.

G. Marston, for the plaintiff.

ENDICOTT, J. This case was properly submitted to the jury. The circumstances were peculiar. As the plaintiff approached the crossing, a freight train was passing; and after the last car had passed, she attempted to cross. She was driving with care and watching the road; she heard no signal, received no warning that other cars were coming, and saw no flagman. At a point forty-six feet from the centre of the track, she could have seen up the track forty-six feet; at thirty feet from the crossing, she could have seen the track for a long distance. She did not look in that direction when she reached those points, and gave as a reason that she did not suppose that one train would follow so closely upon another. She was struck by some cars which had been purposely detached from the train that had passed, and which, without warning of their approach, followed the train over the crossing. Of the negligence of the defendant, upon her evi-

dence, there can be no question. Whether the plaintiff was in the exercise of that due care which persons of common prudence and intelligence would exercise when placed in a similar situation, and whether she was careless in failing to look up the track at the points near the crossing where it was visible, was a question for the jury to determine in the peculiar circumstances of the case. *Wheelock v. Boston & Albany Railroad*, 105 Mass. 203. *Allyn v. Boston & Albany Railroad*, Ib. 77. *Chaffee v. Boston & Lowell Railroad*, 104 Mass. 108. *Exceptions overruled.*

HENRY G. HUBON vs. WALLACE M. PARK.

Essex. Nov. 4, 1874. — Jan. 6, 1875. AMES & DEVENS, JJ., absent.

A promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another, within the statute of frauds, Gen. Sta. c. 105, § 1, c. 2.

One who, in consideration of another's promissory note to him, promises the other to pay the latter's debt to a third person, can maintain an action on the note without showing performance of his promise.

CONTRACT upon a promissory note signed by the defendant and payable on demand to the plaintiff. Writ dated March 13, 1872.

At the trial in the Superior Court, before *Wilkinson, J.*, the plaintiff put in the note in suit and rested his case.

The defendant then offered evidence to prove, which the plaintiff admitted was true, that the consideration of the note was the verbal promise of the plaintiff that he would pay a certain debt of the defendant to two other parties; that the defendant had paid to the plaintiff on March 9, 1872, the sum of \$25 on account of the note; and that at the time the action was brought the plaintiff had not paid anything on account of the debt for which the note was given, and did not pay anything on said debt till several months thereafter, but had paid the whole of it since.

The defendant asked the judge to rule, that, upon the facts admitted, the plaintiff could not maintain this action; that it was prematurely brought; that there was no consideration upon which an action could be maintained at the time it was commenced; and

that he was not entitled to a verdict which would entitle him to costs against the defendant, when he had not performed, at the time his action was brought, any part of the promise for which consideration this note was given.

The judge declined so to rule, and directed a verdict for the plaintiff, less the amount paid by the defendant; and the defendant alleged exceptions.

C. Sewall, for the defendant.

S. B. Ives, Jr., for the plaintiff, was not called upon.

GRAY, C. J. The promise of the plaintiff to the defendant was not a promise to pay the debt of another, but to pay the defendant's own debt to a third person, and was not within the statute of frauds. *Alger v. Scoville*, 1 Gray, 391, 395. Although it had not been performed before the bringing of this action, it was a sufficient consideration for the defendant's note to the plaintiff. *Gower v. Capper*, Cro. Eliz. 543. *Nichols v. Raynbred*, Hob. 88 b. *Hodgkins v. Moulton*, 100 Mass. 309. *Backus v. Spaulding*, ante, 418. *Exceptions overruled.*

ANDREW J. PERKINS vs. JANE WHELAN.

Essex. Nov. 4, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

An action for breach of the warranty of title implied in the sale of a chattel accrues at the time of the sale, and the statute of limitations runs from that time.

CONTRACT for breach of warranty in the sale of a horse. Writ dated May 8, 1873. The answer set up the statute of limitations. Trial in the Superior Court, before *Wilkinson, J.*, who, by consent of the parties, before verdict, reported the case for the consideration of this court in substance as follows:

The following facts were admitted: The plaintiff bought the horse in question of John Whelan, the defendant's husband, on January 27, 1865, and took a bill of sale of it at the time; John Whelan died August 30, 1870; on December 29, 1870, Elizabeth Whelan, a sister of John, brought an action of tort in the nature of trover against the plaintiff for a conversion of the horse, in which action she claimed the horse under an independent title,

dating back to a purchase by her in 1862, and at the trial of said action offered evidence in support of her title and tending to show that she had never parted with her title to the horse, and that John never had any title to it. The questions tried to the jury in that action were, whether Elizabeth ever had title, or had parted with the same. The case was tried at March term 1872, and resulted in a disagreement, and was again tried at March term 1873, and resulted in a verdict for the plaintiff, Elizabeth Whelan, against the present plaintiff. The verdict was followed by judgment, which was satisfied by the present plaintiff, in April, 1873. John Whelan's will was proved October 4, 1870, and John P. Gilmore, who was named executor in the will, was duly appointed and qualified as such on that day, and gave the notices thereof required by law.

Upon these facts, the defendant contended that any right of action which the plaintiff had against the said John or his estate, accrued at the time of the purchase by the plaintiff. The plaintiff contended that his right of action accrued to him when the judgment against him was rendered, claiming to have no knowledge of any defect in his title to the horse till the date of the judgment, except what may be inferred from the bringing of the suit by the said Elizabeth.

It was also agreed by the parties, that no formal notice of the claim of Elizabeth was given by the plaintiff to the executor, nor was any demand made upon him to assume the defence of said suit. But the executor was present at the second trial in March, 1873, and testified to his inability to find a paper material to the issue. The plaintiff claims to be able to show that the executor was cognizant of said suit as early as March, 1872. But this is not admitted. The executor's account was settled in May, 1873. The plaintiff notified the defendant of said suit soon after it was brought, and was informed by her that Elizabeth had no claim whatever to said horse, and was also informed by her of the witnesses who knew about the question at issue, and the defendant in this action was present as a witness at both the said trials. It is admitted that the defendant is to some extent a devisee under said will ; but the will was not read, nor is the extent or nature of her interest under said will made any part of this report. This report being solely to settle the questions raised by the fore-

going facts. If the plaintiff's claim is barred by the statute of limitations, the plaintiff is to become nonsuit. If the plaintiff cannot maintain the action against the defendant on account of the other facts set forth, together with the claim of the plaintiff that he supposed his title to said horse good until said judgment, then the plaintiff is to become nonsuit; otherwise, the cause is to stand for trial.

W. S. Knox, for the plaintiff, cited *Shearman v. Akins*, 4 Pick. 283; *Howes v. Bigelow*, 13 Mass. 384; *Bearce v. Jackson*, 4 Mass. 408; *Raymond v. Raymond*, 10 Cush. 184.

D. Saunders & C. G. Saunders, for the defendant.

MORTON, J. The statute of limitations is a bar to this action. The plaintiff's cause of action is founded upon the breach of the warranty of title implied in the sale of the horse by John Whelan to him. This breach occurred at the time of the sale, and the right to sue therefor then accrued. The case is analogous to an action for a breach of the covenants in a deed against incumbrances, where it is held that the covenant is broken as soon as the deed is delivered, and an action then accrues for such breach. *Harrington v. Murphy*, 109 Mass. 299, and cases cited.

We are not aware of any decision of the precise point of this case by this court; but in *Grose v. Hennessey*, 13 Allen, 389, it was held, that an action for a breach of the warranty of title in a chattel could be maintained by the buyer, although he had not been disturbed in his possession. This implies, and is consistent only with the rule, that the warranty is broken at the time of the sale and the cause of action then accrues. As this view is fatal to the plaintiff's case, the other questions presented by the report become immaterial.

Plaintiff nonsuit.

WILDER S. THURSTON vs. CITY OF LYNN.

Essex. Nov. 4, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

The St. of 1861, c. 107, amending the charter of the city of Lynn and giving the mayor and aldermen of that city, with the concurrent vote of the common council, exclusive authority to lay out, alter or discontinue any street or town way, to establish the grade thereof, and to estimate the damages any individual may sus-

tain thereby, does not apply to a case where damages are sustained by repairing a highway or town way, and any person whose property is injured by such repair may enforce his remedy under the Gen. Sts. c. 44, §§ 19, 20.

PETITION on the Gen. Sts. c. 44, §§ 19, 20, to the county commissioners, for a jury to assess damages, setting forth that the petitioner was the owner of an estate at the corner of Union and Silsbee Streets in Lynn, and that he had suffered damage to said estate "by reason of the lowering of said streets in the month of April, 1872, by said city, for the purpose of repairing said streets and of fixing the grade thereof;" that after the commencement of the work, and within one year after the completion thereof, namely, on April 23, 1872, he presented his petition to the mayor and aldermen of said city, requesting them to adjudicate upon the question of said damage, and to allow him reasonable compensation therefor; that said mayor and aldermen did not finally adjudicate upon the question of said damages within thirty days after the filing of the petition, and that the said parties did not agree to extend the time therefor by any agreement in writing; that afterwards, on May 6, 1873, the mayor and aldermen refused to allow him any compensation for said damages, and reported and accepted leave to withdraw on his said petition.

At the trial before a sheriff's jury, no evidence was offered of any action or vote of the city government authorizing the repairs, and it was admitted that no such action or vote had been taken by the city. Evidence was offered to show that the person who was at that time surveyor of highways for the city was present and directing the work; this was objected to as incompetent to show that it was the act of the city. The sheriff sustained the objection, and ruled that, to entitle the petitioner to recover damages under the petition, he must show such action of the mayor and aldermen, with the concurrent vote of the common council, as is provided in the city charter. The petitioner alleged exceptions, and declined to put in any further evidence. The jury found for the respondent. The Superior Court accepted the verdict, and the petitioner appealed.

G. O. Shattuck & W. A. Munroe, for the petitioner.

S. E. Iveson, for the respondent.

MORTON, J. This petition is brought under the Gen. Sts. c. 44. That chapter gives a remedy against a town, in the mode adopted by the petitioner, to any owner of land adjoining a highway or town way, who sustains damage in his property by reason of any raising, lowering or other act done for the purpose of repairing such way. Gen. Sts. c. 44, §§ 19, 20. By § 35, the provisions of this chapter are made to apply to cities, except as otherwise provided in their charters.

The city charter of Lynn provides that "the mayor and aldermen of the city of Lynn, with the concurrent vote of the common council, shall have exclusive authority and power to lay out, alter or discontinue any street or town way, to establish the grade thereof, and to estimate the damages any individual or party may sustain thereby; and the person or party dissatisfied with the decision of the city council, in the estimate of damages, may make complaint to the county commissioners of the county of Essex, at any meeting held within one year after such decision, whereupon the same proceedings shall be had as are now by law provided in cases where persons or parties are aggrieved by the assessment of damages by the selectmen, in the forty-third chapter of the General Statutes." St. 1861, c. 107.

At the trial before the sheriff's jury, it was ruled that, to entitle the petitioner to maintain this petition, he must show that the work by which he sustained damage was done under the vote or action of the mayor and aldermen, with the concurrent vote of the common council, under the above cited provision of the charter.

We are of opinion that this ruling was erroneous. It can only be sustained upon the ground that the St. of 1861, above cited, was intended to change the provisions of the Gen. Sts. c. 44, so far as applicable to the city of Lynn. Such is not the fair construction or effect of that statute. It deals with the subjects of laying out, altering and discontinuing ways, being the subjects embraced in the Gen. Sts. c. 43, and expressly refers to that chapter for the remedy of any person aggrieved by the action of the city council. It makes no provision for cases of repairs of ways, which is the subject of c. 44. The last named chapter is not affected by it, but remains in force and applies to the defendant city. The petitioner alleges that he has sustained damage "by

reason of the lowering of said street” “for the purpose of repairing said street and of fixing the grade thereof.” This states a case within c. 44, and the addition of the words “and of fixing the grade thereof” does not show that the lowering by which he was damaged was an act within the exclusive authority of the city council, and not within the authority of the surveyor of highways by whom it was done. He may therefore maintain his petition under the Gen. Sta. c. 44, without proving a concurrent vote of the city council authorizing the repairs. *Mitchell v. Bridgewater*, 10 Cush. 411. *Verdict set aside.*

SAMUEL T. SUIT & another vs. SAMUEL WOODHALL.

Essex. Nov. 4, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

Under an answer to a declaration on an account annexed for the price of intoxicating liquors sold to the defendant, alleging ignorance of the claim sued, and that if it shall be made to appear that the plaintiff sold said items to the defendant, it will also appear that the liquors were sold in violation of law, it is not competent for the defendant to prove that they were thus sold.

CONTRACT on an account annexed, the first item of which was for certain whiskey sold by the plaintiffs to the defendant on June 17, 1874; the second item being for casings sold the same day. The answer first set up the defendant's ignorance as to whether the plaintiffs sold him the goods described in the account annexed, and left the plaintiffs to their proof. It then proceeded (omitting certain allegations as to the casings, which it is now unnecessary to state) as follows :

“ If it shall be made to appear that the plaintiffs ever sold and delivered said items or either of them to the defendant, it will also appear that item numbered one was intoxicating liquors, and that item numbered two were the casings containing said liquors ; all of which said liquors were sold by the plaintiffs to the defendant, in violation of the laws of this Commonwealth relating to spirituous and intoxicating liquors ;” also that “ if it shall appear that the plaintiffs ever sold and delivered said items or either of them to the defendant, it will also appear that item numbered one was intoxicating liquors, and that item numbered two were

the casings, containing said liquors ; all of which said liquors the plaintiffs sold to the defendant in another state for the purpose of being brought into this Commonwealth, to be here sold in violation of the liquor laws of this Commonwealth ; and the plaintiffs at the time of said sale and delivery had reasonable cause to believe the defendant intended to sell the same within this Commonwealth contrary to the laws thereof."

At the trial in the Superior Court, before *Lord, J.*, the plaintiffs called their clerk as a witness. Upon his cross-examination the defendant offered to prove that the liquors sued for were sold in another state by the plaintiffs to the defendant, for the purpose of being brought into this Commonwealth by the defendant, to be here sold in violation of the liquor laws of this Commonwealth ; and that the plaintiffs had, at the time of said sale, reasonable cause to believe that the defendant intended to sell the same within this Commonwealth contrary to the laws thereof. But the judge excluded the evidence, and ruled that this defence was not open to the defendant under his answer ; that the answer did not set forth in clear and precise terms the substantial facts recited in the answer, but only inferentially that from some source and in some manner such facts would appear, and that an amendment stating the facts was necessary ; but the defendant's counsel declined to ask leave to amend the answer in that respect. Whereupon the defendant submitted to a verdict for the plaintiffs, and alleged exceptions.

E. T. Burley, for the defendant.

C. G. Saunders, for the plaintiffs.

GRAY, C. J. It is the object of every system of pleading to bring the controversy to a precise and definite issue for trial. The common law required that in every plea material facts should be alleged directly and positively. Gould Pl. c. 3, § 49. Even under the St. of 1836, c. 273, which abolished special pleading, and required the general issue to be pleaded in all cases, with a specification of the matters intended to be given in evidence, it was held that such a specification must contain as distinct an allegation of the grounds of defence, though not in the same technical form, as a special plea. *Brickett v. Davis*, 21 Pick. 404.

The new practice act was intended, without going back to the technicalities of special pleading, to require the issues to be tried

to be more precisely and distinctly stated than under the St. of 1886. It in terms abolishes the general issue, as well as special pleas in bar as formerly used ; requires that both the denials and allegations in the answer shall be in clear and precise terms ; permits the plaintiff to file a demurrer or a replication to the answer ; and provides that " the allegations and denials of each party shall be so construed by the court as to secure as far as possible substantial precision and certainty, and discourage vagueness and loose generalities." Gen. Sts. c. 129, §§ 15, 17, 20, 23, 27.

The present action is upon an account annexed for goods sold and delivered. The defendant was not entitled to avail himself of the defence that the contract of sale was illegal, without clearly and precisely setting it up in his answer. *Bradford v. Tinkham*, 6 Gray, 494. *Libby v. Downey*, 5 Allen, 299. *Cardoze v. Swift*, 113 Mass.

He has not pleaded such a defence otherwise than by stating that " if it shall be made to appear," or " if it shall appear," that the plaintiffs sold and delivered the goods to the defendant, " it will also appear " that they were intoxicating liquors, and the vessels containing the same, " all of which said liquors " (necessarily limited by grammatical construction to the liquors which may so appear to have been the goods sold) were sold by the plaintiffs to the defendant in violation of law.

The answer contains no clear and precise allegation that the goods sued for were sold illegally, but only that if it shall appear that the goods were sold as alleged in the declaration, it will also appear that they were sold in violation of law. The issue thereby tendered is not whether there was an illegal sale, but whether in a certain contingency it will appear that there was an illegal sale. If the plaintiff had demurred to the answer, his demurrer would not have admitted an illegal sale, but merely that it might appear that there was such an illegal sale. And if he had filed a replication, denying all the allegations in the answer, his denial would in like manner have been limited to what might be made to appear, and no issue would be joined upon what the fact was.

The case cannot be distinguished from *Cassidy v. Farrell*, 109 Mass. 397, in which it was decided that, in an action like the present, the defence of an illegal sale was not open under an an-

swer alleging that "if the plaintiff shall offer any evidence tending to prove the items in the account, the defendant will offer evidence tending to prove that said items were spirituous and intoxicating liquors," sold in violation of law. In this case, as in that, the allegation is of what the state of the evidence will or may be at the trial, not what was the fact at the time of the contract. In *Hanson v. Herrick*, 100 Mass. 323, on which the defendant relies, no question of the form of the answer was raised or considered.

It was therefore rightly ruled at the trial that no question of the illegality of the contract sued on was open to the defendant under his answer; and the defendant having declined to accede to the suggestion of the court to amend, his

Exceptions must be overruled.

CHARLES V. JACKMAN vs. JOHN J. DOLAND.

Essex. Nov. 4, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

An answer to a declaration upon a promissory note for \$280 alleged that "if it shall appear at the trial of this suit that the defendant made and signed said note, it will also appear that the said plaintiff, by a bill of sale in writing, sold to the defendant all the property used by him" in carrying on a specified business, to the value of \$1280; that at the time of said sale he paid the plaintiff \$1000; that it was then agreed between the parties that the balance was not to be paid until the plaintiff had performed certain acts; that the note, if given at all, was given at the time the bill of sale was given, and in consideration that he should perform said acts; that the plaintiff had not performed said acts; that there was no consideration for said note; that the defendant denied owing anything on the note. *Held*, that the first part of the answer set up no legal defence. *Held, also*, that the rest of the answer, if it could be treated as a separate allegation, showed no want of consideration, and was insufficient.

CONTRACT on a promissory note, dated July 15, 1872, for \$280, payable four months after date. Writ dated March 24, 1873. The answer denied the making of the note, and that the defendant owed the plaintiff the same, and proceeded as follows: "And the said defendant, further answering, says, that if it shall appear, at the trial of this suit, that he made and signed said note, it will also appear that the said plaintiff, by a bill of sale in

writing, sold to the defendant all the property used and employed by him in carrying on the wood and coal business, in Lawrence, for the sum of \$1280, and consisting of the following articles, at the following prices," which were then stated in detail. "And the said defendant says, that, at the time of said sale and delivery of said bill of sale, he paid the said plaintiff the sum of \$1000; that the balance of said sum of \$1280, to wit, the sum of \$280, it was then agreed between the said plaintiff and the said defendant, should not be paid by the said defendant, until the said plaintiff should make and deliver certain articles named in said bill of sale, and not delivered at the time the said bill was delivered; and should repair certain articles named in said bill," which were then enumerated. "And the said defendant says that said promissory note, if given at all, was given at the time said bill of sale was given to him, and in consideration that he should make and deliver said articles, and make such repairs as are above set forth. And the said defendant says, that said plaintiff has never made and delivered said articles, and has never made said repairs, and he says there was no consideration to said note, and he denies that he owes him anything on the same, as principal or interest."

At the trial in the Superior Court, *Lord, J.*, ruled that the matters set up in the answer, printed in quotation marks, were not so pleaded as to constitute a defence to the action.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. C. Sanborn, for the defendant.

D. Saunders & C. G. Saunders, for the plaintiff, were stopped by the court.

GRAY, C. J. The first part of the answer sets up no legal defence, because it states no facts, but only what in a certain contingency may be the evidence at the trial. *Suit v. Woodhall, ante*, 547.

If the rest of the answer can be treated as constituting a separate allegation, it is insufficient, because it does not show any neglect on the part of the plaintiff, or lapse of reasonable time, or refusal upon demand; and because, if it did, the matters alleged would not show a want of consideration, but at most only a subject of recoupment, which is not pleaded. *Hodgkins v. Moulton*, 100 Mass. 309.

Exceptions overruled.

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**GEORGE F. CHOATE, Judge of Probate, vs. SAMUEL W. AR-
RINGTON & another.**

Essex. Nov. 5, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

Where an executor and the surety upon his probate bond are defaulted in an action against them for a breach of the conditions of the bond, judgment for the amount of the penalty of the bond should be entered before the case is sent to an assessor, but if this is not done, judgment *nunc pro tunc* may subsequently be entered.

Under the Gen. Sts. c. 101, § 28, cl. 3, execution is to be awarded upon breach of the conditions of an executor's bond, for the full value of all the estate of the testator that has come to the hands of the executor, and for all damages occasioned by his neglect or maladministration.

A surety upon an executor's bond is liable for any default on the part of the executor in not accounting for assets received before as well as after the execution of the bond.

In an action against an executor and the surety upon his bond, for breach of the conditions of the bond in not duly rendering an account, an inventory and account filed by the executor, and also evidence of the receipt by him of money and property of the estate, prior to the giving of the bond in suit, are admissible for the purpose of showing the amount for which the executor ought to account, and of fixing the amount of the surety's liability.

In an action to enforce an executor's bond for breach of its conditions in not duly rendering an account, the burden is on the executor and his surety upon the bond to account for whatever property has come to the hands of the executor; but the burden is on the plaintiff to prove the damages sustained by a failure to account or other maladministration.

An executor gave a bond with two sureties conditioned that he should administer according to law the estate of the testator, and render an account. One of the sureties was afterwards discharged by order of the Probate Court, and a new bond was given with a new surety. Before the execution of the latter bond, property belonging to the testator's estate came to the hands of the executor for which he failed to account, and a suit at law was brought upon the second bond for this breach of its conditions. *Held*, that under the Gen. Sts. c. 101, § 28, cl. 3, 4, the surety upon the second bond was liable for the full value of the estate not accounted for, and that whatever adjustment, if any, should be made between him and the sureties upon the first bond, could be determined only by a suit in equity.

Where, before a trustee appointed under a will to hold and manage the residue of the devised estate has entered upon the performance of the trust, the executor collects the rents of the real estate and credits them to the estate in his account to the Probate Court, deducting his expenditures on account of the real estate and the support of the testator's family, which account is assented to by the parties interested, and allowed by the court, and the executor afterwards continues to collect the rents until the trustees assume charge of the estate, the executor is bound, under the Gen. Sts. c. 98, § 8, to account for the income of the real estate.

Upon an adjudication in this court that an executor and his surety are liable upon their probate bond by reason of the executor's failure duly to render an account,

the account should be so stated in this court as to show what is included in it, as the basis of future adjustments with the executor and his sureties, and to enable the court to determine how far interest should be charged on the account.

CONTRACT on a bond given by Samuel W. Arrington as principal, and John McCormick as surety, conditioned that said Arrington, who had been appointed executor of the will of James Arrington, should administer the estate of the testator according to law, and render an account. The breach alleged was that the executor had not administered the estate according to law, and had also failed to account. The defendants were defaulted, and the case was sent to an assessor, who made a report in substance as follows:

James Arrington died July 19, 1866, leaving a will and codicil, which were admitted to probate in October, 1866. He devised the residue of his property to trustees in trust to pay so much of the income to his wife as should be sufficient to support her and his minor children. On March 5, 1867, the defendant Arrington gave a bond in the usual form in the sum of \$25,000, with John Hurley and James J. Buckley as sureties.

On May 6, 1867, he filed an inventory, by which it appeared that the real estate of the testator was appraised at \$18,100, and the personal estate at \$38,095.87. Arrington, immediately upon filing his bond, began to collect the rents of the real estate, claiming them and giving receipts therefor as executor, and to collect the dividends and interest upon the stocks and other personal securities belonging to the estate, and continued to do so up to and for some time after the appointment of a trustee under the will. On March 3, 1868, the executor filed an account, in which the rents collected from the real estate were credited, and by which it appeared that there was then a balance in the hands of the said executor amounting to \$37,826.37. No other account was ever filed by him, although he was required to file a further account by a decree of the judge of the Probate Court made on November 12, 1872.

In November, 1870, John Hurley, one of the sureties upon the bond above referred to, petitioned to be discharged from further liability thereon, and on December 6, 1870, a decree was made by the judge of probate, so discharging him; and thereupon, on December 16, 1870, Arrington filed the bond in suit. No inventory was taken at the time of filing this bond.

Arrington had in his hands, at the time of filing his account, the sum of \$37,326.37. Since his appointment he has collected rents from said real estate amounting to \$14,573.40, of which \$8,147.27 were collected before, and \$6,426.13 after, December 16, 1870; and from other personal securities he collected as income the sum of \$8,628.17 before, and \$3,621.50 after, that date. In December, 1872, a trustee was appointed under the will, and after that date Arrington transferred to the trustee stocks and securities amounting at the prices at which they were appraised in said executor's inventory, and in part in said trustees' inventory, to the sum of \$23,624.20.

On these facts the assessor found that there was due and payable from said Samuel W. Arrington upon his bond the sum of \$33,430.86, being the amount of the balance of his account, with the income of the real and personal estate less the rents and dividends credited in the account, and less the amount at which the personal securities transferred to the said trustee were appraised, and assessed damages against him in that amount. Arrington, though duly notified, was not present at the hearing before the assessor, and offered no evidence.

The plaintiff contended that the executor's inventory filed March 6, 1867, and the account of March 3, 1868, were evidence tending to show the amount of property for which McCormick was liable, and was at least evidence tending to show the amount of property in the executor's hands when McCormick became his surety, but for the purposes of this case the assessor ruled that the testimony was not competent for either purpose.

The plaintiff also contended that the evidence of the receipt of the various sums of money by Arrington after he became executor, as income of the real and personal estate, as above set forth, both before and after McCormick became surety, was admissible as evidence against McCormick to show the amount for which he was liable, but this evidence was also rejected as incompetent for that purpose.

The plaintiff also offered evidence tending to show that certain definite portions of the property which originally came into the possession of Arrington as executor, remained in his possession when and after McCormick became surety, and had not been since accounted for, contending that McCormick was responsible

therefor ; and that the burden of proof was on him to show that such property had been administered according to law, and that he was liable in the absence of any such testimony ; but the testimony was rejected, and it was ruled for the purposes of the hearing, that McCormick was not responsible for the application of that property which originally came into the possession of the executor before he became surety, although it was still in his hands at and after that time, but only for such new property as came into said Arrington's possession after he became surety ; and that the burden of proof was upon the plaintiff to show that he had suffered damage, and that the burden was not sustained by showing that property for which McCormick was responsible came into the possession of the executor and had not since been delivered to said trustee upon his demand ; but that it was incumbent upon the plaintiff to show by further evidence that such property had not been administered according to law and the provisions of the testator's will. The assessor found against McCormick in nominal damages, and the plaintiff excepted to all the above rulings.

At the trial in this court, *Colt, J.*, reserved the case for the consideration of the full court upon the pleadings and the assessor's report. "If the rulings of the assessor were correct, judgment is to be entered upon the report ; if otherwise, the case is to be recommitted to the assessor for further hearing of the parties."

S. B. Ives, Jr. & R. C. Lincoln, for the defendants, were first called upon.

J. A. Gillis, for the plaintiff.

WELLS, J. The case shows a breach of the conditions of the bond in not rendering an account when required by the Probate Court. The defendants were defaulted and judgment for the amount of the penalty of the bond should have been entered before reference to the assessor. It may be entered *nunc pro tunc*.

For this breach of the bond, execution is to be awarded for the full value of all the estate of the deceased that has come to the hands of the executor, and for which he shall not satisfactorily account, as well as for all damages occasioned by his neglect or maladministration. Gen. Sts c. 101, § 28, cl. 3, 4. The separa-

tion of these two clauses would seem to leave the third—for a breach in not accounting—without any provision as to the amount for which execution is to be awarded. But reference to the original statute of 1786, *c. 55*, makes it clear that the provisions contained in the fourth clause must be intended to apply to the third also. The fourth is an additional clause inserted in the revision of 1836, as indicated by the notes of the commissioners to *c. 70*, § 10, for the purpose of greater precision, and not to change the law as it previously existed.

The purpose of awarding the execution in this mode is to put the whole assets of the estate, not already disposed of and accounted for in a proper manner, into the control of the judge of the Probate Court, so that he may proceed with its settlement and direct the course of its further administration. He may remove the present administrator, and appoint another to take the proceeds of the execution and complete the administration; and the proceedings upon the bond in this court are sometimes suspended, in order to have that change made before the final award. *Newcomb v. Williams*, 9 Met. 525, 589. *Bennett v. Russell*, 2 Allen, 537, 541. But we do not regard that course as necessary, because the judge of the Probate Court may doubtless, if he sees fit, or if no application is made for removal of the executor or administrator, permit him to continue and complete the settlement of the estate; in which case the award of execution will determine disputed questions and also the amount for which he is to be held accountable from that time. Gen. Sts. *c. 101*, § 29. If the bonds already given are not sufficient security against future breaches, (see § 30,) new bonds may be required under § 15.

The surety is liable for whatever is properly chargeable to his principal in the official capacity on account of which the bond was given; and whatever is competent as evidence upon which to charge the principal is competent also against the surety. The inventory and the former account filed by the executor in this case were competent to show for what the executor ought to render an account, and therefore for what he and his surety were liable upon the bond. So too, evidence of the receipt of various sums of money as income of personal estate, and of any and all property which at any time had come or ought to have come into

his hands, was competent both against him and his surety. It was not necessary to show that it was in his hands when McCormick became surety, or at any time afterwards. If he has never properly disposed of and accounted for it, he is bound to account for it now; and the sureties upon his bond, whenever given, are held for his faithful performance of that duty. *Dawes v. Edes*, 13 Mass. 177. *Winship v. Bass*, 12 Mass. 198. *Sigourney v. Wetherell*, 6 Met. 553, 558. *Mattoon v. Cowing*, 13 Gray, 387, 390. *Chenery v. Davis*, 16 Gray, 89. *Leland v. Felton*, 1 Allen, 581. *Alvord v. Marsh*, 12 Allen, 603. *Chapin v. Waters*, 110 Mass. 195.

The property being shown to have belonged to the estate, or to have come to the hands of the executor at any time, the burden is then upon him, and thus upon the defendants in this suit, to account for it. If it is sought to recover damages occasioned by the neglect of the executor to account at the proper time, or by other maladministration, the burden of proving such damages would be upon the plaintiff.

So far as the award of execution is for the value of estate not accounted for, there can be no separation of that estate or apportionment of damages. The statute requires the award to be "for the full value of all the estate" so unaccounted for. It gives this as the rule and measure, and there is no other. The result cannot be modified, therefore, by the fact of the previous bond; even if the other surety in that bond can be held bound after the discharge of his co-surety; or if there had been, before his discharge, such a breach of that bond as to render both of those sureties liable to be still held, under the Gen. Sts. c. 101, § 18, for damages on account of a part of the same assets to which this suit applies. Whatever contribution there ought to be between the sureties upon the several bonds must be sought, and the adjustments therefor can only be made, in a suit in equity.

The trustees appointed to hold and manage the residue of the estate, not having qualified themselves to act, the executor proceeded to collect the income, including rents of real estate. These he returned in his first account, credited to the estate, charging also for his expenditures on account of the real estate and on account of the maintenance of the widow and minor children, for whose use, in the first instance, it was so devised. The parties

interested assented to the account thus rendered, the widow "for herself and minor children;" and it was allowed by the Probate Court. The executor thereafter continued to collect the rents until the trustees were ready to assume the charge of the trust estate. These facts make a case for requiring the executor to account for the income of real estate under the Gen. Sta. c. 98, § 8. *Stearns v. Stearns*, 1 Pick. 157. *Palmer v. Palmer*, 13 Gray, 326, 328. *Almy v. Crapo*, 100 Mass. 218.

It follows that the surety must be held responsible for the whole amount for which his principal ought to account. If the executor has not been, and is not to be removed, he will probably render such an account in the Probate Court as will obviate the necessity of the ultimate award and issue of execution. If not, the account should be so stated in this court as to answer the purpose of an executor's account, so far as to show what is included in it, as the basis of future adjustments with the executor and his sureties, and also to enable the court to determine how far interest should be charged upon the balance or any part of the account. For the purpose of a more formal statement of the account, and a restatement of the results, in accordance with this opinion, the case is

Recommitted to the assessor.

ORLANDO TOMPKINS & others vs. ISAAC C. WYMAN.

Essex. Nov. 5, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

A petition under the Gen. Sta. c. 134, § 49, will not lie to compel a person to bring an action to try his alleged title, unless the petitioner has an exclusive and adverse possession which works a disseisin of the respondent.

Land held in common was divided among the proprietors and held by them in severalty, but improved as a common pasture in proportion to the land owned by each. The greater part of the proprietors conveyed their lands to A., who gave a deed of the entire estate to B., the deed containing covenants of warranty except as against C., who had the title of the other proprietors. B. entered upon the entire tract of land. Held, that B. had not an adverse possession against C., and could not by petition, under the Gen. Sta. c. 134, § 49, compel him to bring an action to try his title.

PETITION under the Gen. Sta. c. 134, §§ 49, 50, to compel the respondent to bring an action to try his alleged title to a certain

parcel of land upon the Great Neck in Marblehead. The respondent claimed to own a portion of the said land, and disclaimed all title to the residue.

At the hearing in this court, before *Colt, J.*, the petitioners put in evidence a deed of quitclaim from George F. Odiorne to them of the premises described in their petition, dated February 12, 1872, with testimony which, in the judgment of the presiding judge, proved that the petitioners entered upon the premises under the deed and "expended large sums of money in surveying and lotting up the premises and building roads through the same in various directions, and in this manner were in possession of the same from 1872 up to the time of the filing of the petition."

The respondent then introduced evidence tending to show that Marblehead Neck was originally owned by commoners, so called; that in October, 1638, grants of small portions of the Neck were made to various persons, and that in January, 1722-3, the bounds of the lots so granted were established, and the remainder of the Neck divided among the commoners by metes and bounds, and was all thereafter held in severalty by the proprietors, but improved in common as a common pasture by them, they acting as a *quasi* corporation, electing officers and having a hayward who had charge of the pasture generally, and of the turning of the cattle there pastured on and off the Neck; that all the cattle were turned on and off through a gateway at the southwest end of the Neck, the cattle having the whole run of the Neck excepting the land which was then fenced off and cultivated on the northwestern side of the Neck.

It appeared also that the proprietors were entitled to pasture in proportion to the land owned by them, and that the premises were so improved up to 1845, at which time the proprietors ceased to hold meetings, most of them having sold their land to Ephraim Brown, through whom the petitioners claim. That, from 1820 to 1845, those under whom the respondent claimed were of the said proprietors, and so improved the land claimed by the respondent; that subsequently to 1845 and up to 1872 the respondent and those under whom he holds improved the land in the same manner as before, to wit, by pasturing cattle thereon. The respondent also introduced evidence tending to show record

title in himself to the lands claimed in his answer, all the profits of title being of earlier date than February 12, 1872.

It also appeared in evidence that on February 12, 1872, a deed of the entire premises described in the petition was made by William Fabens and others, trustees under the will of Ephraim Brown, to George F. Odiorne, and a mortgage given back to them by Odiorne to secure a part of the purchase money, in which it was provided, among other things, that in the event of the respondent establishing his title to a part of the granted premises, a proportionate part of the money secured by the mortgage should be deemed to have been paid ; also that a warranty deed of the same date was made by the *cestuis que trust* under the said will to Odiorne, in which they granted all the premises described in the petition, and among other things, covenanted to warrant the same against the lawful claims and demands of all persons except the respondent, and those claiming by, through or under him.

The respondent asked the judge to rule that he should not be ordered to bring an action as prayed for by the petitioners. But the judge declined so to rule ; and found as a fact that the petitioners were actually in such possession of the premises described in the petition, at the date of their petition, as would entitle them to maintain their petition, and had been in such possession since February 12, 1872, claiming an estate in fee ; and that the respondent claimed to be the owner of a part of the said premises, to wit, that part described in his answer, which claim was of an estate adverse to the estate of the petitioners ; and, without passing upon the validity of the respondent's title, entered the following order :

" Ordered, that the respondent be required to bring a proper action to try his title to the premises described in this petition within six months from the last day of this term of the court, and that this petition stand continued." To this ruling and order the respondent alleged exceptions.

E. R. Hoar & C. P. Thompson, for the respondent.

S. B. Ives, Jr., for the petitioners.

MORTON, J. The tract of land which this suit concerns was originally owned by commoners. In 1728 it was divided among the proprietors by metes and bounds, and was thereafter held

by them in severalty, but was used and improved by them in common as a pasture, they acting as a *quasi* corporation. The proprietors thus improved the lands up to 1845, when they ceased to hold meetings, the most of them having sold their interests to Ephraim Brown, through whom the petitioners claim. The respondent proved that he owned the lands described in his answer, and that up to 1872 he, and those under whom he claimed, improved the lands as before by pasturing cattle thereon. In February, 1872, one Odiorne, who then held the title of said Brown, made a quitclaim deed to the petitioners, covering the whole tract and including the land of the respondent. Under this deed the petitioners entered upon the premises, and, as stated in the bill of exceptions, "expended large sums of money in surveying and lotting up the premises and building roads through the same in various directions, and in this manner were in possession of the same from 1872 up to the time of the filing of the petition."

The petitioners took by their deed, and can claim title to, only those parts of the larger tract which were held in severalty by Ephraim Brown. Their only possession, as stated above, is not inconsistent with, or exclusive of, the possession and use of the premises by the respondent, for the purpose of pasturing cattle. There is now, as there has been for more than a hundred years, a mixed possession of persons owning in severalty but occupying in common. The statute provides that "any person in possession of real property claiming an estate of freehold" may bring his petition, if the respondent makes a claim adverse to the estate of the petitioner. Gen. Sts. c. 184, § 49. We think this contemplates an exclusive and adverse possession which works a disseisin of the respondent. *Munroe v. Ward*, 4 Allen, 150. The petitioners do not show any ouster of the respondent. There was no fencing or other occupation which would exclude him.

The real difficulty in this case is the difficulty of ascertaining the boundaries of the lots of the parties. Neither party claims any land included in the deeds of the other. Neither party has seen fit to assert any exclusive possession of the land claimed by him. There is no reason why the respondent rather than the petitioners should be compelled to bring a suit, and thus assume the burden of being able to fix definitely the disputed boundaries.

We are of opinion therefore that upon the facts shown at the trial the petition should have been dismissed.

Exceptions sustained.

ELIAS C. LARRABEE & others vs. JONATHAN TUCKER & others.

Essex. Nov. 6, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

Under the Gen. Sts. c. 91, § 5, kindred of the half blood in any degree inherit equally with those of the whole blood in the same degree in the distribution of personal property.

APPEAL from a decree of the Probate Court ordering a distribution of funds held in trust under the will of John Henfield. The case was heard upon agreed facts, which, so far as material, appear in the opinion of the court.

C. Sewall, for the appellants.

W. Cogswell, for the respondents.

COLT, J. The question here presented arises upon an appeal from a decree of the Probate Court ordering a distribution of funds held in trust under the will of John Henfield.

That court had original jurisdiction of the matter in controversy, because by the Gen. Sts. c. 100, § 22, it is authorized, concurrently with this court, to hear and determine in equity all matters in relation to trusts created by will.

The testator, John Henfield, devised the residue of his estate in trust for the benefit of his son during life, and directed his trustee, upon the death of the son leaving no children or descendants of children, to divide the same "among the next of kin of my said son, to those persons to whom the property would go, provided my said son owned the property and he died without issue and intestate."

The question is whether, under this clause of the will, the children of the half sisters of the testator take equally with the children of his brothers and sisters of the whole blood, in the distribution to be made.

By the Gen. Sts. c. 91, § 5, it is provided that "kindred of the half blood shall inherit equally with those of the whole blood in the same degree." This provision is found among those statutory

rules which regulate the descent of real estate and which are adopted in the distribution of personal property, and constitutes a part of a section, which, in its first clause, declares that the degrees of kindred shall be computed according to the rules of the civil law. Its plain purpose is to admit the kindred of the half blood relation in different degrees to an equal participation in the distribution of intestate estates, thus changing the rule of the common law. The different degrees of kindred, and the mode of computing them in the whole and the half blood, is the subject of the section in question. It is impossible to give meaning to all its words if it be construed to mean that only one degree of the kindred of the half blood can inherit.

It follows that, as relations by the half blood of different degrees are entitled to take equally with those of the whole blood, the entry must be *Decree of the Probate Court affirmed.*

WILLIAM H. KEEFE vs. THOMAS FLYNN.

Essex. Nov. 6, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

A declaration alleged that the defendant employed A. to build a house for him according to the terms of a contract in writing in the possession of the defendant; that after the execution of the contract, A. assigned to the plaintiff all sums of money then due and to become due to A. from the defendant for the erection of the building according to the contract; that the plaintiff notified the defendant of the assignment, and exhibited it to him, and he agreed to its terms, and promised the plaintiff to pay him all sums that should become due A. for the erection of the building; that thereafter a certain sum became due to A. under the contract, which the defendant refused to pay the plaintiff. It appeared by a copy of the assignment, annexed to the declaration, that A. assigned to the plaintiff all moneys due or to become due until a certain date for labor performed or to be performed by A. for the defendant. By the contract, the defendant was to pay A. a round sum, in instalments according to the progress of the work, for building a house for him. *Held*, that the declaration could not be construed as alleging a promise by the defendant to pay any sum not included in the assignment. *Held, also*, that the contract was not included in the assignment.

CONTRACT. The declaration alleged that David O'Connell was employed by the defendant to erect a building upon the premises of the defendant, according to the terms of a certain contract in writing in the possession of the defendant, and after

the execution of the contract, and after O'Connell had commenced to perform his part thereof, on September 9, 1872, O'Connell assigned and made over to the plaintiff, by an instrument in writing, all sums of money then due and to become due him from the defendant, for the erection of the building according to the contract; that the plaintiff thereupon notified the defendant of the assignment, and exhibited the same to him; that he agreed to the terms of the assignment, and promised to pay to the plaintiff, under the assignment, all sums of money that should become due to O'Connell from him for the erection of the building; that on or about October 28, 1872, the sum of \$300 became due to O'Connell under the said contract, which sum the defendant paid to O'Connell, and which has never been paid the plaintiff; that the defendant owes the plaintiff said sum.

Annexed to the declaration was a copy of the assignment, dated September 9, 1872, by which O'Connell, in consideration of \$300, assigned to Keefe "all moneys now due me from Thomas Flynn, and all that may become due me from said Flynn, until the 1st day of January, 1873, for labor performed or to be performed by me for said Flynn."

The answer was a general denial, and that "if it shall appear that the defendant was ever indebted to said O'Connell, or ever paid any moneys to said O'Connell, as mentioned in the plaintiff's declaration, then the defendant says that said moneys were paid to said O'Connell by virtue of a certain contract, wherein the said O'Connell contracts to furnish the materials and labor to build and complete a certain building for the defendant, and that said contract was never to his knowledge assigned to the plaintiff; and that if it shall appear that the moneys due under said contract ever were assigned to said plaintiff, then the defendant says that the said defendant never assented to such assignment or promised to pay to the said plaintiff any moneys due from him to said O'Connell."

Annexed to the answer was a copy of a contract under seal between Flynn and O'Connell, dated August 5, 1872, by which O'Connell covenanted with Flynn, in a good and workmanlike manner and according to his best art and skill, to build and finish a house, according to plans and specifications furnished by a certain architect; and Flynn covenanted with O'Connell to pay or

cause to be paid unto the said O'Connell \$2550 in the manner following, to wit, \$800 when the building is boarded, \$300 when the building is ready for plastering, and the balance when the house is finished.

Trial in the Superior Court, before *Lord, J.*, who ruled that the plaintiff could not recover upon his declaration, if the facts stated therein were proved as alleged, taken in connection with the contract referred to in the answer, directed a verdict for the defendant, and reported the case for the determination of this court, the case to stand for trial if the plaintiff can maintain his action upon proof of the facts stated in his declaration; otherwise, judgment to be rendered on the verdict.

W. S. Knox, for the plaintiff.

C. E. Briggs, for the defendant.

MORTON, J. The allegations of the plaintiff's declaration are, that O'Connell made to him an assignment, of which a copy is annexed; that he notified the defendant thereof; and that the defendant promised to pay to the plaintiff, under said assignment, such sums as should become due to O'Connell from him. It cannot fairly be construed as alleging a promise by the defendant to pay any sum not included in the assignment.

It is true, as claimed by the plaintiff, that if he had a valid assignment by O'Connell, of any sum due or which would become due under an existing contract with the defendant, and the latter accepted the assignment and promised to pay to the plaintiff, he could maintain an action in his own name upon such express promise. Such assignment and promise would make the defendant liable to the plaintiff, and discharge his liability to O'Connell, his original debtor, and this would furnish a sufficient consideration for his promise. *Burrows v. Glaver*, 106 Mass. 324, and cases cited.

But the difficulty in the plaintiff's case is, that his assignment does not include the debt due under the building contract between O'Connell and the defendant, the amount of which he claims in this action. By that contract, O'Connell was to build a house according to certain plans and specifications, and the defendant was to pay therefor \$800 when the house was boarded, \$300 when it was ready for plastering, and the balance when it was finished. These were to be general payments on account of the house, including all materials and labor furnished.

The plaintiff has no assignment of the contract, or of the amounts which would become due under the contract. His assignment is of "all that may become due me from said Flynn until the 1st day of January, 1873, for labor performed or to be performed by me for said Flynn." The only alleged promise of the defendant was to pay to the plaintiff the amount included in this assignment. This does not render him liable for the sum of \$300 claimed in the declaration, and therefore the presiding justice of the Superior Court correctly ruled that the plaintiff could not maintain this action. *Judgment on the verdict.*

116 566
158 568

PATRICK MCGRATH, administrator, *vs.* JAMES REYNOLDS & others.

Essex. Nov. 6, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

A written instrument, not duly attested as a will, by which a sum of money is given to another for certain purposes named, which is signed and delivered in expectation of death by the party at whose request it is made, and which is shown by the attending circumstances not to be intended as passing a gift *inter vivos*, cannot give effect to the intended gift as a *donatio causa mortis*.

A man, in expectation of death, caused a written instrument to be made by which he gave to A. a stated sum of money for certain purposes named, and for the purpose of carrying out its provisions delivered to him a savings bank book with an order for the payment of the deposits, which made up only a smaller portion of the sum named in the instrument. The donor, when asked by A. where the remainder was, said it was in his trousers' pocket, turning in his bed and looking towards the closet in which the trousers were, and that E., who owned the house and who was present, would give it to him. After the donor's death, E. delivered the money to A. *Held*, that there was no sufficient delivery of the money to give effect to the gift as a *donatio causa mortis*, and that it could not take effect otherwise than as an entire gift.

BILL IN EQUITY to obtain the instructions of the court as to the disposition of certain funds alleged to have been placed in the plaintiff's hands by Bernard Reynolds, as a *donatio causa mortis*. The case was reserved by Colt, J., for the consideration of the full court, upon the bill and answers and a report, and appeared to be as follows :

Bernard Reynolds on September 23, 1873, sent for the plaintiff to come to him at Salem, where he was then lying very sick and

in expectation of death. The plaintiff accordingly went to Salem and found Reynolds in bed in his room at the house of his sister, Ellen Gaffney, where he had been boarding for some three or four years. Reynolds then stated to the plaintiff that he had some money which he wished him to divide among his, Reynolds's, relations. The plaintiff, after some objection, took a piece of paper and wrote at Reynolds's direction as follows: "Salem, Sept. 23, 1873. I give to Patrick McGrath \$5758, to be divided as follows:" he then, also at Reynolds's direction, wrote the names of certain relatives of Reynolds, and then wrote against their names respectively certain sums of money. This paper Reynolds then signed and handed to McGrath. Reynolds then produced two savings bank books of the Emigrant Savings Bank of Boston, each showing a deposit of \$900, and both in Reynolds's name, and requested McGrath to fill out the blank orders printed in the books for the payment to McGrath of the amounts deposited, which McGrath accordingly did. The orders were then signed by Reynolds, and the books and orders delivered by him to McGrath, in whose possession they have been up to the present time.

McGrath then, perceiving that the amount in the bank books fell short of \$5758 mentioned in the paper above referred to, asked Reynolds where the rest of the money was; Reynolds told him that it was in his trousers' pocket, turning at the same time in the bed and looking towards the closet in which the trousers were then hanging, and that Ellen would give it to him. There was then in the trousers' pocket the sum of \$3850. Ellen, his sister, was then present and heard the question and answer, and had previously been informed by Reynolds where the money was. McGrath then took the books to the bank for the purpose of drawing the money, but it being represented to him that he would lose some of the interest by drawing it at that time, he requested to have the amounts assigned to him. One of the officers of the bank informed him that this could not be done upon the orders produced, but drew a form of assignment, which McGrath sent to Reynolds. Reynolds signed and gave it to his sister, with directions to give it to McGrath, and this she did after Reynolds's death. Reynolds died the morning of September 27, 1873. In the evening of that day Ellen Gaffney took

the money, amounting to \$3850, as above stated, from his trousers' pocket, and placed it in her own trunk, and about three weeks after Reynolds's death delivered it to McGrath.

The bank having declined to pay over any money after the death of Reynolds, McGrath was appointed administrator of Reynolds's estate, January 6, 1874. He had already paid over to two of the persons mentioned in the paper the sums set opposite their names, before he had notice that the parties interested, or any of them, intended to raise any question as to the disposition of the funds intrusted to him.

Upon these facts the case was reserved for the consideration of the full court, such order or decree to be made as the nature of the case requires.

J. A. Gillis, in support of the gift.

S. B. Ives, Jr. & C. W. Richardson, *contra*.

WELLS, J. The writing signed by Reynolds cannot operate as a will, for want of attestation. The testamentary purpose, however, is so manifest, especially in connection with the attending circumstances and the declarations of Reynolds, as to forbid giving it effect as a transfer by way of gift *inter vivos*. It can be regarded only as an attempt to make a gift *mortis causa*; and it is so set forth in the bill.

As a gift *mortis causa*, it is not aided by the execution of the written instrument, except so far as that may contribute to greater certainty in the proofs. Such gifts cannot be effected by formal instruments of conveyance or assignment. They are manifested by, and take their effect from, delivery. They can therefore only be of such articles of personal property as are capable of transmission by delivery alone, so far at least as to confer a right or title which equity will protect and enforce. They require actual delivery or its equivalent. Symbolical or constructive delivery is not sufficient. *Parish v. Stone*, 14 Pick. 198, 203. *Sessions v. Moseley*, 4 Cush. 87, 92. *Rockwood v. Wiggin*, 16 Gray, 402. *Marshall v. Berry*, 13 Allen, 43. *Coleman v. Parker*, 114 Mass. . See also cases cited in 2 Redfield on Wills, 302 *& seq.*, and 1 Lead. Cas. in Eq., 583, notes to *Ward v. Turner*.

The greater part of the subject of the gift in this case was in money. There was no manual tradition of the money, and the

occurrences at the time of the supposed gift do not furnish an equivalent for delivery. The donor informed the donee where it was, and that his sister, who was present, would give it to him. But there was no change of possession or control until after the death of the donor, when it was too late to make a delivery under the authority which the words of the donor would imply. Even if we regard the sister as the agent of the donee to receive and hold the money for the purposes of the intended gift to him, it does not relieve the difficulty; because she did not assume the possession and control of the money until after the decease of the donor. It does not follow because it was in her own house, where her brother was a boarder, that it was virtually in her possession at the time; and that inference is excluded by the fact that it was in a pocket in his personal clothing; and by the affirmative statement that she "had previously been informed by Reynolds where the money was."

We are forced to the conclusion, therefore, that there was a failure to make the intended gift effectual in law, by reason of an omission to perfect it by delivery of the money. As there was no intention to make the gift otherwise than as a whole, the failure of the principal part must defeat the whole. We cannot regard the delivery of the bank books as a delivery of part in the name of the whole so as to make the whole gift effectual. We need not consider the question whether the deposits in the savings banks would pass as *donatio causa mortis*, by delivery of the books with the order of payment or the assignments, if disconnected from the rest of the scheme. The intended gift was not of those deposits or books specifically, but of a definite larger fund; and the books were delivered merely as means in part to carry out the entire purpose. That purpose failing, there is no intended gift of which the delivery of those books is an appropriate manifestation.

The result is, that the plaintiff must hold the funds as administrator.

Instructions accordingly.

CHARLES ADAMS, JR. *vs.* INHABITANTS OF IPSWICH.

Essex. Nov. 23, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ., absent.

The husband of a pauper had a derivative settlement in a town from his grandfather, acquired under provisions of law in force prior to February 11, 1794. The father of the husband had also resided in the town for ten years together, and paid taxes there for five years, while the husband was a minor. Neither the husband, nor the pauper after his death, had complied with the conditions necessary to acquire a settlement in their own right. *Held*, that the pauper had a legal settlement in the town.

The transfer, authorized by the Gen. Sts. c. 71, § 7, of an inmate of a state lunatic hospital, from that institution to another, is properly made under the authority of the original mittimus.

The right of the Commonwealth to recover from the town of a pauper's settlement money paid out of the treasury for his support at a state lunatic hospital under the Gen. Sts. c. 73, § 24, and the St. of 1862, c. 223, § 11, is not affected by the St. of 1870, c. 105.

The right of the Commonwealth to recover from a town money paid for the support of a pauper at a state lunatic hospital is not limited by the fact that the town had no notice that the pauper was chargeable to it, or of his commitment to the hospital.

Under the Gen. Sts. c. 155, § 12, the right of the Commonwealth to recover from the town of a pauper's settlement money paid for his support at a state lunatic hospital is limited to such support as has been furnished within six years previous to the commencement of the action, and is not extended by ignorance of the fact of settlement.

CONTRACT by the treasurer of the Commonwealth to recover the amounts paid by the Commonwealth to the Lunatic Hospital at Northampton, for the support of Nancy Smith, an insane pauper, from June 10, 1862, to October 1, 1870. Writ dated July 14, 1871. Answer: 1. A general denial; 2. The statute of limitations.

The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on a statement of facts, in substance as follows:

The accounts charged in the declaration were paid by the treasurer of the Commonwealth to said hospital at the dates mentioned, and under the acts and resolves referred to, as follows: May 24, 1863, to October 1, 1863, St. 1862, c. 223, § 11; October 1, 1863, to January 1, 1864, St. 1863, c. 240, § 9; January 1, 1864, to January 1, 1865, St. 1864, c. 138, § 1; January

1, 1865, to January 1, 1867, Res. 1865, c. 16; January 1, 1867, to October 1, 1870, Res. 1867, c. 38.

Nancy Smith was married in 1837 to Walter Brown, Jr., who died in 1838 or 1839, and never complied with or met any of the conditions which would have given him a settlement in his own right; and Nancy, after the death of her said husband, never complied with or met any of the conditions which would have given her a settlement in her own right. Walter Brown, Jr., had a derivative settlement in Ipswich from his grandfather, Stephen Brown, which was acquired in that town under the laws in force prior to the statute of 1793. Walter Brown, Sen., the father of Walter, Jr., became of age in 1809, and died in 1863. He lived in Ipswich during that interval, ten consecutive years, and paid taxes there for five of those years, prior to Walter Brown, Jr.'s attaining his majority.

Nancy Smith was committed to the lunatic hospital, at Taunton, by the judge of probate of Bristol County in 1856, as a person having no known settlement. She was removed to the hospital at Northampton in 1862, by the Alien Commissioners of the Commonwealth, under the provisions of the Gen. Sts. c. 71, § 7. The records of the Taunton hospital show that Nancy was discharged to the Alien Commissioners, but there was no warrant, mittimus or other documentary authority for her removal, or for placing or detaining her in the hospital at Northampton. No notice whatever was given to the town of Ipswich that Nancy was in the hospital, or that that town was chargeable with her support, by either the hospital or the place of her residence, at the time she was placed in the hospital at Northampton; and no such notice was given to the town, or demand of payment made upon it, until May 24, 1869.

If upon these facts the plaintiff is entitled to recover, judgment is to be entered for such sum as the court shall find the defendant liable for under the statutes above mentioned; otherwise judgment for the defendant.

J. Willard, for the plaintiff.

C. A. Sayward, for the defendant.

WELLS, J. The pauper had a settlement in Ipswich; and that settlement still continues, if it has not been defeated by the St. of 1870, c. 392, § 2. She derived it from her husband,

through an original settlement acquired by his father in that town, unless its acquisition in that mode was prevented by the existence of a previous settlement, which his father derived from his grandfather, by virtue of provisions of law in force prior to February 11, 1794. If the older settlement prevented the subsequent acquisition of the more recent one, the former is preserved by the exception in the St. of 1870. *Bellingham v. Hopkinton*, 114 Mass. . In either alternative the pauper is shown to have a present settlement in Ipswich.

She was properly committed to the lunatic hospital at Taunton; and from there transferred to the hospital at Northampton in accordance with the provisions of the Gen. Sts. c. 71, § 7. There was a change of the place, but not of the legal authority for the custody of the lunatic pauper. It was a continued maintenance of the same custody to which she had been committed in due form. No new mittimus was required. The statutes gave all the authority requisite for her transfer and subsequent detention at Northampton, under the original mittimus.

There has been no repeal of the statute authorizing the recovery of these expenses from the town of the pauper's settlement. The St. of 1870, c. 105, which is relied on as a repeal, merely changes the rate of compensation, and repeals acts or parts of acts inconsistent therewith. Such general language can have no effect beyond the necessary and natural result of the change which the new statute effected in the previous provisions of law relating to the subject matter of its direct provisions. The right of recovery given by the Gen. Sts. c. 73, § 24, and the St. of 1862, c. 223, § 11, is not inconsistent with the new provisions made by this statute. It is applicable to the liability, and is not affected by changes, from time to time, made in the rate by which the extent of liability is to be measured. The mention, in the St. of 1870, c. 105, of the mode of remedy, is not the provision of a new remedy, nor a repeal or change of the existing remedy. It was probably intended to indicate that the compensation then provided for should be recovered in the mode authorized by the law as it already existed; which would have been the construction if this clause had not been inserted. *Cumington v. Wareham*, 9 Cush. 585, 591.

The right of recovery in behalf of the Commonwealth is not governed by the provisions regulating claims between different towns. It is not limited by reason of want of notice.

But there is nothing in the nature of the claim, nor in the facts of the case, to take it out of the usual operation of the statute of limitations. The cause of action arose at the time the support was furnished. Ignorance of the fact of settlement makes no difference in the legal right ; and does not bring the claim within the exceptions to the statute of limitations. Gen. Sts. c. 155, § 12. *Jennison v. Roxbury*, 9 Gray, 32. For the amount of the charges for support within six years of the date of the writ, there must be

Judgment for the plaintiff.

AMBROSE HODGKINS vs. INHABITANTS OF ROCKPORT.

Essex. Nov. 6, 1874. — Jan. 11, 1875. AMES & DEVENS, JJ., absent.

In an action against a town to recover for personal injuries occasioned by an alleged defect in a highway, the question whether a hole in a culvert, covered with a flat stone, is so covered as to make the highway safe and convenient for travel, is a question of fact for the jury.

In an action against a town for injuries caused by a crutch on which the plaintiff was leaning being accidentally placed in a hole in a culvert usually covered with a flat stone, but then uncovered, the jury were instructed that the town would not be responsible on the ground that the hole was uncovered and the way thereby dangerous, because it did not appear that the hole was uncovered twenty-four hours or that the town had notice ; but that if they were of opinion that a hole, covered as this had been for many years, rendered the way defective, and the plaintiff proved all other necessary parts of his case, he could recover. *Held*, that the defendant had no ground of exception.

TORT to recover for personal injuries alleged to have been caused by a defect in a highway in the defendant town. Trial in the Superior Court, before *Lord, J.*, who, after verdict for the plaintiff for \$987.50, reported the case to this court in substance as follows :

At the trial, it was admitted that School Street was a highway which the defendant was bound to keep in repair, and that it had been maintained by the town for many years.

The plaintiff put in evidence tending to show that he met with an accident in School Street, in the afternoon of July 12, 1872, that he had previously received an injury, which had made him a cripple, and had compelled him to use a crutch, and that he received the injury for which he claimed to recover in this action by accidentally placing his crutch in a hole in the street, so as to throw him down and inflict serious injury.

Upon the question whether the street was defective, the following facts appeared in evidence: School Street was an ancient highway which had remained in substantially its present condition for twenty or thirty years, except that a sidewalk has been built on the western side since the accident. Near the southern end of said street there is a culvert, covering a watercourse which runs across the street. This culvert is covered with large stones, in one of which there is a hole about six inches in diameter, which is evidently artificial, and which has been there since the culvert was built, not less than twenty years ago. Over this hole there has always been laid a flat stone varying in size, according to the testimony of different witnesses, from about two feet in diameter to eighteen inches by ten, and from an inch and a half to two inches in thickness. The exact weight of this stone was not shown, but it appeared that it weighed more than twenty-seven pounds. At the time of the accident, as before stated, there was no sidewalk on that side of the street. The gravel and soil of the street were brought up against the edge of the flat stone which covered the hole, so that there was no obstruction to travel at the time it was put there; and sometimes it was so, and sometimes the rain washed the dirt from the sides and exposed them.

The plaintiff contended and offered evidence tending to prove, that, when he received his injury, this flat stone had been in some way removed, and that, while passing along in the exercise of proper care, he had got his crutch into the hole, and was injured. There was no evidence how the flat stone got off; nor was there any evidence that it had ever been out of place before, except that a single witness testified that a year or two before he saw the hole uncovered. But this was only a single occasion, and it was again covered at once.

The defendant contended that there was no evidence for the jury of a defective way for which the defendant could be held

liable in this action, it being admitted that the hole had not been uncovered for twenty-four hours, or for any appreciable time, before the accident; and it not being claimed that there had been any notice to the defendant.

The plaintiff contended that the way was defective, in that a hole through the covering stone of the culvert had been improperly and insufficiently covered, and that, as that had existed for more than twenty-four hours, the defendant was liable for an injury received by reason of it.

The judge submitted this question to the jury, and instructed them that the plaintiff could recover, (so far as this part of the case is concerned,) if he satisfied them that the way, as it existed when the hole was covered, was not reasonably safe and convenient; that the defendant would not be responsible upon the ground that the uncovered hole rendered the way dangerous, as it had not existed in that condition for twenty-four hours, and there was no evidence of notice to the defendant; but that, if they should be of the opinion that a hole, covered as this one had been for the time testified to by the witnesses, rendered the way defective, and the plaintiff had proved all other necessary parts of his case, the plaintiff would be entitled to recover.

No objection was made to any other part of the instructions; and the judge, after verdict for the plaintiff, reserved for the consideration of this court the question whether there was evidence sufficient to warrant a submission of the case to the jury; if not, judgment is to be entered for the defendant; otherwise, judgment on the verdict.

S. B. Ives, Jr., (*H. N. Woods* with him,) for the defendant.

C. P. Thompson, for the plaintiff.

COLT, J. The question whether a hole in a culvert, covered with a flat stone, is so covered as to make the highway safe and convenient for travel, is a practical question of fact, depending on a variety of considerations. The size of the hole; its location, with reference to the line of public travel; the weight and shape of the stone, with the means employed to keep it in place; its liability to displacement by accident or design, or by the public travel over it, are all to be taken into account. It was submitted to the jury in this case with careful and accurate instructions, under which they must have found that the way was defective as

it existed, with the hole covered as it was, or, in other words, that the means adopted to secure the safety of the travel upon the highway were not sufficient. It is not true, as contended by the defendant, that the only fact which tended to prove the existence of the alleged defect was the fact that the stone, at the time of the accident, happened to be displaced. A perfect bridge or a perfect culvert may become dangerous by a careless or malicious act, without liability on the part of the town, except when the defect produced has existed for twenty-four hours, or there has been notice of it. There is nothing to show that the jury thought otherwise in this case. *Myers v. Springfield*, 112 Mass.

The case at bar is not like *Doherty v. Waltham*, 4 Gray, 596. There the jury were told that a town would not be liable for an injury to a traveller in the night-time from a hole in the highway, if at sunset sufficient barriers were placed around it to make it safe for the night, although the barriers were afterwards removed, whether by accident or design. The jury must have there found that the means adopted to secure safety were sufficient.

Nor is this case controlled by *Ryerson v. Abington*, 102 Mass. 526, 532. The defect in that case arose from the caving in of a sluiceway, the original construction of which was alleged to have been imperfect, and the question was one of immediate and remote cause. The judge was asked to rule, upon evidence which was thought to justify the request, that the jury must find "that the immediate and particular defect which was the immediate and proximate cause of the injury either had existed twenty-four hours, or that the town had had reasonable notice of it." He refused so to rule, but told the jury that if there was a defect in the original construction, by which the earth was liable in a freshet to be washed away so as to produce the cavity which existed, "and to indicate such a state of things as the natural consequence," the plaintiff might recover. A new trial was ordered by this court on account of other rulings on questions of evidence, and the general rule was stated that the defect complained of must be the immediate cause of the injury; but the court expressly declined to consider whether the instructions given to the jury, justly interpreted, were in accordance with this rule.

In the opinion of a majority of the court, the entry in the present case must be

Judgment on the verdict.

GEORGE A. CURRIER vs. JEREMIAH A. ESTY.

Essex. January 28.—29, 1875. AMES & ENDICOTT, JJ., absent.

A disclaimer of title in an action at law on which judgment has been entered, but which has been adjudged by a decree in equity to be founded in mistake, is not admissible in a subsequent suit as evidence of an admission by the party disclaiming.

A judgment upon a disclaimer upon a writ of entry does not transfer the title, or operate otherwise than by estoppel.

A line designated by fence-viewers for a fence under the St. of 1863, c. 190, has no effect upon the title or right of possession of the land.

TORT for breaking and entering the plaintiff's close, ploughing up the soil and taking away and converting certain trees and shrubs of the plaintiff. Trial in the Superior Court, before *Wilkinson, J.*, who allowed a bill of exceptions in substance as follows:

The plaintiff introduced in evidence a deed of the premises described in his declaration, from one Proctor to himself. He also offered evidence of possession under the deed, and evidence tending to prove that the defendant entered upon the premises, and committed the acts alleged in the declaration.

It appeared in the case, and was not controverted, that in 1866 the defendant commenced a real action against the plaintiff, in which he claimed, with other land, the *locus* described in this declaration; that the plaintiff filed a disclaimer to the *locus*, and judgment was rendered upon said disclaimer in 1868; and that subsequently, in 1871, the plaintiff brought a bill in equity against the defendant, to enjoin him from using or setting up said judgment or disclaimer as any evidence of title. Upon the filing of said bill, a temporary injunction issued, "as prayed for," to continue until the further order of said court. The bill in equity went on to final hearing, and was decided by the full court in 1873, by whose rescript a "decree for the plaintiff with costs" was ordered to be entered.

The defendant then offered in evidence the disclaimer of the plaintiff in the real action, so far as related to that part of the *locus* in question upon which the alleged trespass was committed, as a declaration *in pais* for the purpose of showing the circumstances under which the defendant entered upon the said *locus*, and stated to the court that the disclaimer was not offered either

as an estoppel or bar to the plaintiff's title to the premises described in his writ, or as evidence of title in the defendant. But the judge ruled that the pleadings in that case were not competent evidence for any purpose.

The defendant then asked the judge to rule that, the property having become vested in him by operation of law in consequence of the aforesaid judgment in the real action, the plaintiff could not maintain this action against him; that if the defendant entered upon the *locus* by reason of the law vesting the property in him, and forcibly withheld possession from the plaintiff, then the plaintiff's remedy was by action of forcible entry and detainer, and not tort in the nature of trespass *quare clausum*. But the judge declined so to rule.

The defendant then offered evidence to prove that, in May, 1870, under the St. of 1863, c. 190, he called upon the fence-viewers of the town of Middleton, where the premises are situated, to determine upon a partition fence between him and the plaintiff, the plaintiff having failed and neglected to build any fence after due notice; and to show that upon the adjudication of the fence-viewers after notice to both parties, the fence-viewers assigned to the defendant to build a fence upon a certain line which was upon the *locus in quo*, and that he built the same in pursuance of that notice and assignment. But the judge ruled that the fence-viewers could not establish a line that would give to the defendant any right to trespass upon the premises, nor establish a boundary between the parties so far as title is concerned, and excluded the evidence. The jury found for the plaintiff, and the defendant alleged exceptions.

C. Sewall, for the defendant.

S. B. Ives, Jr., for the plaintiff.

GRAY, C. J. In the suit in equity between these parties, it was adjudged that the disclaimer in the writ of entry and the judgment thereon were founded in misapprehension and mistake of fact, and that the defendant should be perpetually enjoined from availing himself of them by way of estoppel against the plaintiff. *Currier v. Esty*, 110 Mass. 536.

At the trial of the present action of trespass, the defendant did not attempt to disregard the decree in equity, by availing himself of the disclaimer and the judgment at law as an estoppel. He

only offered the disclaimer as evidence of a declaration by the plaintiff against his interest; and the judgment as vesting the title in himself.

But the disclaimer, having been adjudged to be founded in mistake, was no evidence of an admission by the plaintiff. And a judgment upon a disclaimer does not transfer title, or operate otherwise than by estoppel. *Oakham v. Hall*, 112 Mass. .

A line designated by fence-viewers under the St. of 1863, c. 190, is established only "for the purpose of maintaining a fence," and has no effect upon the title or right of possession of the land.

Exceptions overruled.

116 579
148 361
116 579
151 84

INHABITANTS OF GLOUCESTER vs. COUNTY COMMISSIONERS OF ESSEX.

Essex. January 28. — 29, 1875. AMES & ENDICOTT, JJ., absent.

A board of county commissioners has the same power as any court to amend its records according to the truth, upon such evidence as the board in its discretion may deem sufficient.

PETITION for a writ of *certiorari* to quash the proceedings of the county commissioners in the laying out of a town way in Gloucester.

The petition averred that in October, 1870, an application was made, upon the petition of Amos Story and others, to the selectmen of Gloucester, representing that the way from Cripple Cove, so called, to the house of Benjamin S. Brazier in East Gloucester, was narrow, crooked, indirect and inconvenient, and requesting the selectmen to widen and straighten it for a portion of the said way, and to lay out a new and more direct way for the other portion; that the selectmen, after a hearing, refused to widen and lay out the town way, or to grant the prayer of the petitioners; that the petitioners thereupon in December, 1870, applied to the county commissioners for the county of Essex, representing and requesting the same as in the petition to the selectmen aforesaid; that the county commissioners, after a hearing upon the application to them, laid out, widened and straightened the way according to the prayer of the petition; and ordered the same to be

done, built and constructed by the inhabitants of Gloucester ; that the laying out and widening, and the record thereof, are indefinite and uncertain, so that the meaning and intent thereof are not intelligible enough to guide and determine the action of the petitioners ; that although it was alleged in the application to the county commissioners that the selectmen unreasonably refused and neglected to widen, straighten and lay out the said way as requested in the petition to the selectmen, yet the commissioners have not made any adjudication upon that point ; the said commissioners did adjudge " that the common convenience required that the prayer of said petitioners should be granted," but they did not and have not adjudged, and their records show no adjudication by them, that the selectmen had unreasonably neglected and refused to widen and lay out such town way when requested so to do.

The answer alleged that the matters relating to the application made by Amos Story and others to the selectmen of Gloucester, and the action of the selectmen thereon, were substantially as set forth in the petition ; that application was made to the commissioners as set forth in the petition, and that after a full hearing upon the application, they ordered the way to be built and constructed by the inhabitants, as appeared by the record thereof ; but denied that the laying out, or widening of said way, or the record is not sufficient to guide and determine the action of the inhabitants ; that they did in fact adjudicate that the selectmen did unreasonably refuse and neglect to widen, straighten and lay out the way as requested by Story and others, and if the record did not sufficiently set forth that fact, the respondents respectfully asked that they might be permitted to amend the record, so that the same should distinctly and clearly appear ; that it was the design and intention of the commissioners to have that fact appear by their record, and that it was a mistake on their part in making up their record that it does not more fully appear ; that great wrong and injustice will be done if they are not allowed to amend their record as prayed for ; that neither the said inhabitants, nor the city of Gloucester, their successors, would suffer any loss or inconvenience by having the record so amended ; that there are not any informalities or illegalities apparent on the said record, or otherwise, except that their record may not make it

clearly appear that they did adjudge that the selectmen unreasonably refused and neglected to grant the prayer of the petition of said Story and others.

By a supplemental answer, the respondents further stated that on April 30, 1874, they caused the record complained of to be amended, so as to show clearly the fact that they did adjudge that the selectmen of Gloucester had unreasonably neglected and refused to grant the prayer of the petition of Amos A. Story and others to them, and that the record was amended by adding, after the words "the common convenience requires that the prayer of the said petitioners should be granted," the following words, "and we also adjudge that the said selectmen did unreasonably neglect and refuse to grant the prayer of the said petition;" that since the original record was made, one of the then board, namely, Jackson B. Swett, has retired from the board, his term of office having expired, and Zachariah Graves was elected and is now a member of the board as his successor; that the amendment has been made from recollection, and not from any minute made by the commissioners.

The case was reserved by *Colt, J.*, upon the petition, answer and supplemental answer for the consideration of the full court, upon the question, whether by their records and the facts recited in the answers the commissioners had power to lay out the road in question, the petitioner insisting that they had no right to amend their record.

J. C. Perkins, for the petitioner.

C. P. Thompson, for the respondents.

GRAY, C. J. The board of county commissioners has the same power as any court to amend its records according to the truth, upon such evidence, documentary or oral, or recollections of any of its present members who took part in the original decision, as the board in its discretion may deem sufficient. *Balch v. Shaw*, 7 Cush. 282. *Ellis v. County Commissioners*, 2 Gray, 370. *Andover v. County Commissioners*, 5 Gray, 393. *Farmington River Water Power Co. v. County Commissioners*, 112 Mass.

Petition dismissed.

JAMES N. BUFFUM vs. SAMUEL O. BREED.

Essex. Nov. 6, 1874. — Jan. 30, 1875. **AMES & DEVENS, JJ., absent.**

The owner of a mill leased it with the machinery in it for a term of ten years, and gave the lessee the option of purchasing it within three years at a price named. On the same day an agreement was executed by the parties, in which, among other provisions, the lessee agreed not to use the mill and machinery for the manufacture of shoe or packing boxes except for certain specified parties. The lessee, within the three years, took an absolute conveyance of the property from the lessor, and subsequently engaged in the manufacture of shoe and packing boxes for parties not excepted in the agreement. *Held*, that the restriction upon such manufacture terminated with the lease.

BILL IN EQUITY praying for an account, and that the defendant might be restrained from further breach of the following agreement executed August 18, 1865, by the plaintiff, the defendant and one William Bassett, Jr. :

“Whereas the said Buffum has leased for a term of ten years to said Breed and Bassett his mill and wharf property, and other estate, near the West Lynn Station of the Eastern Railroad in said Lynn, and has sold to said Breed and Bassett the lumber on hand, for which said Breed and Bassett have given to said Buffum in part payment their note for \$20,000, payable on demand, it being the intention of said Buffum to leave that amount in the said business, until such time as said Breed and Bassett may find it convenient to pay the same, receiving in lieu of profits eight per cent. per annum on the amount due on said note, said Buffum further intending to retain in his own hands the business of manufacturing shoe and packing boxes, with the exceptions hereinafter stated :

“Now, therefore, in accordance with the foregoing intentions, the said Breed and Bassett agree with said Buffum, that they will not use or suffer to be used the said mill and machinery for the manufacture of shoe or packing boxes, excepting for the Grover and Baker Sewing Machine Company, for S. D. and H. W. Smith, for Nehemiah Berry & Sons and for H. B. Newhall, and such other persons and firms, not doing business in Lynn, as said Buffum does not now manufacture boxes for ; nor will they, except as aforesaid, manufacture boxes, or furnish lumber to others for the manufacture of boxes ; and of the boxes which may

be manufactured by them, as aforesaid, they will keep in regular books a full and accurate account, to which said Buffum and his legal representatives shall at all reasonable times have free access, and they will duly account for and pay over to said Buffum semi-annually one full half part of all net profits received by them from the manufacture of boxes, as aforesaid.

"And the said Breed and Bassett further agree with said Buffum, that they will do no mill work, except such as may be required for their own business and for such business as may be done at the wharf on Summer Street in said Lynn, now or recently occupied by Allen and Edmunds, and at other wharves westerly of ward five in Lynn, nor will they at said mills do any planing at a less price or rate than shall be charged by said Buffum for like work.

"And they further agree that while said note remains unpaid, they will pay to said Buffum, in lieu of profits, the rate of two per cent. per annum, on the amount due on said note, the same to be in addition to interest thereon, and payable semi-annually.

"And the said Buffum agrees with said Breed and Bassett, that so long as they shall perform their agreements herein contained, and conform to the terms of the lease aforesaid, and shall be in good credit and standing, and keeping good their stock of lumber unincumbered, he will make no demand for the payment of the principal of the said notes, within three years from date, unless it shall be convenient for the said Breed and Bassett to pay the same within that time."

The bill alleged that on and before August 18, 1865, the plaintiff was the owner of a certain parcel of land situate on Commercial Street in Lynn, with a certain mill thereon standing, and in the mill machinery for sawing and planing boards, dressing lumber, and manufacturing boxes and doing other business of like character, and at the same time was the owner of certain other land, with a mill standing thereon, on Union Street in Lynn, and was there, also, at that time, and ever since has been, and now is, largely engaged in the business of sawing, planing, and in the dressing and manufacture of lumber, and especially in the manufacture of shoe boxes and packing boxes for various parties in Lynn and its vicinity; that on August 18, 1865, he leased the land on Commercial Street, with the mill and machinery and

other property therein, by written lease of that date to the defendant and one William Bassett, Jr., then copartners under the style of Breed & Bassett, the lease being for the term of ten years from its date, and containing an agreement on the part of the plaintiff that the lessees therein named, or their legal representatives, might purchase the leased property, within three years from August 18, 1865, for the sum of \$17,000; that in consideration of the lease and the covenants and conditions therein contained, the said Breed & Bassett executed the aforesaid agreement; that on or about July 28, 1868, the firm of Breed & Bassett was dissolved, and Bassett sold and assigned his interest in the business previously conducted by the firm and in the aforesaid lease and agreement to the defendant, and that at the same time the plaintiff, in accordance with the covenants of the lease and the assignment from Bassett to the defendant, conveyed to the defendant the said land and mill, and the machinery therein and other property described in the lease, and that since the last named date the defendant has been the owner and occupant of the land and mill, and from that time to the date of the filing this bill has been carrying on business at the mill; and that contrary to the aforesaid agreement has been largely engaged in the manufacture of shoe boxes and packing boxes for sundry persons and firms in Lynn and vicinity, not included in the exceptions in said agreement contained, using in the manufacture the mill and machinery; that he has solicited and obtained in the business the patronage of the customers of the plaintiff, and in all ways has actively and persistently entered into competition with the plaintiff; and that he has done large amounts of mill work for various parties in violation of the agreement, and has done planing for sundry parties for a less price than that fixed and charged by the plaintiff for like work; and has thereby prevented the plaintiff from receiving large gains and profits from his business, and has otherwise greatly injured him, and that the defendant has refused and still refuses to the plaintiff access to the books, containing the account of boxes manufactured by him, or to account for and pay over to the plaintiff any portion of the profits derived from the manufacture.

The defendant demurred to the bill, assigning the following among other causes of demurrer:

1. That the covenants and agreements of the defendant, as set forth in the said agreement, only related and referred to the time included in the term of the lease, and were wholly terminated and concluded upon the conveyance of the estate, as set forth in said bill.

2. That it is not alleged in the bill that the defendant has done any of the acts complained of, except at a time subsequent to the termination of said lease.

3. That the agreement, by its terms, as well as by legal and necessary conclusion, has no reference to any time after the end of the term.

4. That the covenants of the defendant are not perpetual.

The case was reserved by *Colt, J.*, upon the bill and demurrer, for the consideration of the full court.

S. B. Ives, Jr. & R. C. Lincoln, for the defendant.

J. W. Perry & L. S. Tuckerman, for the plaintiff.

ENDICOTT, J. The question for decision is, whether the provision of the indenture, restraining the defendant from manufacturing shoe and packing boxes upon the premises for certain parties, terminated with the lease, or continued in force after the conveyance.

By the terms of the lease, if the lessee exercised his option to purchase, and a conveyance was made, the lease terminated within three years; if he did not, it expired by its own limitation in ten years. It was terminated in one manner contemplated. The option was exercised, and the plaintiff conveyed the premises to the defendant.

Upon a careful examination of the indenture, it is apparent that all its provisions relate to the leasehold property, the lumber to be used in connection therewith, and the business to be there carried on. It was made at the same time, in connection with and in reference to the lease, and in view of the fact, that the only legal relations existing between the parties were those of lessor and lessee.

The two papers must therefore be taken as parts of one transaction, executed at the same time, in the same capacity, and as intended to perfect and complete the original agreement made between the parties. *Merritt v. Harris*, 102 Mass. 326. *Cromwell's Case*, 2 Rep. 69 a. *Hamilton v. Elliott*, 5 S. & R. 375. They

are to be construed together in determining what was the meaning and intention of the parties, in regard to the duration of the partial restraint of trade, upon which the indenture is silent.

The fair interpretation of the agreement on this point, as gathered from both papers, is, that when the relation of lessor and lessee should cease to exist, the restriction should no longer be in force. The restriction would clearly be terminated when the period of ten years expired; it is equally clear that it terminated when the other provision for the termination of the lease was executed by the conveyance of the premises. In the absence of express words, taken in connection with the fact that no mention of it was made in the deed of conveyance, it is not to be inferred that the restriction was intended to survive the lease and all the other provisions of the indenture.

The demurrer is therefore sustained, and the

Bill dismissed, with costs.

EDWARD G. KNIGHT vs. SAMUEL W. LUCE.

Suffolk. Nov. 10, 1874. — Jan. 6, 1875. WELLS & DEVENS, JJ., absent.

On the issue whether a person employed to burn the brush upon the land of another had authority also to burn the brush within the limits of a highway adjoining, from which it is separated by a wall, the question whether a direction by the owner "to clear up the land" included land within the limits of the highway is for the jury, although the estate of the owner extended to the middle of the highway.

TORT for personal injuries caused by the negligence of William B. Taylor, alleged to be the servant of the defendant, in building fires in front of the premises of the defendant, along the line of the Jerusalem Road, so called, a public highway in the town of Cohasset, whereby the horse which the plaintiff was driving was caused to run away, and the plaintiff thereby severely injured.

At the trial in the Superior Court, before *Brigham*, C. J., it was admitted that the Jerusalem Road was a public highway, and that the premises were the property of the defendant. It appeared in evidence that the defendant's lands, at some distance back from the road, were first cleared by Taylor, that the bushes

and brush thereon were first cut, piled in heaps and burned ; that after thus clearing said grounds back from the road, Taylor proceeded to clear up the defendant's grounds along the road within and without the boundary of the road in front of the defendant's premises in the same manner ; that Taylor cut the brush and bushes along and within the limits of the road and piled them up in heaps within two feet of an old stone wall marking the boundary of the road, in front of the defendant's premises and on the side next thereto, and set fire to three heaps thus made.

Taylor was called as a witness for the defendant, and testified, among other things, that the defendant gave him general orders to mow and burn the bushes on his, the defendant's, lands, and generally to clear up his lands, that he had no special orders from the defendant ; that he had done such business for many years, and that he did the work in the same manner as he always did in clearing lands. He further testified that Luce was there, after he had cleared a part of the grounds back from the road and burned some of the brush, and directed him to go on and clear up the lands.

The defendant testified that Taylor came to him for employment to clear up his lands, that he told Taylor to go ahead and clear them up, that he went down after Taylor had cleared up the back part of his premises, saw that the bushes had been burned, and directed him to proceed and clear up his front lands, and that he gave no instructions as to fires one way or the other.

Among other things, to which exceptions were taken, the judge instructed the jury, that if the defendant employed Taylor to clear up land without any directions or restrictions as to the mode of clearing the land, he authorized Taylor to do the work in the usual and ordinary mode ; and if burning brush was within that usual and ordinary mode, and especially if the defendant knew that Taylor was doing the work by burning brush, and made no objection to it, he authorized the burning of the brush ; that if the defendant employed or directed Taylor to clear up land, outside the limits of his estate along its boundaries and within the limits of the highway on which the plaintiff was travelling, the same rule applied to Taylor's authority ; that an employment of Taylor to clear up the defendant's land only, did not imply an employment to clear up land without the boundaries of the de-

fendant's land and within the limits of the highway upon which the plaintiff was travelling, although along the boundaries of the land; that the liability of a master for the acts of his servant might extend beyond his own land, and if the master authorized acts which caused injury to another upon land of another person, the master would be liable for the acts of the servant.

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

G. M. Reed, (*C. A. Reed* with him,) for the plaintiff.

H. D. Hyde, for the defendant.

AMES, J. We see no valid objection to the instructions given at the trial. Whatever rights the defendant might have as owner in fee of a portion of the soil within the limits of the highway, there is no doubt that the extent of his actual occupation was plainly indicated by visible bounds. A general employment of a servant or agent "to clear up his land" does not necessarily import, under such circumstances, a purpose on the part of the employer to cut away the bushes and rubbish within the limits of the highway, even though his title, subject to the public easement, should literally extend to the thread of the way. The lot which he occupied, and which was all that he could have occasion "to clear up" for any purposes of husbandry, may have been all that he was speaking of, and all that he meant that Taylor should go to work upon. The extent of the authority which he gave Taylor was a question for the jury, and the terms made use of are not inconsistent with the theory that in those terms he was speaking only of the land which he occupied. The instructions covered all the exigencies of the case, and were as favorable as the plaintiff had a right to require. *Exceptions overruled.*

**JEREMIAH CROWLEY vs. HENRY D. HYDE & another,
assignees.**

Suffolk. Nov. 10, 1874. — Jan. 9, 1875. WELLS & DEVENS, JJ., absent.

The general order in bankruptcy, made by the Supreme Court of the United States, under the U. S. St. of 1867, c. 176, § 10, providing that notice of the time and place of the sale of a bankrupt's real estate "shall be at least twenty days before such sale," is directory only, affecting the accountability of the assignee, but not the title of a purchaser in good faith.

CONTRACT for money had and received by the defendants to the plaintiff's use. In the Superior Court judgment was ordered for the defendants on agreed facts in substance as follows, and the plaintiff appealed to this court.

The defendants, as assignees of a bankrupt, sold a parcel of his real estate, subject to certain mortgages, at public auction, and the plaintiff was the purchaser thereof. The sum now sued for was paid by the plaintiff to the defendants' agent, in compliance with the terms of the sale requiring \$600 to be paid down by the purchaser. Notice of the sale was given, but not twenty days before the sale, as required by General Order 21 of the Supreme Court of the United States. The defendants offered to tender the plaintiff a good and sufficient deed of the property within the period of fifteen days, but the plaintiff waived the tender, and stated that he made no objection to the title, but only declined to take the deed and complete the purchase because of his inability to pay certain mortgages due on the property, and subject to which the property was sold. At the time he waived a tender of the deed, the plaintiff had had the title examined, but this did not include the doings of the assignees in advertising and selling the property, and he did not have actual knowledge of the want of twenty days' notice of sale, and did not discover it for a number of days after the said period of fifteen days, when for the first time the plaintiff claimed to have the money returned to him.

G. W. Phillips, for the plaintiff. The United States Bankrupt Act, St. 1867, c. 176, § 10, gives the Supreme Court authority to make general orders "for regulating the duties of the various officers of the District Courts in Bankruptcy," and

"generally for carrying the provisions of this act into effect." General Order 19 provides that the assignee shall prepare a complete inventory of all the property of the bankrupt that comes into his possession, and that "all sales of the same shall be by public auction, unless otherwise ordered by the court." General Order 21 provides that notice of the time and place of sale of real estate shall be "at least twenty days before such sale;" upon application to the court, for good cause shown, the assignee may be authorized to sell at private sale; and the court may, by order in special cases, dispense with newspaper and hand-bill advertisements. Here the assignees undertook to sell, at public auction, under Order 21; and gave notice by newspaper advertisement; but not for the required twenty days. The sale was therefore invalid. *Holbrook v. Coney*, 25 Ill. 543, 549. *Cleveland v. Boerum*, 27 Barb. 252, 254. *Gray v. Heslep*, 33 Misso. 238, 243. *Osborn v. Baxter*, 4 Cush. 406, 407. *Wellman v. Lawrence*, 15 Mass. 326, 330.

H. D. Hyde & M. F. Dickinson, Jr., for the defendants.

GRAY, C. J. The bankrupt act provides that upon the execution of the assignment all the property of the bankrupt, of every kind not specifically exempted, shall vest in the assignee, and all debts and rights of action for or of redeeming property of the bankrupt, "with the like right, title, power and authority to sell, manage, dispose of, sue for and recover or defend the same, as the bankrupt might or could have had if no assignment had been made." The further provision that he may, "under the order or direction of the court," redeem or discharge any mortgage or incumbrance, or sell subject to it—like that authorizing the court, upon petition and for cause shown, to make an order concerning the time, place and manner of selling unincumbered property—does not affect the general powers of the assignee, when no special order is made. U. S. St. 1867, c. 176, §§ 14, 15.

The regulations contained in the General Orders, framed by the Supreme Court of the United States under § 10, concerning the notice to be given of such sales, must be deemed, like the corresponding provisions of our own St. of 1861, c. 104, in the case of insolvent debtors, to be directory only, affecting the accountability of the assignee, but not the title of those who purchase in good faith from him. *Tuite v. Stevens*, 98 Mass. 305.

The case differs from that of *Osborn v. Baxter*, 4 Cush. 406, in which an express requirement of the bankrupt act of 1841 had been disregarded by the court in an order for a sale by an assignee appointed under that act; and from *Wellman v. Lawrence*, 15 Mass. 326, which was a case of a sale by an administrator, who had no title in the estate, but a mere power to be exercised in strict compliance with the statutes of the Commonwealth.

The plaintiff has therefore no ground of objection to the title offered to be conveyed to him by the assignees, and no right to recover back the money paid under the contract of sale.

Judgment for the defendants.

CHARLES ADAMS, JR. vs. INHABITANTS OF SWANSEA.

Suffolk. Nov. 23, 1874. — Jan. 9, 1875. AMES & DEVENS, JJ.,
absent.

On the issue whether a female pauper had a settlement in the town of S., derived from her grandfather, there was evidence that the grandfather was born in that town in 1759. An aged witness testified that he knew a lot of land near the line between the towns of R. and S., which he was accustomed in his youth to see and hear people of the town point out and speak of as the lot of the father of said grandfather, the lot where he lived. It also appeared in evidence that in 1790 a part of the town of S. had been set off and made another town; and it was provided by statute that persons born in the limits of the new town, and becoming chargeable for support, should be the poor thereof. *Held*, that the burden of proof was on the plaintiff to show that the pauper's grandfather had a settlement within the present limits of the town of S.; and that there was no evidence to warrant a judge, who tried the case without a jury, in so finding.

CONTRACT by the treasurer of the Commonwealth to recover the amount paid by the Commonwealth to the state lunatic hospital at Taunton, for the support of Mary Handy, an insane pauper. Trial in the Superior Court, before *Brigham*, C. J., without a jury, who, after judgment for the plaintiff, allowed a bill of exceptions, the only parts of which, now material, were as follows:

Mary Handy was unmarried, and when committed to the asylum neither her father, mother, grandparents, or great-grandparents were living. She was the daughter of John Handy, who

was the son of Russell Handy, who was the son of Robert Handy. The plaintiff claimed that Mary Handy's legal settlement was in Swansea, through the birth of her grandfather, Russell Handy, in that town, in the year 1759. The only evidence of the birth-place of Russell Handy was a record of the town of Swansea, produced by the clerk thereof, in which appeared this entry: "Russell Handy, son of Robert Handy and Rachel, his wife, was born April ye 1st, 1759." The only other evidence of Russell Handy's birth, of the residence of Robert Handy, or of Russell Handy, in that part of Swansea, which, since 1790, when the town of Somerset was incorporated, has constituted the town of Swansea, was afforded by the testimony of William Wood, now of Swansea, seventy-two years of age, and a son of a brother of Russell Handy's wife, who testified that he knew of a lot of land near the line between the towns of Rehoboth and Swansea, which he was accustomed, in his youth, to see and hear people of the town point out and speak of as the "Robert Handy lot," and "the lot where Robert Handy lived.*"

The defendant objected that the evidence was not sufficient to fix the settlement of Mary Handy in the present limits of Swansea rather than in Somerset, which was formerly a part of Swansea. The judge declined so to rule, but found that Mary Handy's legal settlement, for the purposes of this action, through the birth of her grandfather, Russell Handy, in Swansea, in 1759, and his residence, and the residence of his father, Robert Handy, there, as testified of by William Wood, was in Swansea, and the defendant was chargeable for the support of Mary Handy while in the lunatic hospital, as an insane person. The defendant alleged exceptions.

J. Brown, for the defendant. 1. The legal evidence to show that Mary Handy's settlement was in the town of Swansea was not sufficient to establish that fact. It was not shown that Robert Handy, or Russell Handy his son, born in wedlock April 1, 1759, ever gained a settlement in Swansea by residence, as required by law. By the St. of 1692, (4 W. & M.) Anc. Chart. 251, a residence of three months in a town, without being warned out, gave a settlement; and by the St. of 1701, (13 W. 3) Anc. Chart. 364, the

* The town of Somerset does not adjoin Rehoboth.

term was extended to twelve months, and so the law continued until April 10, 1767. From that time until the St. of 1789, c. 14, there was no mode by which a settlement could be gained except by the approbation of the town. There was no proof that Robert or Russell Handy, or any of their posterity, ever resided in Swansea a single month. They therefore never acquired a settlement by residence as required by the law then in force. Neither does it appear affirmatively that any of them were citizens of the town or state. The absence of evidence that a tax was ever paid by any of them is a significant fact.

It has never been held in this Commonwealth that the accident of birth within the corporate limits of a town gave a settlement therein. By the common law, bastard children have their settlement in the parish where born, but "all other children have their primary settlement in their father's parish." 1 Bl. Com. 363, 459. But in the case of bastards there are many exceptions to this rule, such as cases of fraud, vagrancy, birth in a licensed hospital, &c., in which cases their settlements are held to be where the mother belongs. But Russell Handy, being a legitimate child, had the settlement of his parents. It would be a forced construction of the statutes in force in 1759 to hold that an infant breathing the first few days or weeks of its existence within the corporate limits of a town gained a settlement, while adults must reside there one year without a warning. At that time, in such cases as this, what would make a town chargeable for the support of a person was fixed by statute here, and not by the common law of England. It was held, in the case of *Somerset v. Dighton*, 12 Mass. 383, and in *Danvers v. Boston*, 10 Pick. 513, that the residence of a minor in a town for more than one year prior to the St. of 1767, without being warned, gave no settlement there. And after April 10, 1767, birth in a place gave no settlement there. *Blackstone v. Seekonk*, 8 Cush. 75. *Shirley v. Watertown*, 3 Mass. 322. In *Berkley v. Somerset*, 16 Mass. 454, it was held that the son of a person who had been warned out of town gained a settlement in the town by a residence of one year in the town after he came of age, prior to 1767, and no suggestion was made that his birth, which happened there, gave him a settlement. In *Newton v. Braintree*, 14 Mass. 382, it is impliedly conceded that birth in a place prior to April 10, 1767, gave no settle-

ment, but the illegitimate child held and followed the settlement of the mother. There is no valid reason for holding that birth would not give a settlement in a place after the Statute of 1767 took effect, but that it would give it prior thereto; for in the one case settlement could only be acquired by approbation in town meeting, while in the other it could only be acquired by residence of one year. And these are the positive enactments of law and should fix the rule in regard to settlements, especially as there is no authenticated case where this court from the earliest times has held that a settlement could be held here except within the rules prescribed by statute. *Danvers v. Boston*, 10 Pick. 513.

2. The evidence of Wood, who was born forty-three years after Russell, and who testified as to what he had heard people say in regard to a place, at least half a century after the birth of Russell, was inadmissible. *Wilmington v. Burlington*, 4 Pick. 174. *Brain-tree v. Hingham*, 1 Pick. 245. If it were competent, it proved only that the lot was "near the line between the towns of Rehoboth and Swansea." It did not prove that the lot was in Swansea, neither did it prove that Robert Handy lived there a year prior to 1767, or at the birth of Russell, nor when he lived there. For aught that appeared, he might have lived there continuously from April 10, 1767 to 1789, and yet not gain a settlement by such residence, for an approbation of the town during that period was necessary to give a settlement. The legal evidence of settlement, therefore, rests upon the record of the birth of Russell Handy alone. *Hingham v. South Scituate*, 7 Gray, 229. *Monson v. Chester*, 22 Pick. 385.

3. If birth was sufficient to give settlement, the burden of proof was on the plaintiff to show affirmatively that the birth occurred in the present limits of Swansea instead of in Somerset. The burden of proof was therefore upon the plaintiff to show that the settlement of Russell Handy, whether by birth or his father's residence, was in the present limits of Swansea and not in Somerset. Having offered no competent evidence of that fact, the plaintiff fails to establish his case. *New Bedford v. Middleborough*, 16 Gray, 295.

J. Willard, for the plaintiff. The record of Russell Handy's birth was competent to show his settlement by birth in Swansea, in 1759: and such a mode of settlement was not barred until

the St. of 1767, (7 Geo. 3,) Anc. Chart. 662. *Blackstone v. Seekonk*, 8 Cush. 75, 76. Leavitt's Summary, 9. 1 Bl. Com. 362. This descended to Mary Handy as a derivative settlement, and warranted the judge's finding. 1 Bl. Com. 363. St. 1793, c. 34. The uncontradicted evidence of Wood tended also to show such a residence by Robert Handy as gave him a settlement by residence under 12 & 13 Wm. 3. Leavitt's Summary, 9-16. It also tended to show that the settlement was in the present limits of Swansea, for which it was competent evidence. *Kellogg v. Smith*, 7 Cush. 375, 378. *Thomas v. Jenkins*, 6 A. & E. 525. In *Hall v. Mayo*, 97 Mass. 416, and similar cases, the evidence rejected was of the exact position of a certain house, to fix a private boundary line. Here Wood's testimony was, in effect, to fix the line between Somerset and Swansea.

COLT, J. The plaintiff claims that Mary Handy, to recover for whose board at the lunatic hospital this action is brought, had her legal settlement in the present town of Swansea, acquired through the birth of her grandfather Russell Handy, the son of Robert, in that town in the year 1759. The present adjoining town of Somerset was incorporated in 1790, and embraces territory which till then had been part of Swansea. It was provided in the act of incorporation of Somerset, that those born in the limits of that town, who should thereafter become chargeable for support, and had not gained a legal settlement in any other town, should be the poor thereof; and, by the act of 1793, c. 9, that those who, before the passage of the prior act, had gained their settlement by birth or otherwise in that part of Swansea which now constitutes the town of Somerset, in case they had already, or should thereafter, become chargeable for support, should be considered the proper poor of the latter town. The burden of proof was therefore upon the plaintiff to show that the settlement of Russell was acquired within the present limits of Swansea. The case was tried without a jury, and the findings of the judge are conclusive as to all facts, where there is competent evidence to warrant the result. It is not a question of the weight or sufficiency of the evidence. The difficulty is that there was in this case no competent evidence that the birth of Russell, if allowed to be sufficient at that time to give him a settlement, was within the present limits of Swansea.

The only evidence relied on was that of an aged witness who testified that he knew of a lot of land, near the town line, which in his youth was spoken of and pointed out to him by the people of the town as the Robert Handy lot, and the lot where he lived. This was hearsay evidence, which comes within none of the exceptions to the general rule for its exclusion. The question was not one of pedigree; nor was it one of boundary, which, if public, or in its nature public, may be proved by reputation, or, if private, by the declarations of deceased owners, accompanying the act of pointing out a line. Its sole purpose was to fix the location of the lot where Robert Handy, the father of Russell, lived at some period in his life. If competent for such purpose, it is difficult to see how, with the aid of any known legal presumption, it tended to fix the birthplace of Russell on that lot, or that Robert lived there at the time. It is settled that hearsay is not admissible to prove the place of a person's birth; *Wilmington v. Burlington*, 4 Pick. 174; that the declaration of a pauper as to where he was born, or that he was warned out of town, cannot be admitted; *Braintree v. Hingham*, 1 Pick. 245; and that family tradition or statements on the land as to the place where a house formerly stood, to which reference was made in a deed, for the purpose of locating a line, are not competent evidence. *Hall v. Mayo*, 97 Mass. 416. *Long v. Colton*, ante, 414.

Unless the settlement of Russell can be established within the present limits of the defendant town, this action fails, and it is unnecessary to consider the other questions raised by the defendant's exceptions.

Exceptions sustained.

PARKER L. RIGGS vs. WILLIAM H. HAWLEY.

Suffolk. Nov. 12, 1874. — Jan. 9, 1875. WELLS & DEVENS, JJ., absent.

In an action on a promissory note, the plaintiff offered evidence that he had been in partnership with the defendant, and upon its dissolution there was a settlement between himself and the defendant, and a certain sum was found to be due him; that the note in suit and other property was given in satisfaction thereof. The defendant's evidence tended to show that the sum mentioned was not the true indebtedness, which was settled by the transfer of the property; that the note is

116 596
154 453

suit was subsequently obtained without consideration; that if the sum stated was assumed at the time of the settlement to be the true indebtedness, the amount was incorrect; and that the note was obtained by fraud and misrepresentation. The judge, after giving appropriate instructions not excepted to, instructed the jury, at the request of the plaintiff, that if the parties made a settlement which included disputed claims about which there had been a difference or discussion, they were bound by the settlement, unless it was procured by fraud or misrepresentation. *Held*, that the defendant had no ground of exception.

CONTRACT on a promissory note, signed by the defendant, for \$186.73, payable to the plaintiff or order. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The plaintiff had been in partnership with the defendant and one Burr, under the name of Hawley, Burr & Riggs. At the trial he offered evidence tending to show, that, upon his withdrawal from said firm, or subsequently, there was a settlement between himself and Hawley and Burr; that the sum of \$1600 was found due him; that the smoke-houses and fixtures of Hawley and Burr were transferred to him in part payment of this sum; and that this note with two others were given for the balance thus found due.

The defendant offered evidence tending to show that said sum was not the true indebtedness, and that, at the settlement, the real indebtedness was fully discharged by the transfer of the property; that these notes were subsequently obtained without further consideration; and that if the amount claimed by the plaintiff was assumed by the parties at the settlement to be the true amount due, and these notes were given for the balance, still that the real indebtedness was much less than the amount then found due, and that these notes, being in excess of the real indebtedness, were without consideration. The defendant also offered evidence tending to show that the notes were obtained by fraud and misrepresentation.

The judge, at the close of the instructions to the jury,—which, as to other matters, were pertinent to the issue, and not excepted to,—added, upon the request of the plaintiff, the following: “If the parties made a settlement which included disputed claims, about which there has been difference or discussion, they are to be bound by that settlement, unless one party is able to show that it was procured by fraud or misrepresentation.”

The jury returned a verdict for the plaintiff for the amount of the note and interest ; and the defendant alleged exceptions.

I. Knowles, Jr., for the defendant.

No counsel appeared for the plaintiff.

ENDICOTT, J. This was a controversy between partners, whether a final settlement between them was binding and conclusive. It appeared in evidence that at the settlement it was agreed that \$1600 was due the plaintiff, that certain partnership property was assigned to him in part payment, and the note in suit, with two others, was given for the balance. The defendant offered evidence that \$1600 was not the true indebtedness ; that it was in fact much less ; that what was due was paid by the transfer of the property ; that the note was without consideration, and procured by fraud and misrepresentation. Precisely what evidence was offered by the defendant does not appear ; but, from the nature of the case, the controversy must have been in regard to a portion of the items making up the \$1600, and whether they were due or not to the plaintiff.

After instructing the jury upon the matters pertinent to the issues presented, to which no exceptions were taken, the presiding judge, at the request of the plaintiff, ruled that "if the parties made a settlement, which included disputed claims, about which there had been difference or discussion, they are bound by that settlement, unless one party is able to show that it was procured by fraud and misrepresentation."

Even if the settlement was based on an account stated, it does not follow, as contended by the defendant, that this instruction precludes him from showing that any particular item was improperly included in the sum agreed upon, by mistake, accident or inadvertence ; if such a question arose upon the evidence at the trial, we must presume that proper instructions were given. But the instruction had reference to another aspect of the evidence, namely, whether the sum agreed upon was the result of a compromise, there being difference and discussion in regard to the disputed claims. As this instruction was given by the court at the request of counsel, we must presume there was evidence to which it would apply, especially as no objection was taken to the ruling because there was no evidence, and the bill of exceptions does not negative the fact.

If the settlement was the result of a compromise, it is, in the absence of fraud, binding and conclusive. The items, in such case, are not to be inquired into. It is sufficient to render the settlement valid, that there were questions in dispute between the parties which have been decided. *Barlow v. Ocean Ins. Co.* 4 Met. 270. *Leach v. Fobes*, 11 Gray, 506. *Kerr v. Lucas*, 1 Allen, 279. Chit. Con. (11th Am. ed.) 46, and cases cited.

Exceptions overruled.

SOLOMON A. WOODS vs. RICHARD N. OAKMAN, assignee.

Suffolk. Nov. 10, 1874. — Jan. 11, 1875. WELLS & DEVENS, JJ., absent.

A. sold a machine to B. for \$385, for which notes were given, but the machine was by the terms of sale not to become B.'s property until payment, and upon delivery a writing was signed to that effect. Subsequently B. wrote to A. for another machine "like the one we had of you before, same size." A. replied, "We shall have another in a few days which we can send you, just same as the other you had; price, \$410." B. then wrote, ordering the machine, "same size as we had of you before." The machine was delivered, and no notes or contract given; and B. soon after became bankrupt. Held, in an action for the conversion of the second machine, against B.'s assignee, that the letters showed, in language free from ambiguity, a contract of sale, without conditions or reference to the terms of the previous sale; and that extrinsic evidence was not admissible to explain it.

TORT for the conversion of a moulding machine. Trial in the Superior Court, before Putnam, J., who reported the case to this court in substance as follows:

The defendant is assignee of the firm of Richardson & Co., bankrupts, and took this machine as part of the property of the bankrupts. The action was brought after a demand and refusal, and the requisite preliminary notices. The plaintiff, to prove his title to the machine, offered in evidence three letters, one dated June 4, 1872, from Richardson & Co., to the plaintiff; one dated June 6, 1872, being reply of Richardson & Co. to the plaintiff; and one dated June 11, 1872, ordering the machine, by Richardson & Co. [The material parts of these letters are stated in the opinion.] It was agreed that the parties never saw each other in reference to this machine, and that the whole negotiation between them, so far as this machine was concerned, except as hereinafter stated, was embraced in these three letters. The machine was

sent by the plaintiff to Richardson & Co., immediately after the receipt by him of their letter of June 11.

The plaintiff then offered to show that, prior to this time, another moulding machine, similar to this, had been delivered by him to Richardson & Co.; that it was delivered on an agreement that Richardson & Co. should pay for it on three and four months' credit, the machine meanwhile to be leased by the plaintiff to Richardson & Co., until such payments were made, and that it was leased accordingly; that certain correspondence passed between them in reference to such machine, by letters; that when the previous machine was delivered, Richardson & Co. were notified by the plaintiff that a lease was required according to their custom, and that they therefore signed a lease, dated December 19, 1871. This lease was made part of the report. By its terms, the machine was to remain the property of the seller until the notes given for the price should be paid. The plaintiff also offered to show that at the time the first machine was bought, another machine was partially negotiated for on the same terms, and that Richardson & Co. subsequently admitted to the plaintiff that they ought to sign a lease of the machine in controversy. This, however, was after Richardson & Co. became insolvent, and had notified their creditors to attend a meeting to act upon their insolvency, and no lease was ever signed.

The plaintiff contended that the clause in the letter of June 6, 1872, "just same as the other one you had," referred to the terms of the previous sale, and that if not, it was ambiguous, and that the evidence offered was admissible, as tending to show that the parties meant by it, upon the "same terms" as before, and that they intended at the time that this second machine should be leased like the other, and that it was not to be an absolute sale.

The judge excluded the offer, and ruled that the three letters, of June 4, 6 and 11, showed an absolute sale; that there was no ambiguity in their meaning, and ordered a verdict for the defendant, to which ruling the plaintiff excepted, and the case is reported by agreement of parties, upon this ruling. If it is correct, judgment is to be entered upon the verdict. If incorrect, a new trial is to be ordered.

B. Dean, for the plaintiff.

E. S. Mansfield, (*C. Allen* with him,) for the defendant.

ENDICOTT, J. The question here raised is, whether the letters by which this machine was purchased contain, in language free from ambiguity, a contract of sale, without any conditions or reference to the terms of a previous sale of a similar machine. Upon a careful examination of these letters, we fail to find any such reference to the previous sale and the terms thereof, as the plaintiff contends is to be found in the language used.

A moulding machine was purchased of the plaintiff by Richardson & Co. in December, 1871, for \$385, for which notes were given, but the machine was not to become the property of Richardson & Co. till the notes were paid, and when the machine was delivered, a lease to this effect was executed by the parties. In June, 1872, Richardson & Co. wrote for another machine "like the one we had of you before, same size." To this the plaintiff replied, "We shall have another in a few days, which we can send you just same as the other you had. Price is \$410." Richardson & Co. thereupon order the machine of the "same size as we had of you before." The machine was sent; no lease or notes were given, as in the previous sale.

It is clear that the words "just [the] same," in the plaintiff's letter, refer to the machine, and not merely to the words "send you," and cannot be held capable of the construction, send you on just the same terms as we sent the other. The price named, also, is different from the former, showing it is the machine to be sent which is to be the same, not the terms of the sale. No reference is made in either of the letters of Richardson & Co. to the terms of the former sale, but the machine is to be the same in size and character. There is nothing equivocal or ambiguous in the language which can admit extrinsic evidence to explain it. The letters show a contract for the sale of a machine similar in size and construction to one previously bought, and for a certain price. As a delivery followed, the title passed to Richardson & Co., and, upon their bankruptcy, to their assignee.

Judgment on the verdict.

INDEX.

ABORTION.

1. At the trial of an indictment on the Gen. Sts. c. 165, § 9, for procuring an abortion, two of the witnesses for the government testified, with great particularity, that the act was performed at a place stated on a certain day named in the indictment. The remaining witness stated that it was on or about that day, that he was not sure of the date. The defendant introduced evidence tending to show that on this day, the day before and the day after, he was one hundred miles away from the place named. The defendant requested the court to instruct the jury "that there was no evidence in the case which would warrant the jury in finding that the defendant did the act complained of upon any other day than the day named in the indictment, and if the jury are satisfied that the defendant did not do the act upon that day, that they cannot convict." The judge declined to give this instruction, and instructed the jury that it need not be proved that the offence was committed on the exact day alleged; that if the jury found that the witnesses for the government were in error as to the date, this might be considered upon the question of the degree of credit they were entitled to, and that if the jury were not satisfied beyond doubt that the defendant performed the operation as alleged, they should acquit him. *Held*, that the defendant had no ground of exception. *Commonwealth v. Snow*, 47.
2. An indictment under the Gen. Sts. c. 165, § 9, averred that the defendant maliciously and without lawful justification thrust a certain instrument "into the body and womb of one Georgiana Goff, the said Goff being then and there pregnant with child, with intent thereby, then and there, to cause and procure the miscarriage of the said Goff." *Held*, that the indictment sufficiently alleged that the act charged was committed upon a woman. *Held*, also, that the intent was sufficiently alleged to be the intent of the defendant. *Commonwealth v. Boynton*, 843.

See ACCOMPLICE; INDICTMENT, 5.

ACCOMPLICE.

On the trial of an indictment, under the Gen. Sts. c. 165, § 9, for procuring a miscarriage, the woman upon whom the operation is alleged to be performed is not an accomplice; the rule in relation to the corroboration of an accomplice does not apply; and the defendant has no ground of exception to a refusal of the judge so to rule, and to an instruction that the jury, if they found that the defendant did the acts charged at the request of the woman,

"should carefully consider her connection with those acts in reference to her testimony, and should scrutinise her statements with peculiar care on that account." *Commonwealth v. Boynton*, 343.

ACCOUNT.

See EXECUTOR AND ADMINISTRATOR, 7-9, 12-17.

ACCOUNT ANNEXED.

See EVIDENCE, 12; PLEADING, 4, 6; VARIANCE.

ACCOUNT STATED.

See LIMITATIONS, STATUTE OF, 4.

ACTION.

1. The owner of a building which has a store therein does not, by letting the store, become exempt from liability for damages to persons having lawful occasion to use said store, caused by an opening in the sidewalk in front of the store which was left there in the original construction of the building, if he is otherwise liable. *Larue v. Farren Hotel Co.* 67.
2. The owner of a horse and carriage is not liable for an injury caused by the negligent driving of a borrower, to a third person, if they were not being used at the time in the owner's business. *Herlihy v. Smith*, 265.
3. It is no defence to an action brought by one citizen of this state against another, on a judgment recovered in a suit between the same parties in a court of another state having jurisdiction of the parties, and in which the defendant appeared, that the plaintiff took an assignment of the cause of action without consideration from a citizen of the other state in order to prevent the defendant when sued there from removing the case into the Circuit Court of the United States. *Goodrich v. Stevens*, 170.
4. A man who deposits money in a savings bank in the name of his wife, and has the bank book therefor made in her name and delivered to her, cannot maintain an action against the bank for its refusal to pay the money to him. *Sweeney v. Boston Five Cents Savings Bank*, 384.
5. One who makes a valid conveyance of real estate subject to a verbal agreement that the grantee shall support the grantor and his family, and give back a mortgage or life lease of the property, may, upon the refusal of the grantee after part performance to fulfil his verbal promise, recover the value of the property conveyed, deducting so much as he has received from the previous part performance of the agreement, or the value thereof. *Dix v. Marcy*, 416.

See CONTRACT, 1, 3, 11; CORPORATION; EXCEPTIONS, 19; LANDLORD AND TENANT; MONEY HAD AND RECEIVED; MONEY PAID; NUISANCE; PLEADING, I.; RAILROAD, 4; REPLEVIN, 1; SALE, 1; SURETY, 3; THEVER; VARIANCE; WAY, 16.

ADMISSIONS.

See EVIDENCE, 6, 7.

ADVERSE POSSESSION.

See QUIETING TITLE.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

1. A case was sent to an auditor to state the accounts between the parties. Upon the return of his report, an amended declaration which was relied on before the auditor, the defendant's answer and declaration in set-off, and the plaintiff's answer thereto, were all filed in court on the same day. The case was then recommitted to the auditor to find whether the questions raised by the answer to the declaration in set-off had been passed upon in the former report. *Held*, that it was to be inferred that the amended declaration was filed by leave of court. *Looney v. Looney*, 283.
2. Pending an action on a recognizance, the court may permit the magistrate by whom it was taken to file a new and corrected certificate thereof in place of the certificate previously returned by him, and may allow the declaration in the action to be amended to correspond with the new certificate. *Morrill v. Norton*, 487.

See EXCEPTIONS, 9; REPLEVIN, 3; TRUSTEE PROCESS, 1.

APPEAL.

1. A judgment in an action for breach of contract, rendered by the Superior Court for the plaintiff without assessing damages, is not a final judgment, and an appeal does not lie to this court. *Riley v. Farnsworth*, 223.
2. The judgment of the Superior Court on a case stated is conclusive upon all facts and inferences of facts involved in it, and no appeal lies therefrom to this court. *Keegan v. Cox*, 289.
3. In an action against a common carrier for the loss of a trunk, the case was submitted to the Superior Court on an agreed statement of facts, from which it appeared that a flood carried away a railroad bridge; that the cars on which was the trunk went through the opening in the bridge, and were with the trunk destroyed by fire, through no fault of the carrier; that the carrier, to avoid trouble and litigation in settling losses connected with the disaster, adopted a rule to pay \$50 to all claimants, where no value was declared at the time of shipment; that no value was declared in this case, and the agent of the company wrote a letter to the plaintiff declining to pay more than \$50, on the ground that the value was not declared at the time of shipment,

and offering to pay this amount. It was also agreed that if the plaintiff was entitled to recover, judgment for \$175 was to be entered for him. The Superior Court entered judgment for the plaintiff. *Held*, on appeal to this court, that the facts would warrant a finding that the judgment below proceeded upon the inference of fact that the letter of the agent admitted liability to some extent, and that the judgment should be affirmed. *For v Adams Express Co.* 292.

See ARREST; BRIDGE; EQUITY, 7.

ARBITRAMENT AND AWARD.

1. Evidence that upon the death of an arbitrator duly appointed by rule of court an entry was made upon the docket of the court of the appointment of another arbitrator, before whom the parties appeared and tried their case without objecting to his authority, is sufficient to warrant a finding as matter of fact that the parties originally assented to the appointment of the arbitrator. *Brigham v. Packard*, 195.
2. Upon an oral submission to arbitration, parol evidence is competent to show what was in controversy, and submitted to the referee. *Blackwell v. Goss*, 394.
3. A. bought a horse of B., and paid him for it, and, not being satisfied with the horse, returned it to B., who agreed to give him another. The horse died while in B.'s possession. The parties then agreed to submit to arbitration two questions, who was the owner of the horse at the time of its death, and what would be a fair adjustment of the loss occasioned by the death of the horse between the parties. The arbitrators found that B. should pay A. a certain amount. *Held*, that the award was binding. *Ib.*
4. The holder of a promissory note agreed with A., whom he sought to charge as indorser thereon, to submit the question of the genuineness of A.'s indorsement to referees, who decided that the indorsement was not genuine. The evidence was conflicting whether the parties intended their decision to be final. The judge, declining to instruct the jury, as requested by A., that the holder of the note was estopped by the decision of the referees to make any claim upon the note against him, instructed them that if the agreement was that if the referees decided the signature was not genuine, the plaintiff should take up the note and make no claim on A. for the amount, and the referees so understanding it, and acting thereon, decided that the indorsement was not genuine, and the holder, after notice of their award, took up the note, relinquishing any claim against the defendant, they might consider the award as conclusive against the plaintiff's claim; but if the submission was not intended by the parties to be final, but was only to obtain their opinion whether the holder should pay and take up the note at maturity, but without relinquishing his claim against A., then the award, though evidence in the case, was not conclusive. *Held*, that these instructions were sufficiently favorable to A., and not open to exception by him. *Huntman v. Nichols*, 521.

5. The testimony of a referee, under an oral submission to arbitration, that "he had no idea the reference was final," is admissible in evidence as a statement that he had not rendered final judgment upon the rights of the parties. *Ib.*

ARREST.

In an action on a recognizance conditioned that A. should deliver himself up for examination within thirty days, judgment was entered in the court below for the defendants on agreed facts from which it appeared that A. had been arrested on execution and entered into the recognizance, and that before the expiration of the thirty days the plaintiff accepted from A. a due bill for a less sum than the execution, and gave a receipt not under seal, declaring it to be "in discharge of all proceedings under said execution, provided that A. shall pay said due bill at maturity; until said maturity of said due bill, the liability of said A. under said execution is to remain as at present." The due bill was not paid. *Held*, on appeal, that although the receipt could not operate as a present discharge of the execution, or release of the judgment or the debt, or as an accord and satisfaction, yet that the facts agreed would warrant the inference of fact that the plaintiff intended to release A. from the arrest on the execution, or that it was intended to lead A. to suppose that he was so released, and that he omitted to deliver himself up in reliance upon the supposed discharge. *Held, also*, that upon an appeal it would be presumed in favor of the judgment that such inferences were drawn, and that neither the defendant nor a surety on the recognizance was liable. *Bullen v. Dresser*, 267.

See BANKRUPT, 1.

ASSAULT AND BATTERY.

1. On the trial of an indictment for an assault and battery with a pistol, there was evidence that a quarrel occurred between the defendant and A.; that the latter while retreating threw beer mugs at the defendant, who fired two shots from a pistol, one of which hit A. The defendant testified that he was in fear of his life; that he did not intend to hit A., and meant to frighten him and prevent him from further violence. *Held*, that whether the defendant was justified in firing the pistol was a question of fact for the jury, and that an instruction that a person who fires a pistol to frighten an assailant is guilty of an assault if he hits him, was erroneous. *Commonwealth v. Mann*, 58.
2. Evidence, that a woman, while walking on a pathway through a field, in the evening, was knocked down by a man, who got on the ground by her and holding her down pulled up her clothes and began to uncover her person, and, when she tried to get up, struck her in the face and tried still to uncover her, and put his hands on her legs and pinched them just above the knees, so that they were discolored for some time, that she cried out and the assailant got up and ran away, is sufficient to support an indictment against

the man for an assault with intent to ravish. *Commonwealth v. Thompson*, 846.

See INDICTMENT, 4, 5; MUNICIPAL COURT; VERDICT, 3.

ASSENT.

See EVIDENCE, 14; PAUPER, 2; PAYMENT, 1.

ASSESSMENT.

See BETTERMENT; CORPORATION; TAX.

ASSIGNMENT.

A declaration alleged that the defendant employed A. to build a house for him according to the terms of a contract in writing in the possession of the defendant; that after the execution of the contract, A. assigned to the plaintiff all sums of money then due and to become due to A. from the defendant for the erection of the building according to the contract; that the plaintiff notified the defendant of the assignment, and exhibited it to him, and he agreed to its terms, and promised the plaintiff to pay him all sums that should become due A. for the erection of the building; that thereafter a certain sum became due to A. under the contract, which the defendant refused to pay the plaintiff. It appeared by a copy of the assignment, annexed to the declaration, that A. assigned to the plaintiff all moneys due or to become due until a certain date for labor performed or to be performed by A. for the defendant. By the contract, the defendant was to pay A. a round sum, in instalments according to the progress of the work, for building a house for him. *Held*, that the declaration could not be construed as alleging a promise by the defendant to pay any sum not included in the assignment. *Held*, also, that the contract was not included in the assignment. *Keefe v. Flynn*, 563.

See ACTION, 3.

ATTACHMENT.

1. A mortgagee's interest in personal property in his possession, after breach of condition and before foreclosure, is not subject to attachment. *Prout v. Root*, 410.
2. An attachment made more than four months before proceedings in bankruptcy under the U. S. St. of 1867, c. 176, may be dissolved pending such proceedings, by giving bond under the Gen. Sta. c. 123, § 104. *Bruley v. Boomer*, 527.

See BANKRUPT, 2; RECEIPTOR.

ATTORNEY.

See BASTARDY PROCESS, 3; EVIDENCE, 10.

AUDITOR.

See AMENDMENT, 1; EVIDENCE, 12; EXCEPTIONS, 3, 10.

AUTREFOIS ACQUIT OR CONVICT.

See INTOXICATING LIQUORS, 27.

BAILMENT.

See ACTION, 2.

BANK.

See EVIDENCE, 11; JURISDICTION; LARCENY, 2, 4; SURETY, 2, 2.

BANKRUPT.

1. The arrest of a bankrupt, after the adjudication of bankruptcy, upon a warrant issued before that adjudication under the U. S. St. of 1867, c. 176, § 40, is unauthorized by law, and a bond given to procure release from such arrest is void. *Usher v. Pease*, 440.
2. An attachment made more than four months before proceedings in bankruptcy under the U. S. St. of 1867, c. 176, is not dissolved thereby; and the attaching creditor of the bankrupt may have a special judgment against the property attached. *Johnson v. Collins*, 392.
3. A. conveyed land to B. by a deed containing a covenant against incumbrances. The land was then subject to an attachment in favor of C. B. brought an action on the covenant against A. and attached his property. A., more than four months afterwards, was adjudged a bankrupt under the U. S. St. of 1867, c. 176, and obtained a discharge. After this, B. paid off the attachment in favor of C. *Held*, that B. was entitled to recover the amount so paid, and to have a special judgment therefor against the property attached in his action against A. *Ib.*
4. The general order in bankruptcy, made by the Supreme Court of the United States, under the U. S. St. of 1867, c. 176, § 10, providing that notice of the time and place of the sale of a bankrupt's real estate "shall be at least twenty days before such sale," is directory only, affecting the accountability of the assignee, but not the title of a purchaser in good faith. *Crowley v. Hyde*, 589.

See ATTACHMENT, 2; CONTRACT, 10; PLEADING, 1; RECEIPTOR, 1; REPLEVIN, 1.

BASTARDY PROCESS.

1. When a copy of the accusation, warrant and proceeding before the court or magistrate to whom a complaint under the bastardy act is made, are filed in the Superior Court, that court has jurisdiction of the case, and it may in its discretion allow the formal complaint to be filed at any subsequent term. *Reed v. Haskins*, 198.
2. The mother of the child is a competent witness at the trial of a complaint under the bastardy act, to show that in the time of her travail she accused the defendant of being the father of her child. *Ib.*
3. A supplementary complaint under the bastardy act, in the name of the complainant, may be signed by her attorney. *Burt v. Ayers*, 763.

4. A supplementary complaint under the bastardy act set forth all the former proceedings in which the complainant alleged that the defendant begot her with child at S., on or about a time mentioned, in the kitchen of a certain dwelling-house. It further alleged that on a certain day she was delivered of a child born alive and a bastard, and that she accuses the defendant of being the father of the child, and that he did beget her with child in said S., "as was alleged in the aforesaid complaint, and is hereinbefore recited." *Held*, that the allegations of the supplementary complaint were sufficient. *Ib.*
5. A person charged under the bastardy act with being the father of a bastard child, executed a penal bond, payable to the plaintiff, conditioned that he should appear at the next term of the Superior Court and answer to the complaint. At that term he was defaulted, and the case was continued without further action on the complaint. *Held*, that there was a breach of the bond for which nominal damages were recoverable. *Held, also*, that if, by the defendant's failure to comply with a subsequent order in the original process, a further sum should become due on the bond, the plaintiff could sue out a *scire facias* on the judgment, and obtain a new execution for the damages caused by such additional breach. *McGrath v. Conway*, \$60.

BETTERMENT.

1. The exemption of the real estate of charitable institutions from taxation, by the Gen. Sts. c. 11, § 5, cl. 3, is only from taxation imposed for the general purposes of government, and does not extend to taxation for local improvements under the St. of 1865, c. 159, or the St. of 1866, c. 174. *Boston Seamen's Friend Society v. Boston*, 181.
2. When the owner of an estate upon which a betterment has been assessed by the mayor and aldermen under the St. of 1865, c. 159, applies for a jury under § 8, the proceeding is in the nature of an application for an abatement of the tax, and the assessment by the jury is to be made as of the time when it was made by the mayor and aldermen, without regard to interest since that time. *Ib.*
3. The exemption of the real estate of incorporated agricultural societies from taxation by the Gen. Sts. c. 11, § 5, cl. 9, is only from taxation imposed for the general public purposes of government, and does not apply to taxation for local improvements under the St. of 1867, c. 106, § 1. *Worcester Agricultural Society v. Worcester*, 189.
4. A petition for a writ of certiorari to quash the proceedings by which a betterment tax had been assessed upon the real estate of an incorporated agricultural society alleged that the respondents had designedly omitted to assess any part of the expenditures for which the tax was laid upon houses of religious worship. The answer denied that houses of religious worship were designedly omitted from said assessment, but admitted that they were not included therein. The case was reserved on the petition, answer and a demurrer thereto. *Held*, that it did not appear that there were any houses of religious worship so situated as to be liable to the assessment. *Ib.*

See CERTIORARI, 5; TAX; WAY, 3, 4, 9.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BOARD OF HEALTH.

1. An ordinance of a city constituted two members of the board of mayor and aldermen and three members of the common council "a board of health of the city;" but neither the ordinance nor the joint rules and orders of the city council contained any provision as to the mode of appointment. The orders of each branch provided that all committees should be appointed by the mayor and president of the common council respectively. A board of health, consisting of two aldermen and three members of the common council, was jointly appointed by the presiding officer of each branch. *Held*, that the board was legally organized. *Taunton v. Taylor*, 254.
2. The order of the board of health of a city under the Gen. Sts. c. 26, forbidding the exercise of an offensive trade in a city, is a quasi judicial act, and can be revised only in the manner provided in the statute; and it is not competent for the defendant, in a suit in equity brought by the board of health to enjoin him from continuing an offensive trade, to prove that the trade is not a nuisance. *Id.*
3. An order of the board of health of a city forbidding the exercise of an offensive trade is to be construed liberally; and although it does not state expressly that the prohibited trade is a nuisance, it is sufficient, if it clearly shows that in the opinion of the board the exercise of such trade will be hurtful to the inhabitants or injurious to the public health, or be attended by noisome and injurious odors. *Id.*
4. A board of health of a city passed the following order: "Ordered, that the exercise of the trade or employment of preparing tripe, manufacturing neat's-foot oil, tallow and glue stock, and the boiling and trying of bones, hoofs, heads, refuse and partially decayed animal matter, and, as part of such trade or employment, the storing about the premises, where such business is carried on, of putrid meats, bones, heads, legs and the various other materials from which offensive smells emanate, which are used in such trade or employment, be and the same hereby is forbidden within the limits of the city." *Held*, that the order was a valid exercise of the power conferred upon the board of health by the Gen. Sts. c. 26. *Id.*
5. The board of health of a city passed a general order forbidding the exercise of an offensive trade within the limits of the city, and notified the defendant to abate the nuisance caused by his carrying on the forbidden trade. The defendant appealed from this order, and applied for a jury, which jury "decided that the order of the board of health should be altered as follows: That the defendant, having selected a suitable locality within the limits of the city, shall confer with the board of health after having obtained in writing the unanimous consent of the residents within a radius of one half mile of the same." The verdict was accepted by the Superior Court, and no further proceedings were had upon it. *Held*, that whether the verdict was valid or invalid, the order of the board of health remained in force, and

that on a bill in equity by the city, the continuance of the trade should be enjoined. *Ib.*

6. The board of health of a city has authority to bring in the name of the city a bill in equity to restrain the exercise of an offensive trade or employment which it has prohibited, and such bill may properly be signed by the mayor. *Ib.*

See CONSTITUTIONAL LAW, 2; EQUITY, 2.

BOND.

1. In an action against a surety on a bond, bearing in the appropriate place a signature apparently that of the principal above that of the surety, the answer was a general denial. The surety, at the trial, admitted his signature to the bond, but objected to the admission of the bond in evidence without proof of its execution by the principal. *Held*, that the bond was rightly admitted in evidence. *Valentine v. Wheeler*, 478.
2. The production of a bond by the obligee from his own possession is competent evidence that it has been duly delivered to him. *Ib.*
3. In an action against a surety on a bond, conditioned for the payment by the principal of all demands, acceptances, or indorsements and obligations for which the obligee should in any way become responsible on account of a firm of which the principal was a member, and for the saving the obligee harmless from any loss on account of any debt or liability of the firm, evidence that the principal obligor purchased goods of a third party; that the obligee accepted a draft purporting to be drawn by the firm; that the principal obligor said that he drew it; that it was indorsed by the third party as collateral security for a debt; is competent to show that the signature of the firm was genuine, and, in the absence of evidence that a draft was drawn against funds in the hands of the acceptor, sufficient to prove that the acceptance was given under the bond. *Ib.*
4. A. gave a bond, with sureties, to B., in a penal sum, conditioned to hold B. harmless from liability for any acceptances made by B. for A. After this, B. accepted a draft drawn by A., and the holder of it sued B. and recovered judgment. B. paid a sum less than the face of the judgment, and the judgment was entered as satisfied. *Held*, in a suit on the bond against one of the sureties, that B. was entitled to judgment for the penal sum. *Ib.*

See BANKRUPT, 1; BASTARDY PROCESS, 5; EXECUTOR AND ADMINISTRATOR, 4-15, 17; MONEY HAD AND RECEIVED, 2; SURETY.

BOOKS OF ACCOUNT.

See EVIDENCE, 5.

BOUNDARY.

Where the boundary line between adjacent lots of land is in dispute, evidence that a stone wall had stood between the lots for more than twenty years, and that the adjoining owners had occupied up to the wall and treated it as

a division wall, is competent evidence of the true line, although the wall is not referred to as a monument in any deed. *Coyle v. Cleary*, 208.

See DRED, 8; EVIDENCE, 24; FENCE.

BRIDGE.

The St. of 1871, c. 177, declares the bridge over the Connecticut River, between the towns of Northampton and Hadley, to be a public highway upon the acceptance by this court of the award of commissioners to be appointed under the act. It then provides that the commissioners shall determine the amount of the damages to the proprietors of the bridge, and what proportions of the damages shall be paid by the towns benefited and by the county of Hampshire; that the decree of the commissioners shall be made to this court for said county, and also to the bridge proprietors, to each of said towns, and to the county commissioners of said county; that the decree shall be binding upon all the parties interested, reserving a right of appeal to a jury; and that "if neither party shall so appeal to a jury within sixty days after receiving the award and decree of said commissioners, as aforesaid, then the same shall be absolutely binding upon all the parties interested therein." The commissioners made their award to this court, and it was filed in the clerk's office, but not during a term of the court; it was also made on the same day to the parties interested. The award stated the rulings of the commissioners on various questions of law which they therein reserved for the consideration of this court. At the next term of this court in said county, but more than sixty days after the award was made and filed, some of the parties interested claimed an appeal to a jury. *Held*, that in the absence of an appeal to a jury, the award of the commissioners was final, and that they could not reserve questions of law for the consideration of this court. *Held*, also, that the appeal to a jury was taken too late, and that the award must be accepted. *Northampton Bridge Case*, 442.

BROKER.

Evidence that a real estate broker has advertised a farm for sale, that his agent took several persons to the farm with a view to purchase, and talked upon the subject with others, one of whom testified that he had purchased the farm from the owner in person, paid him money on the farm, and moved himself and his goods upon it, is sufficient (no objection being taken to its competency) to warrant a finding that the broker had faithfully endeavored to sell the farm, and that the owner had made an agreement, binding upon him, to sell it. *Chapin v. Bridges*, 105.

See CONTRACT, 7.

BURDEN OF PROOF.

See CARRIER, 1; EXECUTOR AND ADMINISTRATOR, 14;
PAUPER, 7; WAY, 7.

CARRIER.

Evidence that A. delivered a box containing his property to a common carrier at one town to be carried to another town; that the box was directed to B. at the latter town; that A. had made efforts to find the box, but had not been able to do so; that he had made inquiries at both towns at the offices of the carrier; that he had not seen the box since he sent it; that he had inquired of B. about the box; is not sufficient evidence to maintain an action by A. against the carrier for the value of the box and its contents, although the defendant put in no evidence. *Morley v. Eastern Express Co.* 97.

See APPEAL, 8.

CASE STATED.

See APPEAL, 2, 3; ARREST; EQUITY, 6.

CERTIORARI.

1. Upon a petition of the mayor and aldermen of a city in which a railroad crossing was situated, and of the directors of the railroad corporation, under the St. of 1872, c. 262, § 1, for an alteration of the same, the order of the county commissioners required an alteration in the grade of the railroad. *Held*, that upon the petition of the railroad corporation, filed seven months after that order, but before any award of the special commissioners appointed under § 2, a writ of certiorari should issue to quash the order of the county commissioners. *Boston & Albany Railroad v. County Commissioners*, 73.
2. Under the St. of 1873, c. 355, a writ of certiorari may be ordered to be issued in vacation and returnable forthwith. *Ib.*
3. While a petition of the mayor and aldermen of a city in which a railroad crossing is situated, and of the directors of the railroad corporation, to the county commissioners under the St. of 1872, c. 262, for an alteration of the crossing, so as to allow the highway to pass under the railroad is pending, the mayor and aldermen are not authorized to join with the common council in changing the grade of the highway at the same place, even with the consent of the railroad corporation, and a writ of certiorari to quash an order of the city council to that effect will be granted upon a petition filed by an abutter, before any work has been done under the order. *Powers v. City Council of Springfield*, 84.
4. A writ of certiorari to quash an order of a city council, altering the grade of a highway at a railroad crossing, and awarding damages to the abutters, passed pending proceedings before the county commissioners for the same object, will not be granted upon a petition filed by an abutter after the work under the order has been, with his knowledge, commenced and prosecuted for more than a month and nearly to completion. *Noyes v. City Council of Springfield*, 87. 1
5. The misnomer of the owner of real estate in laying an assessment thereon is no ground for quashing the proceedings on certiorari unless it is shown that his rights were prejudiced thereby. *Worcester Agricultural Society v. Worcester*, 189.

See BETTERMENT, 4; EQUITY, 1.

CITY.

See BOARD OF HEALTH; CERTIORARI, 1, 3, 4; EQUITY, 1, 3; SEWER;
TOWN; WAY, 1, 2.

COMMON CARRIER.

See CARRIER.

COMMON LANDS.

See QUIETING TITLE, 2.

COMPLAINT.

See DRUNKENNESS; INTOXICATING LIQUORS, 8, 10-13.

COMPROMISE.

In an action on a promissory note, the plaintiff offered evidence that he had been in partnership with the defendant, and upon its dissolution there was a settlement between himself and the defendant, and a certain sum was found to be due him; that the note in suit and other property was given in satisfaction thereof. The defendant's evidence tended to show that the sum mentioned was not the true indebtedness, which was settled by the transfer of the property; that the note in suit was subsequently obtained without consideration; that if the sum stated was assumed at the time of the settlement to be the true indebtedness, the amount was incorrect; and that the note was obtained by fraud and misrepresentation. The judge, after giving appropriate instructions not excepted to, instructed the jury, at the request of the plaintiff, that if the parties made a settlement which included disputed claims about which there had been a difference or discussion, they were bound by the settlement, unless it was procured by fraud or misrepresentation. *Held*, that the defendant had no ground of exception. *Riggs v. Hawley*, 598.

CONDITION.

See SALE, 1, 2.

CONFLICT OF LAWS.

Where a negotiable promissory note, made in this Commonwealth and payable here, is indorsed in another state, the liability of the maker to the indorsee is determined by the law of this Commonwealth: *Woodruff v. Hill*, 310.

See INTOXICATING LIQUORS, 28; PLEADING, 1.

CONSIDERATION.

See CONTRACT, II.

CONSPIRACY.

1. In an action to recover damages for the conspiracy of the defendant and A. in inducing the plaintiff to take a forged note as collateral security for a

loan to A., who had also given certain due bills as security, evidence is inadmissible for the purpose of proving the validity of the due bills, that a third person had lent money to A. and had received the same due bills as security, and still retained similar due bills therefor. *Spaulding v. Knight*, 148.

2. If B. conspires with A. to defraud C. by inducing the latter to loan money to A., upon the security of a forged note, the fact that C. in making the loan also relied upon other securities and upon verbal representations made by B. of the ability of A. to repay the loan, will not prevent his recovering against B. in an action for the conspiracy, if C. also relied upon the forged note. *Ib.*
3. It is no defence to an action for conspiring to obtain money by false pretences that the person so obtaining the money intended to repay it. *Ib.*
4. In an action to recover damages for the conspiracy of the defendant in inducing the plaintiff to take a forged note as collateral security for a loan to A. it was admitted that the note was forged, and that the defendant said to the plaintiff that he knew nothing about it or the maker of it. The defendant requested an instruction that if he made a false representation as to the note, and had reasonable cause to believe that it was forged, yet if he did not absolutely know that the note was forged or that his representations were false, he was entitled to a verdict. *Held*, that this request was rightly refused. *Ib.*

CONSTABLE.

See REPLEVIN, 3.

CONSTITUTIONAL LAW.

1. The St. of 1874, c. 397, § 1, providing that "all divorces *nisi* heretofore decreed under and by authority of" the St. of 1870, c. 404, "shall be deemed and taken to be, and have the force and effect of, absolute divorces from the bonds of matrimony," and that the justices of this court, upon petition and notice, may authorize the party, against whom such divorce has been granted, to marry again, is unconstitutional and void. *Sparhawk v. Sparhawk*, 315.
2. The provisions of the Gen. Sts. c. 26, §§ 52, 57, giving a board of health the power to forbid the exercise within the limits of a city of any trade which is a nuisance or hurtful to the inhabitants, or dangerous to the public health, or the exercise of which is attended by noisome and injurious odors, or is otherwise injurious to their estates, and providing that during the pendency of an appeal to a jury the trade shall not be exercised, are constitutional. *Taunton v. Taylor*, 254.

CONTRACT.

I. Making.

1. Upon a contract in writing by which the subscribers agree "to and with each other" to associate themselves into a corporation for a specified pur-

pose, the name of which is to be determined by the members thereof, and to "pay to the treasurer of said corporation" the amount set against their respective names, an action may be maintained in the name of the corporation, after it is organized, against a subscriber, upon the allotment to him of the shares subscribed for. *Athol Music Hall Co. v. Carey*, 471.

See EVIDENCE, 14 ; FRAUDULENT REPRESENTATION, 2 ; PAUPER, 2 ; PAYMENT, 1 ; PLEADING, 5.

II. Consideration.

2. Where A., in consideration of a sum of money lent to him by B., and of a note made to him by B. for the payment of an additional sum in four months, makes and delivers to B. a note for the amount of both sums, payable in six years, together with an assignment, as collateral security for the payment thereof, of a contract relating to certain real estate, the promise of A. to pay his note at maturity, and the delivery of the collateral security, constitute a sufficient consideration for the promise contained in B.'s note to pay the sum therein expressed at an earlier date. *Backus v. Spaulding*, 418.
3. One who, in consideration of another's promissory note to him, promises the other to pay the latter's debt to a third person, can maintain an action on the note without showing performance of his promise. *Hubon v. Park*, 541.
4. The release of a party from the performance of a contract constitutes a sufficient consideration for his promise to account with the other party for moneys paid by the latter under the contract. *Cutter v. Cochrane*, 408.

See TOWN, 1.

III. Validity.

5. A. & B., bakers in F., bought of C. & D. their business as bakers in the same town, and their personal property connected with that business, and made a contract with them whereby C. & D. agreed "that they will not or either of them hereafter engage in the business of bakers in the town of F., and will not directly or indirectly engage in any business or do any act that shall interfere with the business thus purchased for the sale of bread on the several bread routes heretofore connected with said business," for five years. *Held*, that the contract was a valid one. *Held, also*, that C. & D. were liable, if one of them drove a bread cart in F. on his former routes and supplied his former customers with bread, acting as the hired servant of a baker in another town. *Bouelle v. Smith*, 111.
6. By a verbal agreement between A. and B., A. was to work for B. in the manufacture of bricks, and to have in consideration therefor one third of the profits of such manufacture, and the option of taking a conveyance of one third of B.'s farm, on which the brick-works stood, in case A.'s share of the profits amounted to one third the first cost of the farm. A. worked as agreed, and there were no profits. *Held*, in an action by A. to recover for his services, that the agreement to receive a share of the profits was a defence to the action, although the agreement in connection therewith as to

the conveyance was invalid under the statute of frauds. *Friend v. Pettigill*, 515.

See SELECTMEN; TRUST AND TRUSTEE, 2.

IV. Construction.

7. A. employed a real estate agent to sell his farm, and agreed in writing to pay him a certain sum "if it is sold to any party within a year from this date, or at any time thereafter, before I have given you thirty days' notice in writing of my intention to withdraw the property from the market." *Held*, that the clause relative to withdrawing the property from the market applied only to the time after the expiration of the year. *Chapin v. Bridges*, 105.
8. A contract, made by a book publisher with A., recited that the publisher was about to publish a book to be sold by subscription, through agents, in the United States and in Canada, and agreed to publish an advertisement of A. in the book, he paying a certain sum "for each and every copy sold and delivered to agents and others." A similar contract was made by the publisher with B., except that B. agreed to pay a certain sum "for every copy sold" by the publisher. Both contracts contained the clause that the publisher was to furnish, if requested, his certificate under oath as to the number of copies sold and delivered. Payments were to be made every three months from the date of publication, and A. and B. were not to be liable for copies sold after two years. In actions on these contracts by the publisher, he put in evidence that he had between 1500 and 2000 agents selling the work in the United States and in Canada, and that over 60,000 copies had been delivered by him to agents. There were also put in evidence the written requests of the agents for copies of the book, reports from agents of books subscribed for, charges made by the shipping clerk of books consigned to the agents, and carriers' receipts of books so consigned. There was also evidence that this was the usual way of selling books by subscription. There was no evidence of delivery into the hands of the individual subscribers. *Held*, that this evidence would warrant a verdict for the plaintiff for every copy sent to the agents; but not for copies sold to editors of newspapers in payment of advertising bills of the publisher. *Burr v. Crompton*, 493.
9. The owner of a mill leased it with the machinery in it for a term of ten years, and gave the lessee the option of purchasing it within three years at a price named. On the same day an agreement was executed by the parties, in which, among other provisions, the lessee agreed not to use the mill and machinery for the manufacture of shoe or packing boxes except for certain specified parties. The lessee, within the three years, took an absolute conveyance of the property from the lessor, and subsequently engaged in the manufacture of shoe and packing boxes for parties not excepted in the agreement. *Held*, that the restriction upon such manufacture terminated with the lease. *Buffum v. Breed*, 582.
10. A. sold a machine to B. for \$385, for which notes were given, but the machine was by the terms of sale not to become B.'s property until payment,

and upon delivery a writing was signed to that effect. Subsequently B. wrote to A. for another machine "like the one we had of you before, same size." A. replied, "We shall have another in a few days which we can send you, just same as the other you had; price, \$410." B. then wrote, ordering the machine, "same size as we had of you before." The machine was delivered, and no notes or contract given; and B. soon after became bankrupt. *Held*, in an action for the conversion of the second machine, against B.'s assignee, that the letters showed, in language free from ambiguity, a contract of sale, without conditions or reference to the terms of the previous sale; and that extrinsic evidence was not admissible to explain it. *Oakman v. Woods*, 599.

See PAUPER, 2.

V. *Performance and Breach.*

See CONTRACT, 4.

VI. *Rescission.*

11. Where the seller of goods is induced by the fraud of the buyer to receive in payment thereof the note of a third party, he cannot, without proving that the note is absolutely worthless, maintain an action on the original contract until he has returned or offered to return the note to the buyer. *Estbrook v. Swett*, 808.

See ACTION, 5.

CONVERSION.

See TROVER.

CONVICTION.

See INTOXICATING LIQUORS, 27.

CORPORATION.

The directors of a corporation voted that the treasurer be authorized and instructed to obtain the assistance of A. B. in making collections of unpaid subscriptions to the capital stock. Afterwards, they voted that the treasurer be authorized and instructed to obtain such legal counsel as he should see fit as to the proper legal manner to be pursued to collect unpaid assessments to the capital stock. *Held*, that these votes indicated sufficient authority for the institution of a suit by A. B. in the corporate name and behalf against a subscriber to the capital stock. *Athol Music Hall Co. v. Carey*, 471.

See CONTRACT, 1; EVIDENCE, 6.

COSTS.

See WAY, 11.

COUNTY COMMISSIONERS.

1. A board of county commissioners has the same power as any court to amend its records according to the truth, upon such evidence as the board in its discretion may deem sufficient. *Gloucester v. County Commissioners*, 579.

2. Upon a petition to the county commissioners under the St. of 1872, c. 262, § 1, for an alteration in the crossing of a railroad by a highway, a county commissioner, who resides in the city or town in which the crossing is situated, is disqualified by the Gen. Sta. c. 17, § 12, to act, unless a board cannot be organized without him. *Boston & Albany Railroad v. County Commissioners*, 78.

See CERTIORARI, 1, 3, 4; RAILROAD, 1-3; WAY, 2.

COVENANT.

See DAMAGES; LEASE, 2.

DAMAGES.

In an action for a breach of the covenant in a deed against incumbrances, the grantee may pay off the incumbrance after suit brought and recover this amount as damages. *Johnson v. Collins*, 392.

See BANKRUPT, 3; DOWER, 2; EXCEPTIONS, 20, 22; EXECUTOR AND ADMINISTRATOR, 5, 6; SLANDER, 3, 7; VERDICT, 4; WAY, 4-10.

DECEIT.

See CONSPIRACY, 4; FRAUDULENT REPRESENTATION.

DECREE.

See EQUITY, 7-10.

DEDICATION.

See WAY, 6.

DEED.

1. An unauthorized execution of a deed, either of a partnership or an individual, may be ratified by parol. *Holbrook v. Chamberlin*, 155.
2. If A. and B. are partners, and A. signs the names of both to a lease, and both of them enter under the lease, this amounts to a ratification by B. of the act of A. *Id.*
3. When a boundary line in a deed is described as running to a railroad and thence by the railroad, and it appears that at the time the deed was made the railroad corporation owned a narrow strip of land contiguous to, but not included in, its original location, there is a latent ambiguity in the description, and extrinsic evidence is required to apply it. *Hoar v. Goulding*, 132.
4. A. agreed with B. by an instrument under seal that B. should have the right of unobstructed passage over all that part of A.'s land south of a line ranging with the side of A.'s house then standing upon the land, reserving to A. "the right to eight feet in width on the southerly side of said house for the purpose of enlarging the same or of building a new one." A. built a new house on the site of the former one, covering by its greater width a portion of the land on the south side reserved for that purpose, and then

built a fence ranging with the south side of the new house and extending from the house to the highway. *Held*, that A.'s grant of unobstructed passage over the specified portion of his land was absolute, and that his reservation applied only to the erection of a house, and not of a fence upon the land over which the right of way was granted. *Washburn v. Copeland*, 233.

5. A. conveyed to B. a certain dwelling-house in S., measuring twenty-two feet by seventeen, with all the privileges and appurtenances to the same belonging, or in anywise appertaining. After the death of B. her husband C. occupied the house, and her heirs conveyed by a quitclaim deed to D. a certain piece of land with the building thereon at S., meaning to describe and quitclaim the same premises now occupied by C., and the same premises that were conveyed by A. to B. *Held*, that the deed from A. to B. did not include a parcel of land adjoining, on one side, land in front of the building, and could not be made to include it by evidence of subsequent occupation. *Held*, also, that the deed to D. described only one parcel of land and did not include the lot on the side, although it was at the time in the occupation of C.; and that D. could not maintain a writ of entry to recover possession of it. *Stone v. Stone*, 279.

See BANKRUPT, 3; BOUNDARY; DAMAGES; ESTOPPEL; EVIDENCE, 4; FRAUD; MONEY HAD AND RECEIVED, 2; MORTGAGE, 5; SPECIFIC PERFORMANCE, 3.

DEMAND.

See MONEY HAD AND RECEIVED, 1.

DEVISE AND LEGACY.

1. A testator devised all of his estate, both real and personal, to his wife, "to her sole and separate use and benefit forever," and if there should be any part thereof left at her decease, "it is my wish and desire that it should be disposed of as follows," &c. *Held*, that the wife took either an estate in fee, or an estate for life with power to convey in fee; and that she could maintain a bill in equity for specific performance against one who had agreed to buy the land devised, and to whom she had agreed to convey "a good and clear title to the same in fee simple, free from all incumbrances." *Lyon v. Marsh*, 232.
2. A testator made the following bequest: "I give and bequeath to my beloved wife, S. C., \$1200 annually, from the proceeds of my estate, real and personal, (except what may be hereinafter mentioned as reserve,) as her dower. The said property to be held in trust, and said annuity to be paid to said wife in semi-annual instalments, so long as she remains my widow, and no longer. When such intrusted property shall be distributed as follows, viz.: Reserved. all notes, drafts, or evidences of debts due to my estate from each or either of my sons-in-law, shall be held in reserve without interest until a final settlement of my estate, and that the annual income of my estate, (if any,) after reserving the said \$1200 as above mentioned, be equally distributed among my heirs annually; and when at a final settlement of my estate, I devise that my remaining estate shall be equally divided

among my five daughters." *Held*, that the widow was entitled to receive a clear annual sum of \$1200 out of his estate, whether the income of his property, excluding what he directed to be reserved, should be sufficient, or it should become necessary to apply part of the principal for that purpose. *Warren v. Gregg*, 304.

3. A testator by will authorized his wife to "select or reserve for her own use and occupancy one bed, and suitable bedding for the same, and what other furniture, pictures, or miscellaneous library she may wish to use and occupy." The will further provided: "The rest of my miscellaneous library and furniture to be equally distributed, either by sale or otherwise, among my legal heirs." *Held*, that the wife was authorized to use so much of the furniture of any description and to any extent as she might select. *Id.*

See EVIDENCE, 2; EXECUTOR AND ADMINISTRATOR, 3; TRUST AND TRUSTEE, 1.

DISCLAIMER.

See EVIDENCE, 17; WRIT OF ENTRY, 3.

DISTRIBUTION.

Under the Gen. Sta. c. 91, § 5, kindred of the half blood in any degree inherit equally with those of the whole blood in the same degree in the distribution of personal property. *Larrabee v. Tucker*, 562.

DISTRICT COURT.

See EXCEPTIONS, 21.

DIVORCE.

See CONSTITUTIONAL LAW, 1.

DONATIO CAUSA MORTIS.

See GIFT.

DOWER.

1. A writ of dower, made in the form of a writ of summons and attachment, may be served by a nominal attachment of the tenant's goods or estate and delivering a summons to him. *Harrington v. Conolly*, 69.
2. Under the St. of 1869, c. 418, if an interlocutory judgment is rendered that the demandant recover her dower and her damages for the detention thereof as assessed by the jury to that time, and commissioners are appointed to set off the dower, the demandant is entitled to further damages to the time of final judgment upon the report of the commissioners. *Id.*

DRAIN.

See SEWER.

DRUNKENNESS.

A complaint alleging that on a day named the defendant "was guilty of the crime of drunkenness by the voluntary use of intoxicating liquor," suffi-

ciently charges an offence under the Gen. Sts. c. 165, § 25. *Commonwealth v. McNamara*, 340.

EASEMENT.

See DEED, 4.

EMBEZZLEMENT.

See INDICTMENT, 2, 3; JURISDICTION; LARCENY, 3, 4.

EMINENT DOMAIN.

See BRIDGE.

EQUITY.

I. *Jurisdiction and General Principles.*

1. The validity of an order of a city council, for the alteration of a highway and the payment of damages occasioned thereby, can only be impeached directly by petition for a writ of certiorari, and not collaterally by petition in equity to restrain the appropriation and payment of money under it. *Fisk v. Springfield*, 88.
2. Where A. by fraud obtains from B. a bond for a deed of land, and a sum of money which has been awarded B. by a city for a portion of the land taken before the bond is executed, which sum is greater than the amount A. is to pay for the land, and B. conveys the land to A. and receives the price agreed upon, it is not necessary for B. to restore or to offer to restore the money to A. in order to maintain a bill in equity to rescind the sale. *Montgomery v. Pickering*, 227.
3. If the board of health of a city, in the exercise of the powers conferred upon it by law, has brought a bill in equity to restrain the exercise of an offensive trade, and the defendant has had full notice and opportunity to be heard before a jury and in the Superior Court, and has not lost such opportunity by any mistake as to his rights, and no error is shown in any stage of the proceedings, the temporary injunction granted upon the filing of the bill will be made perpetual. *Taunton v. Taylor*, 254.

See BOARD OF HEALTH, 2, 5; DEVISE AND LEGACY, 1; EVIDENCE, 22; EXCEPTIONS, 12; JUDGMENT, 2; SEWER; SPECIFIC PERFORMANCE.

II. *Pleading and Practice.*

4. Where the persons interested in the subject matter of a suit in equity are numerous, it is within the discretion of the court to determine whether or not they should be made parties. *Smith v. Williams*, 510.
5. Land subject to dower had been taken by a railroad, and the sum of \$500 paid to a trustee in trust to pay the income to the widow for life and on her death to divide the principal among the heirs of the husband of the widow. After the death of the widow, one of the heirs, whose interest was $\frac{1}{16}$, brought a bill in equity "for himself, and in behalf of all others interested in the subject of the suit to enforce the trust." The bill set forth the names

- and residences of the other heirs; and showed that six persons residing in this Commonwealth were entitled to $\frac{1}{16}$; sixteen persons residing in various parts of New England to $\frac{1}{16}$; two in Albany, New York, to $\frac{1}{16}$; and three persons in Wisconsin to $\frac{1}{16}$. *Held*, on demurrer, that the bill could not be maintained, for want of proper parties thereto. *Ib*.
6. If a general replication is filed by a plaintiff to a bill in equity, and the parties afterwards submit the case to the decision of the court upon an agreed statement of facts, and the case is reserved for this court upon the bill, answer and agreed statement of facts, the allegations in the answer are to be taken as true only so far as they are supported by the facts agreed. *Trautman v. Taylor*, 254.
7. A decree of a single justice of this court sitting in equity, in a cause heard before him on oral evidence, and which is heard in this court on appeal upon a report of the same evidence only, will not be reversed on a question of fact, unless it clearly appears to be erroneous. *Montgomery v. Pickering*, 227.
8. A decree against an infant trustee, even when the trust results by implication of law, is not erroneous for want of allowing him a day to answer after coming of age. *Walsh v. Walsh*, 377.
9. A decree made upon the consent of the guardian *ad litem* of an infant, and upon the representations of counsel and adjudication of the court that it was a decree fit and proper to be made as against an infant, is binding upon him. *Ib*.
10. A decree ordered four heirs at law, two of whom were infants, to convey an estate to the *cestui que trust* of their ancestor. Before the conveyance the *cestui que trust* died, having previously conveyed his interest in the estate to the two heirs who were of age. A decree was then made, reciting these facts, and ordering the infant heirs to convey their interest in the estate to the other heirs. *Held*, on a bill of review brought by the infant heirs against the others, to reverse the decree, that the *cestui que trust* had an equitable fee simple which he could convey, and that the fact that the conveyance had not been made to the *cestui que trust* was no ground for reversal. *Ib*.

See BOARD OF HEALTH, 6.

ESTATES OF DECEASED PERSONS.

See EXECUTOR AND ADMINISTRATOR; INSOLVENT ESTATE.

ESTOPPEL.

A. for the purpose of defrauding his creditors made a mortgage of land to his father and brother, and caused the deed to be recorded. Afterwards he had a certificate of peaceable entry and possession by the mortgagees, for breach of the condition of the mortgage, written upon it. The mortgage was never delivered to the mortgagees. The father afterwards died. *Held*, on a petition for partition brought by the brother against A., that the respondent was not estopped either by the deed or in *pais*. *Nourse v. Nourse*, 101.

See PARTNERSHIP, 1; RECEIPTOR; WRIT OF ENTRY, 3.

EVIDENCE

1. If goods are damaged by two different causes, and the defendant is only responsible for one of them, the burden of proof is on the plaintiff to show the extent of the damage occasioned by the cause for which the defendant is liable. *Priest v. Nichols*, 401.
2. Oral declarations of a testator are inadmissible to control the construction of his will. *Warren v. Gregg*, 304.
3. On the issue whether a will offered for probate was executed by the testator, the opinion of experts in handwriting as to the genuineness of the signature, formed by comparing it with other instruments proved to have been signed by the testator, is competent evidence, and such witnesses may give the reasons of their opinion. *Demeritt v. Randall*, 331.
4. A. for the purpose of defrauding his creditors made a mortgage of land to his father and brother, and caused the deed to be recorded. Afterwards he had a certificate of peaceable entry and possession by the mortgagees, for breach of the condition of the mortgage, written upon it. The mortgage was never delivered to the mortgagees. The father afterwards died. *Held*, on a petition for partition brought by the brother against A., that it was not competent for the respondent to put in evidence his own declarations made to a third party, in regard to the purpose with which he had, two months before, made and recorded the mortgage, and in regard to its delivery or non-delivery. *Nourse v. Nourse*, 101.
5. On the issue whether labor and materials were furnished on a contract with the defendant or a third person, the defendant put in evidence a memorandum book of the plaintiff, in which the charges were made from day to day to the third person. The plaintiff was then allowed, under objection, to put in evidence his journal, and ledger, posted from the journal, but neither of them from the memorandum book, in both of which the charge was to the defendant after the work was done. *Held*, that the journal and ledger were improperly admitted in evidence. *Bentley v. Ward*, 333.
6. In an action against a manufacturing corporation for a nuisance, a statement of its superintendent that the nuisance existed and would be remedied, and that "he would not have it around his place for \$500," is competent evidence against the corporation. *McGenness v. Adriatic Mills*, 177.
7. Evidence of verbal admissions tending to show that the person making them was guilty of a crime should be received by a jury with great caution, but whether any substantial reliance should be placed upon such evidence depends upon the circumstances of each case; and he is not entitled to an instruction that no substantial reliance can be placed upon them if uncorroborated. *Commonwealth v. Sanborn*, 61.
8. Memoranda made by a surveyor as the results of his examinations and calculations, and minutes which help to explain such memoranda, made by him in the scope of his employment by one of the parties to an action with the consent of the other, are admissible in evidence after the death of the surveyor. *Walker v. Curtis*, 98.

9. In an action to recover for digging a pit for a dam at a certain price for each yard of earth removed, the number of yards of earth was in dispute. The plaintiff put in evidence his books, to show the whole number of days' work done on the pit, an estimate by his foreman of how many days should be deducted from the aggregate on account of workmen not engaged in digging, and an estimate of the number of yards one man would dig in a day. *Held*, that the evidence was competent. *Ib.*
10. A party, who testifies himself and who calls as a witness one who has been his legal counsel and who is not examined or cross-examined as to conversations with his client, may object, when the counsel is called as a witness by the other party, to his testifying in regard to such conversations. *Montgomery v. Pickering*, 227.
11. Under the U. S. St. of 1864, c. 106, § 6, a copy of the certificate of organization of an United States National Bank, which is certified by the comptroller of the currency and authenticated by his seal of office, is competent evidence in a state court. *Tapley v. Martin*, 275.
12. An item in a declaration on an account annexed was for amount paid on land. The case was sent to an auditor, who reported that the plaintiff offered evidence tending to prove a settlement between the parties whereby it was agreed that the defendant owed the plaintiff a certain sum on the house and land, but the auditor found that no such settlement was made. In the Superior Court the plaintiff moved to amend by adding a count as for a balance found due on accounting together. The amendment was not allowed. The plaintiff then offered evidence of the facts set forth in the amendment as evidence under the first item. *Held*, that the evidence was rightly rejected. *Looney v. Looney*, 283.
13. When a copy of a judgment roll offered in evidence is partly printed and partly written, but has the clerk's certificate at the end of the written part only, whether the certificate applies to the whole roll or to the written part alone is a question of fact to be determined by examination and inspection of the papers. *Goodrich v. Stevens*, 170.
14. Where a bill of goods sold is presented to a purchaser, his conduct may be such as to warrant the jury in drawing the inference of an admission that the bill is accurate and actually due, although he says nothing to that effect. *Hayes v. Kelley*, 300.
15. In an action for the conversion of certain oxen, it appeared that the plaintiff's title was derived from a sale made by the defendant to A. who sold to the plaintiff; that the sale to A. was upon a condition which had not been performed, and that at the same sale A. had bought a horse on the same condition, which he had sold to the plaintiff, but not when he sold the oxen. The plaintiff put in evidence tending to show a waiver of the condition as to the horse. The defendant offered evidence to show that upon this issue and upon the same facts, he had obtained a verdict and a judgment against the plaintiff in a former action concerning the title to the horse. This evidence was not admitted. *Held*, that the evidence put in by the plaintiff was competent to show that the defendant had waived the condition as to

- all the property sold to A., and that the evidence offered by the defendant should have been admitted in rebuttal. *Bates v. Santom*, 120.
16. On the issue whether an indorsement on a promissory note is genuine, evidence is competent that the alleged indorser had business transactions with the maker, and indorsed a note signed by him corresponding in date and amount to the note in suit. *Huntsman v. Nichols*, 521.
 17. A disclaimer of title in an action at law on which judgment has been entered, but which has been adjudged by a decree in equity to be founded in mistake, is not admissible in a subsequent suit as evidence of an admission by the party disclaiming. *Currier v. Esty*, 577.
 18. At the trial of an issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, a witness was allowed to add to his negative answers to certain questions put to him in regard to whether he had made certain statements about the mental condition of the testator, the following reasons for such denial: in one case, "because I never thought of such a thing as his not being sane," and in the other, "because it was not true." *Held*, that the objecting party had no ground of exception. *Nash v. Hunt*, 237.
 19. At the trial upon charges of fraud filed under the Gen. Sts. c. 124, §§ 31-34, against a poor debtor, evidence was put in tending to show that the property, alleged to be fraudulently conveyed, was encumbered by a mortgage given to secure the purchase money of certain real estate, bought by the defendant and A.; that a large part of the mortgage had been paid from the proceeds of sales of said real estate; and that the mortgagee had received all the proceeds of said sales. *Held*, that the deeds of said real estate were not admissible in evidence to show from the consideration expressed therein how much had been paid on the mortgage. *Sheldon v. Grady*, 136.
 20. At the trial for the assessment of damages sustained by the taking of land for a town way, a witness who had been a selectman and assessor of the town may rightly testify to the difference in the market value of the petitioner's remaining estate before and after the laying out of the way, supposing the way to be made. *Sexton v. North Bridgewater*, 200.
 21. At the trial for the assessment of damages sustained by the taking of land for a town way, a witness who has stated that in his opinion the petitioner's remaining estate is worth three times what it was worth before the road was laid out, may state the reasons of his opinion. *Ib.*
 22. The report of a master in chancery is not evidence as an adjudication between the parties until it has been accepted and a decree rendered accordingly. *Nash v. Hunt*, 237.
 23. If one party to a suit contends that a transfer of property was made by a certain instrument in writing, and testifies as to the circumstances attending it, the other party may show that the transfer was made by a later instrument; and the evidence of a witness, who prepared the instrument and attended to the execution of it, that there was no such consideration or understanding as had been testified to, is competent; and the witness may

- also be asked as to the circumstances attending the execution of the second instrument, and why it was executed. *Ib.*
24. In an action of tort for breaking and entering the plaintiff's close, it appeared that the plaintiff's deed mentioned as the corner where the description began, a stake and stones on land of a third party. A witness testified that he had a conversation with this third party on his land, while he owned it, about the corner, and that the third party was not living at the time of the trial. It was admitted that the third party had never owned the land in controversy. The witness was then asked what statement the third party had made in this conversation. *Held*, that this statement was rightly excluded. *Long v. Colton*, 414.
25. The value of land conveyed by A. to C. cannot be shown by the recital of the consideration in an unaccepted deed of adjacent land, from A. to C., or by evidence of the value of other land in the same range and county. *Spaulding v. Knight*, 148.

See ABORTION, 1; ARBITRAMENT AND AWARD, 1, 2, 5; ASSAULT AND BATTERY, 2; BASTARDY PROCESS, 2; BOARD OF HEALTH, 2; BOND; BOUNDARY; BROKER; CARRIER; CONSPIRACY; CONTRACT, 8, 10; DEED, 3; EXCEPTIONS, 4, 7, 8, 10-15, 20; EXECUTOR AND ADMINISTRATOR, 13; FENCE; FRAUDULENT CONVEYANCE; FRAUDULENT REPRESENTATION; GIFT, 2; INSURANCE; INTOXICATING LIQUORS, 3-7, 15-26; JUDGMENT, 2; LARCENY, 2; MONEY HAD AND RECEIVED, 1; MONEY PAID; MORTGAGE, 7; NUISANCE; PAUPER, 2, 7; POOR DEBTOR, 2; RECEIPTOR, 2; SLANDER, 3, 6, 7; TOWN, 1, 3-5; TRIAL; WILL.

EXCEPTIONS.

1. When a case is tried by a judge without a jury, his findings on questions of fact are final. *Hoar v. Goulding*, 132.
2. If a judge has authority to entertain a suggestion of a fraudulent abuse of the powers of the court, upon a summary motion, without putting the party making the suggestion to plead and try it in regular form, it is within his discretion to decline to do so, and his action cannot be revised by this court. *Crosby v. Harrison*, 114.
3. It is within the discretion of the judge to whom a petition for a review is presented, if he is of opinion that the petitioner has a substantial defence to the action upon the merits, which by accident or mistake, and without fault on his part, he has had no opportunity of making, to grant a review without passing in advance upon the questions of law or fact which may be involved in the trial of the case; and to the exercise of his discretion in this respect no exception lies. *Boston v. Robbins*, 318.
4. The findings of a judge presiding at a trial upon preliminary questions of fact material to the competency of evidence introduced at the trial are not open to revision in this court. *Walker v. Curtis*, 98.
5. How many times the same question shall be repeated on cross-examination, and how far the witness shall be compelled to answer, are matters within

the discretion of the presiding judge, and not subjects of exception. *Dennerritt v. Randall*, 331.

6. The admission in rebuttal of evidence to corroborate the plaintiff's testimony in chief is within the discretion of the judge presiding at the trial, and affords the defendant no ground of exception. *Huntsman v. Nichols*, 521.
7. At the trial of an issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, a subscribing witness who had testified in chief as to the execution of the will and the sanity of the testator at that time, and also as to the facts connected with the preparation of the will, and interviews with the testator in relation thereto, was recalled in rebuttal, and examined anew without restriction upon the points in controversy. *Held*, that the objecting party had no ground of exception. *Nash v. Hunt*, 237.
8. On the issue whether the defendant made the contract sued upon, the plaintiff rested his case on an auditor's report in his favor; the defendant denied making the contract; the plaintiff then offered evidence as to what was said and done by the parties at the time when he contended the contract was made. *Held*, that this evidence was part of the plaintiff's case, and that it was within the discretion of the judge at the trial to exclude it. *Wheeler v. Wheeler*, 297.
9. Where a case was heard by an auditor upon an amended declaration, and at the trial a motion of the plaintiff to amend his declaration by adding a new count was refused, it was *held* that the plaintiff had no ground of exception. *Looney v. Looney*, 283.
10. Where the plaintiff introduces an auditor's report in evidence, to the admission of which the defendant objects, it is within the discretion of the presiding judge to allow the plaintiff afterwards to withdraw the report from the consideration of the jury. *Hayes v. Kelley*, 300.
11. Where evidence is put in under an objection, and the judge permits the party putting in the evidence to withdraw it, a refusal to give instructions which are only appropriate on the theory that the evidence is in the case is not a ground of exception. *Id.*
12. On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the heir contended as one ground for inferring unsoundness of mind that the will was unreasonable, and introduced evidence tending to show that he had been in partnership with the testator and other persons, and that, upon closing up the partnership affairs, his interest amounted to a large sum, which he had transferred to the testator upon the assurance that upon the testator's death the estate would become his; that the fact and amount of his interest had been established by the report of a master in a suit in equity, to which he and the testator were co-defendants, and that the final settlement of the partnership affairs had been made in accordance with that report. He then offered in evidence a duly certified copy of the record in that case, and of the master's report. This evidence was excluded. *Held*, that he had no ground of exception. *Nash v. Hunt*, 237.

13. A witness called as an expert upon the value of the plaintiff's services as a book-keeper for the defendant, testified in his preliminary examination that he had been twenty-five years an accountant; that he knew the plaintiff fifteen years before, and knew him to be an able book-keeper, but that he had not known of him for eight or nine years; that he himself had been employed as a book-keeper for three firms whose business was from \$1,000,000 to \$1,500,000 a year, but was a different kind of business from that of the defendant; that twenty years before he had sold goods to the defendant, and had then a general knowledge of the character and extent of his business; and that he had acted as an expert accountant. No objection was made to the testimony as relating to a subject on which the opinions of witnesses were inadmissible. *Held*, that no exception lay to the rulings of the presiding judge that the witness was an expert, and allowing him to answer the question what was a fair compensation for the services of a competent accountant in keeping the books in a business of the character of the defendant's amounting to about \$160,000 a year, and to state, after an examination of the defendant's books in court, what was a fair compensation for keeping books of that character, and the usual charge per day for the services of an accountant in fixing up complicated accounts. *Shattuck v. Train*, 296.
14. An exception to evidence, admitted at the trial under a general objection, will not be sustained in this court, because the witness testified in regard to a privileged communication, if the evidence is otherwise competent. *Nash v. Hunt*, 237.
15. The admission of immaterial evidence is not ground for a new trial, unless the excepting party shows that he has been prejudiced thereby. *Wing v. Chesterfield*, 353.
16. The judge presiding at a trial may refuse to give, in the language of counsel, instructions already given in substance; and no exception lies to his remark, in so refusing, that the party was merely asking him to repeat the portion of the charge most favorable to his case. *Ib.*
17. In replevin of a horse, the issue was whether the sale by the plaintiff to the defendant was upon condition that the defendant was to give a note indorsed by A. in payment. The jury were instructed that if the plaintiff sold the horse upon condition that a note indorsed by A. should be given, the property did not pass until the note was indorsed; but if nothing was said about an indorser, and the plaintiff took the defendant's note in payment without an indorser, and the horse was delivered to the defendant, that vested the title in him; that the question was whether there was an agreement originally that there should be an indorser. No exception was taken to these instructions. The jury, after being out several hours, came in for further instructions, and asked, "if the defendant gave the plaintiff the note in payment for the horse, whether the property passed to the defendant." The judge ruled that it did. The plaintiff asked the judge to further instruct the jury "that if the original agreement was that the note should be indorsed, the property did not pass by giving the note to the plaintiff."

- The judge declined to further instruct the jury. *Held*, that the plaintiff had no ground of exception. *Nelson v. Dodge*, 367.
18. It is within the discretion of the judge presiding at a trial, after he has answered a question put by the jury, who have come in for further instructions, to decline to repeat instructions given before the jury retired. *Ib*.
 19. In an action for injury sustained by the goods of a tenant who occupied part of a building, caused by the negligence of the landlord who occupied the rest of the building, in not keeping a waste pipe, which was in his charge, in repair, there was evidence that the floor of the plaintiff's premises was not level, and that the water flowed down the incline to the goods. The defendant asked the judge to instruct the jury that he was not liable if there was any negligence on the part of the plaintiff in not looking after the waste pipe, or if the fact that the floor was not level caused any additional damage. The judge refused to give these instructions, and instructed the jury that for injuries arising from the plaintiff not taking reasonable precaution to prevent injury, when he had reasonable cause to believe that such precaution was reasonably necessary to avoid damage to his property, the defendant was not liable. *Held*; that the defendant had no ground of exception. *Priest v. Nichols*, 401.
 20. In an action for injury done to goods by water, the judge instructed the jury on the question of damages, that the evidence must be such that they could decide thereon as to the amount of damage; that guesses of witnesses were not sufficient to found a verdict upon; that the judgment of persons having sufficient knowledge and opportunity of judging as to the amount of goods injured, and as to the extent of the injury, was competent; that exact accuracy in testimony was not required, but that the jury could not give damages to an amount exceeding what they were satisfied of on the evidence. *Held*, that the defendant had no ground of exception. *Ib*.
 21. Where a case is submitted to a district court upon a statement of facts, by the terms of which the court is to render judgment for one party or the other, and the judge rules that the plaintiff is not entitled to recover, he has no authority except to render judgment accordingly; and the fact that he goes through the form of taking the verdict of a jury does not entitle his ruling to be revised by this court under the St. of 1872, c. 199, § 15, on a bill of exceptions allowed by him. *Haas v. Harrington*, 135.
 22. The verdict of a jury summoned under the Gen. Sts. c. 63, § 22, to assess damages for land taken for a railroad, must be adjudicated upon in the Superior Court; and if the officer presiding at the trial returns to the Superior Court, with the verdict, a bill of exceptions which he certifies to be conformable to the truth, and which the presiding judge allows, without himself passing upon the question of law presented, this court has no jurisdiction of the exceptions. *Tucker v. Massachusetts Central Railroad*, 124.
 23. Under the St. of 1864, c. 111, requiring questions of law to be entered in this court "as soon as may be" after they are reserved by report or otherwise, an excepting party cannot as matter of right enter his exceptions in this court six months after they are allowed; but the court may, in its dis-

- cretion, allow them to be entered, on his petition, supported by proof that the failure to enter them seasonably was owing to accident or mistake. *Bentley v. Ward*, 383.
24. The certificate of the presiding judge, disallowing a bill of exceptions, is *prima facie* evidence that it is not conformable to the truth. *Sawyer v. Yale Iron Works*, 424.
25. If the party seeking to establish the truth of his exceptions neglects without excuse for sixteen months to apply to the commissioner, appointed by the court, to have a day fixed for a hearing, this is good ground for dismissing the petition to prove the exceptions. *Freeman v. Griggs*, 302.
26. Upon the return of the report of a commissioner, to whom a petition to establish the truth of exceptions has been referred, the question whether the truth of exceptions is established is a question of law to be decided by the court. *Sawyer v. Yale Iron Works*, 424.
27. An exception, not taken at the trial and seasonably presented in writing to the presiding judge, cannot be considered by this court upon a petition to establish the truth of exceptions. *Ib.*
28. When it appears in a bill of exceptions that evidence of the conduct of a party was admitted tending to show a waiver of a certain condition, the omission of the exceptions to state that it was also admitted upon the question whether there was any such condition, as to which no exceptions were taken, is immaterial to the truth of the exceptions. *Bates v. Santom*, 120.
29. If an exception alleged does not state the ruling excepted to, and the evidence to which it applied, with substantial accuracy, so as to present the same question and in the same aspect to this court as to the court below, the petitioner is not entitled to be heard in this court upon the exception, either in the form in which it was, or in that in which it appears that it should have been, tendered to the presiding judge. *Sawyer v. Yale Iron Works*, 424.
30. When a bill of exceptions is disallowed by the judge presiding at the trial, the right of the excepting party to prove some of the exceptions and to waive others is limited to the case where the exceptions are wholly distinct from each other; and if the true and false statements are intermingled in the exceptions as tendered, the presiding judge may properly disallow the whole bill of exceptions as not conformable to the truth. *Ib.*
31. When evidence offered to prove a fact is excluded by the presiding judge, and afterwards admitted only for the purpose of contradicting a witness who had previously been examined upon the subject, a bill of exceptions, which states that the evidence was offered and admitted for the purpose of proving the fact, may be disallowed as not conformable to the truth. *Ib.*
32. A bill of exceptions tendered stated that the judge refused to rule, that, under circumstances specified, there was no implication that a fixture was personal property; the implication, if any, was that it became real estate. The judge did actually rule that the circumstances did not authorize the implication either that it was personal property or that it was real estate. *Held*, that the exception was rightly disallowed. *Ib.*

23. Where one series of requests for instructions, intermingling two subjects, is presented to the judge just before he charges the jury, a bill of exceptions to his rulings upon the whole series, which does not truly state the requests and rulings as to one of these subjects, may be wholly disallowed. *Id.*

See ABORTION, 1; ACCOMPLICE; ARBITRAMENT AND AWARD, 4; EVIDENCE, 18; INDICTMENT, 5; INTOXICATING LIQUORS, 24; JUDGMENT, 1; LARCENY, 2; LIMITATIONS, STATUTE OF, 2; PAUPER, 1; REPLEVIN, 3; SALE, 2; SLANDER, 5; SURETY, 3; TRIAL; VERDICT, 4; WAY, 11; WILL, 3.

EXECUTION.

See ARREST; EXECUTOR AND ADMINISTRATOR, 11.

EXECUTOR AND ADMINISTRATOR.

1. An executor and residuary legatee who has given bond to pay debts and legacies, and, being afterwards required by the judge of probate to give a similar bond in a larger sum, fails to do so, may be removed from office by the judge of probate, and after such removal no judgment can be rendered against him in an action previously brought against him in his representative capacity on a debt of the testator. *National Bank v. Stanton*, 435.
2. An action was brought upon a general debt of a testator against his executor, in his representative capacity, who was also residuary legatee and had given bond to pay debts and legacies. The executor was subsequently removed, and an administrator *de bonis non* appointed. The answer of the executor set up merely his removal, and that he ought not to be held to answer. *Held*, that the administrator was properly allowed to defend the action and to file an answer setting up that it was brought within one year from the giving of the bond by the executor; and that this fact, if proved, was a defence to the action. *Id.*
3. Where a testator charges the payment of pecuniary legacies upon his real estate, and directs that they shall be paid by A. and B., and then devises one part of his real estate in trust for B. during his life, with remainder to his children, and the other part to A. in fee, as residuary devisee and legatee, the legacies must be paid by A. and B. in equal proportions; and if there is sufficient personal property in the hands of the executor to pay the testator's debts and A.'s proportion of the legacies, he cannot rightfully sell any part of the real estate devised to A. *Chapin v. Waters*, 140.
4. If during the lifetime of a devisee the real estate devised to him is unlawfully sold by the executor, his heirs are not entitled to an execution under the Gen. Sts. c. 101, § 28, in a suit brought, in the name of the judge of probate, on the bond of the executor, but it must be applied for and issue to his administrator. *Id.*
5. Land devised to A. was mortgaged by him, with other property, and was afterwards unlawfully sold by the executor of the deviser for the payment of debts. After this the mortgage was foreclosed, and the other property was not sufficient to pay the mortgage debt. *Held*, in a suit on the execu-

- tor's bond, that the amount to be deducted from the value of the land sold was the difference between the mortgage debt and the value of the other property, and not the proportion of the mortgage debt which the land sold bore to the other property. *Ib.*
6. A devisee of land made a mortgage of it which was fraudulent as to creditors, and died. Subsequently the executor of the deviser, for the purpose of defeating the mortgage and for the benefit of the heirs of the devisee, except one who refused to assent to the transaction, sold the land by a license from the Probate Court as for the payment of the debts of the deviser. The sale was unlawful, and the executor never received anything on it. In an action by the judge of probate on the executor's bond, for the benefit of the heir who did not assent to the sale, it was *held* that the interest for which the executor was liable was simple interest only from the time of the sale. *Ib.*
 7. In an action on an administrator's bond, for not accounting, the administrator is not entitled to contest the validity of the order of the Probate Court authorizing it. *Bennett v. Woodman*, 518.
 8. It is no defence to an action upon a probate bond, brought in the name of the judge of probate for breach of its conditions in not accounting, that the person upon whose representation the action was brought will receive no benefit from a recovery upon the bond. *Ib.*
 9. The fact that one, who has been duly appointed an administrator, is the executor and sole legatee of the estate under a will afterwards discovered, does not relieve him of the duty of making a proper settlement of his account as administrator; and is no defence to an action on his bond for not accounting. *Ib.*
 10. Where an executor and the surety upon his probate bond are defaulted in an action against them for a breach of the conditions of the bond, judgment for the amount of the penalty of the bond should be entered before the case is sent to an assessor, but if this is not done, judgment *nunc pro tunc* may subsequently be entered. *Choate v. Arrington*, 552.
 11. Under the Gen. Sts. c. 101, § 28, cl. 3, execution is to be awarded upon breach of the conditions of an executor's bond, for the full value of all the estate of the testator that has come to the hands of the executor, and for all damages occasioned by his neglect or maladministration. *Ib.*
 12. A surety upon an executor's bond is liable for any default on the part of the executor in not accounting for assets received before as well as after the execution of the bond. *Ib.*
 13. In an action against an executor and the surety upon his bond, for breach of the conditions of the bond in not duly rendering an account, an inventory and account filed by the executor, and also evidence of the receipt by him of money and property of the estate, prior to the giving of the bond in suit, are admissible for the purpose of showing the amount for which the executor ought to account, and of fixing the amount of the surety's liability. *Ib.*

14. In an action to enforce an executor's bond for breach of its conditions in not duly rendering an account, the burden is on the executor and his surety upon the bond to account for whatever property has come to the hands of the executor; but the burden is on the plaintiff to prove the damages sustained by a failure to account or other maladministration. *Id.*
15. An executor gave a bond with two sureties conditioned that he should administer according to law the estate of the testator, and render an account. One of the sureties was afterwards discharged by order of the Probate Court, and a new bond was given with a new surety. Before the execution of the latter bond, property belonging to the testator's estate came to the hands of the executor for which he failed to account, and a suit at law was brought upon the second bond for this breach of its conditions. *Held*, that under the Gen. Sts. c. 101, § 28, cl. 3, 4, the surety upon the second bond was liable for the full value of the estate not accounted for, and that whatever adjustment, if any, should be made between him and the sureties upon the first bond, could be determined only by a suit in equity. *Id.*
16. Where, before a trustee appointed under a will to hold and manage the residue of the devised estate has entered upon the performance of the trust, the executor collects the rents of the real estate and credits them to the estate in his account to the Probate Court, deducting his expenditures on account of the real estate and the support of the testator's family, which account is assented to by the parties interested, and allowed by the court, and the executor afterwards continues to collect the rents until the trustees assume charge of the estate, the executor is bound, under the Gen. Sts. c. 98, § 8, to account for the income of the real estate. *Id.*
17. Upon an adjudication in this court that an executor and his surety are liable upon their probate bond by reason of the executor's failure duly to render an account, the account should be so stated in this court as to show what is included in it, as the basis of future adjustments with the executor and his sureties, and to enable the court to determine how far interest should be charged on the account. *Id.*

See **INSOLVENT ESTATE; LIMITATIONS, STATUTE OF, 5-7.**

EXPERT.

See **EVIDENCE, 3, 20, 21; WILL, 2.**

EXPRESSMAN.

See **APPEAL, 3; CARRIER.**

FENCE.

A line designated by fence-viewers for a fence under the St. of 1863, c. 190, has no effect upon the title or right of possession of the land. *Currier v. Esty*, 577.

See **DEED, 4.**

FIXTURE.

Counter-shafting, pulleys, hangers and belts, though fastened to a building, a portable boiler, and steam pipes supported by hooks attached to a building, are either trade fixtures or personal chattels, and may be removed by a lessee who puts them into a building; and the fact that the lease contains an agreement of the lessor to sell the premises to the lessee makes no difference. *Holbrook v. Chamberlin*, 155.

See EXCEPTIONS, 32; LEASE, 1; TROVER.

FLOWING LAND.

See MILL.

FRAUD.

A. by fraud obtained a bond for a deed of land from B., who afterwards with full knowledge of the facts, and after taking legal advice, executed and delivered the deed. *Held*, that the deed did not operate as a confirmation of the previous transaction, unless it was given with that intent. *Montgomery v. Pickering*, 227.

See COMPROMISE; CONSPIRACY, 4; CONTRACT, 11; EQUITY, 2; JUDGMENT, 2.

FRAUDS, STATUTE OF.

1. A promise to a debtor to pay his debt to a third person is not a promise to answer for the debt of another, within the statute of frauds, Gen. Sta. c. 105, § 1, cl. 2. *Hubon v. Park*, 541.
2. A memorandum in writing of an auction sale of land, signed by the auctioneer authorized by the vendor to conduct the sale, contained a description of the premises sold, the names of both parties to the agreement, the price agreed upon, an acknowledgment of the receipt of a sum of money in part payment, and a clause in which the auctioneer agreed that "the vendor shall in all respects fulfil the conditions of sale," but did not set forth what were these "conditions of sale." *Held*, that this was not a sufficient memorandum within the statute of frauds. *Riley v. Farnsworth*, 223.

See ACTION, 5; CONTRACT, 6; PLEADING, 6.

FRAUDULENT CONVEYANCE.

1. On the issue whether the conveyance of a parcel of land was void, as being in fraud of creditors, evidence that the deed was not recorded until ten months afterwards, that the grantor continued to occupy and exercise acts of ownership upon the land, and that the grantee made an oral promise to support the grantor, is sufficient to support the inference of a secret trust, and render the conveyance void, without proof that such a promise attached itself to the land in any other manner. *Rice v. Cunningham*, 466.
2. On the issue whether a conveyance was made in fraud of creditors, evidence that the grantor, ten months after making the conveyance, appropriated other property to the payment of his debts, is incompetent. *Id.*

FRAUDULENT REPRESENTATION.

1. In an action to recover damages caused by the defendant's inducing the plaintiff to enter into a partnership with him for a term of years, by means of a fraudulent representation that he was the owner of certain buildings agreed to be used for the purposes of the partnership, and the use of which was to be contributed by the defendant as his share of the capital, proof that the buildings were owned by the defendant's wife, who gave the defendant verbal authority to use the buildings for the agreed term, is not a valid defence, if the representation is material; and the question of the materiality of the representation is for the jury. *Moore v. Cains*, 396.
2. In an action upon a contract, into which the defendant alleges that he was induced to enter by the plaintiff's false and fraudulent representations, the defendant may be asked on his direct examination, "What induced you to sign the papers and complete the contract?" *Knight v. Peacock*, 362.

GAMING.

Under the Gen. Sts. c. 85, § 2, a person who has lost money at gaming can recover from the owner, tenant or occupant of the house wherein it was lost, only such sums as are sued for within three months after their loss. *Low v. Blanchard*, 272.

GIFT.

1. A *donatio causa mortis* from a husband to his wife is valid, notwithstanding the Gen. Sts. c. 108, § 10. *Whitney v. Wheeler*, 490.
2. On the issue whether a *donatio causa mortis* was made, statements of the alleged donor, tending to show a continuous and apparently fixed state of mind and purpose in him, inconsistent with the alleged gift, and existing previously thereto, are admissible to contradict the testimony of the donee. *Ib.*
3. A written instrument, not duly attested as a will, by which a sum of money is given to another for certain purposes named, which is signed and delivered in expectation of death by the party at whose request it is made, and which is shown by the attending circumstances not to be intended as passing a gift *inter vivos*, cannot give effect to the intended gift as a *donatio causa mortis*. *McGrath v. Reynolds*, 566.
4. A man, in expectation of death, caused a written instrument to be made by which he gave to A. a stated sum of money for certain purposes named, and for the purpose of carrying out its provisions delivered to him a savings bank book with an order for the payment of the deposits, which made up only a smaller portion of the sum named in the instrument. The donor, when asked by A. where the remainder was, said it was in his trousers' pocket, turning in his bed and looking towards the closet in which the trousers were, and that E., who owned the house and who was present, would give it to him. After the donor's death, E. delivered the money to A. *Held*, that there was no sufficient delivery of the money to give effect to the gift as a *donatio causa mortis*, and that it could not take effect otherwise than as an entire gift. *Ib.*

GRAND JURY

Under the Gen. Sts. c. 171, § 7, grand jurors sworn by the clerk in the presence of the court are legally charged with the performance of their duties, and it is not essential to the validity of their indictments that they should be instructed by the presiding judge. *Commonwealth v. Sanborn*, 61.

GUARDIAN.

See EQUITY, 9.

HANDWRITING.

See EVIDENCE, 3, 16.

HEIR.

See EQUITY, 5.

HIGHWAY.

See WAY.

HUSBAND AND WIFE.

See ACTION, 4; GIFT, 1.

INDICTMENT.

1. Where an indictment duly charges the commission of an offence at a time before it was found, and the date of its presentment appears by the record of the court, an error in the date of the caption of the indictment is immaterial. *Commonwealth v. Brown*, 339.
2. An indictment under the Gen. Sts. c. 161, § 38, which charges a defendant with being the clerk, servant and agent of A., B. and C., sufficiently negatives the fact of apprenticeship by averring that he was not then and there an apprentice to the said A., B. and C. *Commonwealth v. Smith*, 40.
3. An indictment under the Gen. Sts. c. 161, § 38, which avers the property embezzled to be the property of A., B. and C., sufficiently negatives the consent of the owners by averring that it was without the consent of A., B. and C. *Ib.*
4. An indictment under the Gen. Sts. c. 160, § 27, charging an assault with intent to ravish, and which also charges a battery, is not bad for duplicity. *Commonwealth v. Thompson*, 346.
5. An indictment alleged that A. at a time and place stated "in and upon one B. then and there being pregnant with child, unlawfully did make an assault, and a certain instrument, the name of which is to the jurors unknown, up and into the womb and body of the said B. unlawfully did force and thrust, with intent then, there and thereby to cause and procure the said B. to miscarry, abort and to bring forth the said child of which she was pregnant as aforesaid, and to kill and murder said child, by reason," &c. *Held*, that whether it was intended to charge an assault with intent to commit a

felony, under the Gen. Sts. c. 160, § 33, or an intent to procure miscarriage of a woman, under the Gen. Sts. c. 165, § 9, yet as the bill of exceptions stated it to be an indictment for procuring an abortion, it must be so regarded in this court. *Held, also*, that the allegation as to the time and place of the offence applied to the particular acts set forth as the means by which the abortion was alleged to be performed, as well as to the alleged assault. *Held, also*, that the instrument and the means by which it was used were sufficiently described. *Held, also*, that it was not necessary to prove an assault, or an intent to kill the child, and that the defendant might be convicted although the woman consented. *Commonwealth v. Snow*, 47.

See ABORTION, 2; INTOXICATING LIQUORS, 27.

INFANT.

See EQUITY, 8-10; PARTNERSHIP, 2.

INFORMATION.

See TRUST and TRUSTEE, 1.

INJUNCTION.

See BOARD OF HEALTH, 2, 5; EQUITY, 3.

INSANITY.

See WILL, 1, 2.

INSOLVENT ESTATE.

If commissioners, appointed under the Gen. Sts. c. 99, to take proof of claims against the insolvent estate of a deceased person, make no return to the Probate Court at the expiration of the time allowed for the performance of that duty, they may be compelled by that court, on motion of any party interested, to make their return. *Blanchard v. Allen*, 447.

See LIMITATIONS, STATUTE OF, 6, 7; REMOVAL OF ACTIONS, 1.

INSURANCE.

A policy issued by an insurance company on the life of A. contained a provision that if the premiums should not be paid on or before the days when due, at the office of the company, or to agents when they produce receipts signed by an officer of the company, the policy should cease. On the issue whether a premium due on a certain day had been paid to an agent of the company, there was evidence that the agent was authorized to collect premiums, and after deducting his commissions to invest the remainder in certified checks which were to be sent with his account to the company at regular periods; that a few days before the premium became due the agent was indebted to the firm of which A. was a member, to an amount exceeding the premium; that it was the practice of the members of the firm to pay their private debts with funds of the firm, and A.'s premiums had previously been

so paid; that the agent stated to A. that he would take care of the premium, and after the day when it became due stated to him that he had done so; that the agent had received the receipt signed by an officer of the company, and had so informed A., but retained it as a voucher against A.; that the agent sent the company, after the death of A., a check for an amount including this premium with his account; but the company refused to receive it, and returned him a check for the amount of the premium, and demanded the receipt. *Held*, that the evidence was sufficient to warrant the jury in finding that funds, which the assured had a right to control and apply to the payment of the premium, had come into the hands of the company's agent before the premium became due; that the assured directed that the agent should apply so much of said funds as was necessary to that payment; and that the agent did so apply it, and that the jury would be warranted in finding a verdict for the plaintiff. *Chickering v. Globe Ins. Co.* 321.

See MONEY HAD AND RECEIVED, 1.

INTEREST.

See EXECUTOR AND ADMINISTRATOR, 6; MECHANIC'S LIEN, 4; WAY, 10.

INTOXICATING LIQUORS.

1. The sale of cider at a public bar and to be drunk on the premises is not an offence under the St. of 1869, c. 415, without proof that the cider is intoxicating. *Commonwealth v. Chappel*, 7.
2. The St. of 1869, c. 415, § 30, does not prohibit the sale of beer, which is not "ale, porter, strong beer," or "lager bier," unless it is intoxicating; and whether it is intoxicating is a question of fact for the jury, and the fact that it contains a certain percentage of alcohol is not conclusive upon this point. *Commonwealth v. Bloss*, 56.
3. On a complaint on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law, evidence that the defendant was at a bar room on the day mentioned in the complaint; that he had been there for more than a year previously; that in the bar room were found small tumblers on a drainer which smelt of liquor; that intoxicating liquors were found in a cellar communicating with the bar room; that there was a sign over the bar room on which was the surname of the defendant with that of another person; and that the defendant said to the witness when the liquors were found that if he, the witness, was as good to search other places as he was that, he would find more liquors, is sufficient to be submitted to the jury, although the liquors found were returned on a search-warrant as the property of the other person whose name was on the sign, and were forfeited, no one claiming them. *Commonwealth v. Shaw*, 8.
4. On a complaint on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law, evidence that the defendant had on the day named in the complaint a tunnel and measure in his hand; that there were several measures over the sink in the kitchen

- that there were intoxicating liquors found buried in the ground in the cellar, which had not been used for some time; that near the day of the complaint drunken persons, strangers, had been found on the defendant's premises; that access to the cellar where the liquors were found was from the outside, and that there was a path to it leading from the defendant's back door, and footmarks in the cellar from the outside door; and that although there was a door leading into this cellar from another to which tenants had access, this door was not used, the floor was covered with dust and showed no footmarks, is sufficient to be submitted to the jury. *Ib.*
5. On a complaint on the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with intent to sell the same in violation of law, evidence that, on the approach of state constables, the doors of the defendant's house were locked; that a crash was heard at the back of the house, and on going there a stone jar was found broken, with some whiskey in it, a broken tumbler, and liquor spilled upon the ground; that in the kitchen were found a sugar bowl with a spoon in it, and a tumbler which had recently been used for liquor; that there was a bar room where were kept candies, cigars, tobacco, soda, small beer, and small whiskey tumblers, is sufficient to be submitted to the jury. *Ib.*
6. On a complaint under the St. of 1869, c. 415, § 36, for keeping intoxicating liquors with an intent to sell them in violation of law, it is sufficient to authorize a verdict of guilty, if it is proved that the defendant was in possession and exercising control of the liquors with intent to sell the same in violation of law, although he was not the owner of the liquors. *Commonwealth v. O'Reilly*, 15.
7. A complaint on the St. of 1869, c. 415, charged the keeping of intoxicating liquors on a day certain with the intent to sell the same in violation of law. The evidence for the government related to certain acts of the defendant in a saloon and that intoxicating liquors were kept there on the day named in the complaint. The defendant testified that he had sold out his interest in the business prior to said day, and had had nothing to do with it since. The government then introduced evidence of the defendant's selling liquor in the saloon on a day subsequent to that alleged, for the sole purpose of affecting the credibility of the defendant as a witness. *Held*, that the evidence was rightly admitted for this purpose. *Commonwealth v. Mason*, 66.
8. A complaint on the St. of 1869, c. 415, § 39, to a police court alleged that the defendant, at a place within this Commonwealth, unlawfully did convey certain intoxicating liquors in a wagon to another person who intended to sell them in violation of law, the defendant having reasonable cause to believe that they were so intended for illegal sale. On appeal in the Superior Court the defendant objected that the complaint set forth no offence, because it omitted the words "from place to place within this Commonwealth." *Held*, that the defect was merely formal and the objection was taken too late. *Commonwealth v. Doherty*, 13.
9. Under the St. of 1869, c. 415, § 39, a person may be convicted who conveys spirituous or intoxicating liquors in this Commonwealth to another,

- having reasonable cause to believe that the latter intends to sell them to a third person in violation of law, whether the person so conveying the liquors is the owner of them or not. *Commonwealth v. McCluskey*, 64.
10. In a complaint under the St. of 1869, c. 415, § 44, an averment that intoxicating liquors were kept "by a person unknown" for sale in violation of law, is sufficient. *Commonwealth v. Intoxicating Liquors*, 21.
 11. A complaint under the St. of 1869, c. 415, § 45, averred that certain intoxicating liquors were kept and deposited by A. "in a certain dwelling-house building" (the situation of which was described) "occupied by the said" A. "as a dwelling and premises." *Held*, a sufficient averment that the liquors were kept by A. in his dwelling-house. *Commonwealth v. Intoxicating Liquors*, 27.
 12. A complaint under the St. of 1869, c. 415, §§ 44, 45, averring that certain intoxicating liquors are kept and deposited in a dwelling-house, a place of common resort being kept therein, and which charges that intoxicating liquor had been sold in said house by the occupant thereof within a month previous, is sufficient, without an averment that the occupant of the house is the keeper of the place of common resort. *Ib.*
 13. A complaint under the St. of 1869, c. 415, § 45, described the building in which intoxicating liquors were alleged to be kept for sale in violation of law as "a certain dwelling-house building situate on Cherry Street, so called, in N., on the northerly side of said street, the same being the second house from Market Street, on said Cherry Street, and occupied by A. as a dwelling and premises." The warrant which issued on the complaint described the building to be searched as "a certain frame building situate on Cherry Street, so called, in N., on the northerly side of said street, and is the second house easterly from Market Street, in said Cherry Street, and occupied by A. as a dwelling and premises." *Held*, that there was no variance. *Ib.*
 14. A complaint under the St. of 1869, c. 415, § 44, averred that intoxicating liquor was kept "in a certain tenement on Derby Square, and numbered six on said square, and the rooms over the tenement on the first floor, numbered six on said square, the entrance to said rooms being numbered eight on said square." The warrant issued on this complaint recited the averment of the complaint, and directed the officer to enter and search "the tenement herein above described." *Held*, that the warrant was void. *Commonwealth v. Intoxicating Liquors*, 342.
 15. A complaint under the St. of 1869, c. 415, § 44, alleged that intoxicating liquors were kept and deposited by some person unknown in a certain building occupied by said unknown person as a store-room. The evidence was that the liquors were deposited in a freight depot belonging to a railroad corporation; that they arrived and were deposited there in regular course of business, like other freight, and were not otherwise kept or deposited there. *Held*, a fatal variance. *Commonwealth v. Intoxicating Liquors*, 26.
 16. On the trial of a complaint under the St. of 1869, c. 415, §§ 44, 45, which alleged that intoxicating liquors were kept in a dwelling-house and intended

for unlawful sale, it is not necessary to prove that sales were intended to be made in the dwelling-house; it is sufficient to show that it was in effect a magazine or warehouse where liquors were stored which were intended to be sold at a saloon in the immediate neighborhood. *Commonwealth v. Intoxicating Liquors*, 24.

17. Evidence of the seizure in a dwelling-house of a barrel of whiskey and a tunnel; that the government stamp on the barrel was about a month old; that the barrel was not full; that empty barrels were found in the cellar, some of which had government stamps on them of recent date; that the occupier of the dwelling-house kept, at a place about one half mile from it, a saloon where liquors had at various times about the time of the seizure been seized in small quantities in flasks; and that a bar, draiuer, tumblers and other implements of the liquor traffic were found there, is sufficient to warrant a finding that the liquors were kept in the house to be sold in the saloon in violation of law. *Ib.*
18. On a complaint under the St. of 1869, c. 415, §§ 44, 45, alleging that intoxicating liquors are kept in a dwelling-house and intended for unlawful sale, it is not necessary to prove that sales were intended to be made in the dwelling-house; it is sufficient to show that it was in effect a magazine or warehouse where liquors were stored which were intended to be sold at a saloon in the immediate neighborhood. *Ib.* *Commonwealth v. Intoxicating Liquors*, 27.
19. Evidence that three casks containing liquors were found in the cellar of a dwelling-house occupied by A.; that A. kept a saloon an eighth of a mile distant, in which there was a bar or counter; that he had a few weeks before pleaded guilty to a complaint dated and sworn to April 4, 1874, alleging a single sale of intoxicating liquors in the saloon May 4, 1874; that shortly before the seizure a boy brought liquors to the saloon, similar to those found in A.'s cellar; that the boy came to the saloon by a street which led from said dwelling-house to the saloon, and that A. admitted that he knew the boy; is competent evidence to warrant a jury in finding that the liquors in the cellar were intended for sale in violation of law, although the street on which the boy was first seen near the saloon was also the direct route from two other streets as well as that from the dwelling-house. *Ib.*
20. Evidence that liquors were seized in the freight depot of a railroad company, at N. in this Commonwealth; that they were marked T. D., with the name of a place in Vermont, and the words "to be held at N.;" that a person employed in a grocery drove by the officer who made the seizure, in a buggy, and made motions towards the freight depot; that when the officer arrived at the depot the man who drove by in the buggy and one of the employees of the railroad company were engaged in rolling the barrels of liquor out on the back side of the depot, is not sufficient to warrant a finding that the liquor was kept for sale in violation of law, under the St. of 1869, c. 415, § 44. *Ib.* *Commonwealth v. Intoxicating Liquors*, 21.
21. On an indictment under the Gen. Sts. c. 87, § 7, for keeping a tenement used for the illegal keeping and illegal sale of intoxicating liquors. if the

- government contends that liquors had been there sold and kept for sale in violation of law, it is not necessary to prove delivery of liquors, but the fact of a sale having been made may be shown by circumstantial evidence: and the manner in which the place is fitted up, the furniture and liquors found there, the number of persons about the premises, are all circumstances tending to show that the keeper of the tenement was engaged in the illegal sale of liquors. *Commonwealth v. Campbell*, 32.
22. The St. of 1869, c. 415, § 35, making the delivery of intoxicating liquors *prima facie* evidence of a sale, does not preclude the government from proving the fact of a sale by circumstantial evidence, where there is no evidence of a delivery. *Ib.*
23. Evidence to the effect that a place was a regular drinking saloon kept by A.; that on the entrance of an officer to the place ale was poured into a sink; that A. falsely declared it not to be ale; that there was a bar in the saloon, and men standing in front of it who had been drinking; is sufficient to warrant a finding that A. kept and maintained a liquor nuisance within the Gen. Sts. c. 87, § 6. *Commonwealth v. Glennan*, 46.
24. On the trial of an indictment for the keeping of a tenement for the illegal keeping and sale of intoxicating liquor, there was evidence of a seizure of a keg of whiskey on the premises on September 13, 1873. A witness for the defendant testified that the keg was his, and that he bought it on June 28, 1873. The government then put in oral evidence that the keg seized had on it a United States revenue stamp dated August 17, 1873. *Held*, that the defendant had no ground of exception to the admission of this evidence. *Commonwealth v. Powers*, 337.
25. Upon the issue whether the defendant was at a time alleged in the indictment the keeper of a common nuisance under the Gen. Sts. c. 87, §§ 6, 7, evidence is admissible that the defendant sold liquor in the tenement on a day certain about eight weeks before the first date alleged in the indictment, and had gone in and out of the tenement at various other times between that day and the first date alleged in the indictment. *Commonwealth v. Kelley*, 341.
26. At the trial of an indictment under the Gen. Sts. c. 87, § 7, for maintaining a liquor nuisance on a day certain and on divers other days between that day and another day certain, evidence of the character of the place on any day between the two days named is competent. *Commonwealth v. Connor*, 35.
27. A conviction on an indictment under the Gen. Sts. c. 87, § 7, for maintaining a certain tenement as a liquor nuisance on a day certain, and on divers other days between that day and a day certain, is not a bar to an indictment found at the same session of the grand jury for maintaining the same tenement as a liquor nuisance on the day last named in the first indictment, and on divers other days between that day and another day certain. *Ib.*
28. Payment of a tax to the United States on sales of intoxicating liquors made in accordance with this Commonwealth, is no bar to an indictment under

the Gen. Sts. c. 87, §§ 6, 7, for keeping the tenement for such sales in violation of law, and thereby maintaining a common nuisance. *Commonwealth v. Sanborn*, 61.

See DRUNKENNESS; PLEADING, 4.

JUDGE.

See COUNTY COMMISSIONERS, 2; EXCEPTIONS, 1-6, 18.

JUDGMENT.

1. If, after a verdict for the plaintiff, the defendant dies, the court has power to pass upon the exceptions alleged by him, and if justice requires, to enter judgment *nunc pro tunc* as of the term when the verdict was rendered, although no administrator has been appointed in this state. *Tapley v. Martin*, 275.
2. A., a creditor of a corporation, made a contract with B., the trustee for the bond-holders of the corporation, whereby he agreed, in consideration of the payment of \$5000, to pay B. a certain proportion of the deficiency, in case certain bonds issued by the corporation and secured by a mortgage of its property, were not paid at maturity. A proceeding in chancery was brought in another state by B. against the corporation to foreclose the mortgage. This was resisted in the name of the corporation by A. and other stockholders who contributed money for the defence. A master appointed by the court of chancery passed upon the account of the trustee, and the court ordered the property to be sold at auction. It was bought by B., who was authorized by the court to bid, for less than the mortgage debt. B. then sued A. in this Commonwealth to recover the proportion of the deficiency agreed on. *Held*, that the judgment of the court in chancery had the same effect as if the contract had in terms referred to a suit for foreclosure in that court. *Held, also*, that the foreign judgment was *prima facie* evidence against A. of the amount due under the mortgage, unless the judgment was obtained by fraud or collusion. *Held, also*, that if the plaintiff charged the trust fund with the \$5000 paid the defendant, it was a false charge. *Held, also*, that if the plaintiff had other funds which were properly applicable to the mortgage debt and which were not so applied, the account should be corrected accordingly. *Held, also*, that if the plaintiff allowed the property to be out of repair for the purpose of purchasing it, and did purchase it thereby for less than its value, he should be charged with its full value. *Held, also*, that if the defendant was aggrieved by a premature termination of the hearing before the master, it was no defence in this action. *Prichard v. Farrar*, 213.

See APPEAL, 1, 2; BANKRUPT, 2, 3; BOND, 4; EVIDENCE, 13, 15, 17; EXECUTOR AND ADMINISTRATOR, 10; MORTGAGE, 3, 4; PLEADING, 2; TRUSTEE PROCESS, 2; WRIT OF ENTRY, 3.

JURISDICTION.

The U. S. St. of 1864, c. 106, § 55, making the embezzlement of the funds of a national bank by one of its officers a misdemeanor, does not interfere

with the jurisdiction of state courts over larcenies committed upon the property of a national bank by one of its officers. *Commonwealth v. Barry*, 1.

See ACTION, 3; BASTARDY PROCESS, 1; EQUITY, I.; EXCEPTIONS, 21, 22; JUDGMENT, 1; MUNICIPAL COURT; REMOVAL OF ACTION.

JURY.

See GRAND JURY; LAW AND FACT; VERDICT, 1-3.

LACHES.

See CERTIORARI, 1, 4; SPECIFIC PERFORMANCE, 3.

LANDLORD AND TENANT.

If goods of a tenant of part of a building are injured by water escaping from a waste pipe and from an engine, through the negligence of the landlord, who occupies the rest of the building, and who has charge of the waste pipe and engine, the tenant may maintain an action therefor against the landlord. *Priest v. Nichols*, 401.

See ACTION, 1; EXCEPTIONS, 19; LEASE.

LARCENY.

1. The finder of lost goods, who, at the time of first taking them into his possession, has a felonious intent to appropriate them to his own use and to deprive the owner of them, and then knows or has reasonable means of knowing or ascertaining who is the owner, is guilty of larceny. *Commonwealth v. Titus*, 42.
2. On an indictment for larceny of goods found by the defendant, the bill of exceptions stated that evidence was admitted to show what the defendant said and did about the property and his possession of it, subsequently to the original finding and taking, for the sole purpose of proving the intent with which he originally took the property into his possession, at the time of finding it. What the acts and admissions were was not stated. *Held*, that the defendant had no ground of exception to the admission of the evidence. *Id.*
3. The fact that a person who has stolen property belonging to a national bank is an officer of the bank and subject to punishment for embezzlement under the U. S. St. of 1864, c. 106, § 55, does not relieve him from his liability to punishment for the same act as a larceny at common law or under the statutes of a state. *Commonwealth v. Barry*, 1.
4. Where money belonging to a bank is intrusted to the care of the teller during the day, but at night is placed in a safe, which he cannot rightfully open, if he abstracts the money from the safe at night and converts it to his own use, his offence is larceny and not embezzlement. *Id.*

See INDICTMENT, 2, 3; JURISDICTION; RECEIVING STOLEN GOODS; SLANDER, 4, 5.

LAW AND FACT.

On the issue whether a person employed to burn the brush upon the land of another had authority also to burn the brush within the limits of a highway adjoining, from which it is separated by a wall, the question whether a direction by the owner "to clear up the land" included land within the limits of the highway is for the jury, although the estate of the owner extended to the middle of the highway. *Knight v. Luce*, 586.

See ASSAULT AND BATTERY, 1; EXCEPTIONS, 26; FRAUDULENT REPRESENTATION, 1; RAILROAD, 4, 5; REPORT; TRUST AND TRUSTEE, 2; TRUSTEE PROCESS, 3; WAY, 13, 15.

LEASE.

1. Lessees of a mill covenanted "to deliver up the premises and all future erections and additions to or upon the same" at the end of the term, "in as good order and condition as the same now are or may be put into by the lessor." The lease was for a term of years to begin at a future day. When the lease was made, glass in some of the windows was broken. New glass was put in by the lessees before the term began, in consideration of being allowed by the lessor to occupy part of the premises in the mean time. Held, that the lessees were bound to pay for glass which was broken during the term of the lease. Held, also, that the lessees were entitled to remove all machinery in the nature of trade fixtures or personal property put in during the term of the lease. *Holbrook v. Chamberlin*, 155.
2. A portable wood-cutting machine, worked by a belt attached to a factory, is a chattel, and does not pass by a lease which demises the factory and land; and the lessees are not liable for injury done to it by them on the covenants of the lease, whereby they agree to deliver up the premises in good condition at the end of the term. *Ib.*

See CONTRACT, 9; LICENSE.

LICENSE.

1. Where a person occupies a part of a building under a lease, and has a sign upon the outer wall of a different part of the building, in the same place where it was maintained for a long time previous to the granting of the lease, the law will imply a license from the owner of the building so to maintain it. *Pevey v. Skinner*, 129.
2. The right of a person to use the outer wall of a part of a building occupied by him under a lease which provides "that the lessee may have the right to place signs upon the outer wall of said rooms," is a privilege, and not an exclusive right, and *prima facie* is to be exercised in reference to the condition of the premises at the time the lease was given; and he is not entitled to put another person, who is occupying a part of said outer walls with a sign, to the proof of any title thereto, beyond a license from the owner of the building. *Ib.*

LIEN.

See MECHANIC'S LIEN; PAYMENT, 2.

LIMITATIONS, STATUTE OF.

1. An action for breach of the warranty of title implied in the sale of a chattel accrues at the time of the sale, and the statute of limitations runs from that time. *Perkins v. Whelan*, 542.
2. In an action on an open and mutual account, if one item is for a breach of an agreement which occurred more than six years before the date of the writ, and the last item is within the six years, and the defendant pleads the statute of limitations, but does not object that the first item is not properly the subject of an account, the plaintiff may recover both items. *James v. Clapp*, 358.
3. Under the Gen. Sts. c. 155, § 12, the right of the Commonwealth to recover from the town of a pauper's settlement money paid for his support at a state lunatic hospital is limited to such support as has been furnished within six years previous to the commencement of the action, and is not extended by ignorance of the fact of settlement. *Adams v. Ipswich*, 570.
4. Under the Gen. Sts. c. 155, § 13, an account stated, which is not supported by evidence of some writing signed by the party to be charged, will not prevent the running of the statute of limitations against the previously existing liabilities included therein. *Chace v. Trafford*, 529.
5. The provision of the Gen. Sts. c. 97, § 16, that "no executor or administrator shall be held to answer to the suit of a creditor of the deceased, if commenced within one year after his giving bond for the discharge of his trust," includes an executor who is also a residuary legatee and has given bond to pay debts and legacies; and the exception in the statute, "unless it is for the recovery of a demand that would not be affected by the insolvency of the estate," does not apply to a suit brought against such an executor upon a debt of the testator, which is not preferred by statute. *National Bank v. Stanton*, 435.
6. The operation of the Gen. Sts. c. 97, § 5, limiting actions against an administrator to two years from the time of his giving bond, is not suspended by the Gen. Sts. c. 99, §§ 20, 25, relating to insolvent estates of deceased persons. *Blanchard v. Allen*, 447.
7. The estate of a deceased person was represented insolvent, and commissioners were appointed under the Gen. Sts. c. 99, who passed upon all the claims of the creditors which were presented, and disallowed the plaintiff's claim. No return of their proceedings was made to the Probate Court. Further assets were received by the administrator, and all the debts were paid in full, except the plaintiff's. These payments absorbed the assets. After this, and more than two years after the administrator had given bond, the plaintiff brought an action of law against the administrator, whom he had notified of his claim within said two years. No new assets had come into the hands of the administrator. *Held*, that the action was barred by the special statute of limitations. *Id.*

See EXECUTOR AND ADMINISTRATOR, 2; TOWN, 3.

LOST GOODS.

See LARCENY, 1, 2.

MANUFACTURING CORPORATION.

See EVIDENCE, 6.

MARRIAGE.

See CONSTITUTIONAL LAW, 1.

MARRIED WOMAN.

See ACTION, 4; GIFT, 1.

MASTER AND SERVANT

See LAW AND FACT.

MASTER IN CHANCERY.

See EVIDENCE, 22.

MECHANIC'S LIEN.

1. One who furnishes materials used in the construction of a block of houses situated on one lot, under an entire contract with the owner, has a lien under the Gen. Sts. c. 150, upon the whole estate for the value of the materials so furnished. *Worthley v. Emerson*, 374.
2. A petition to enforce a lien under the Gen. Sts. c. 150, alleged that labor was performed and materials furnished in pursuance of a contract under seal between the petitioner and the respondent. The answer admitted the making of the contract. At the trial, the petitioner admitted that the labor was performed and the materials were furnished by the petitioner and his partner, and that the contract was made for the partnership in the name of the petitioner alone, doing the business of the firm in that name. *Held*, that the non-joinder of the partner did not, without an amendment to the answer, entitle the respondent to a nonsuit. *Gilbert v. Fowler*, 375.
3. A certificate under the Gen. Sts. c. 150, § 5, need not aver that the account therein set forth is "a statement of a just and true account of the amount due, with all just credits." *Ib.*
4. In a proceeding under the Gen. Sts. c. 150, to enforce a mechanic's lien, interest, even if not claimed in the certificate filed with the town clerk, nor in the petition, is to be computed upon the debt from the filing of the petition to the time of judgment, and upon the judgment to the time of satisfaction out of the proceeds of the sale of the estate in execution of the order of the court. *Johnson v. Boudry*, 196.

MILL.

1. A mortgagor may maintain a complaint under the mill act for damages suffered while he was in possession of the land, although his right of possession

has been terminated by foreclosure of the mortgage before suit brought *Vaugh v. Wetherell*, 138.

2. In a complaint under the mill act by a mortgagor, it is no defence that the respondent has acquired the right of the mortgagee by an assignment of the mortgage. *Ib.*

MISNOMER.

See CERTIORARI, 5; TRUSTEE PROCESS, 1, 2.

MONEY HAD AND RECEIVED.

1. A. having an insurable interest in a house owned by B. took out a policy of insurance on it against fire in B.'s name, and as agent for B. received the money from the insurance company on the destruction of the house by fire. *Held*, that an action would lie by B. to recover this sum of A. without a previous demand, and that the testimony of A. was not admissible in defence to show that he intended the insurance to apply to his own interest. *Looney v. Looney*, 283.
2. Land was conveyed by an absolute deed, and the grantee made and delivered a bond by which it appeared that he took it only in trust to sell it and account to the grantor for the proceeds. The trust was afterwards executed. *Held*, that the grantor might maintain an action for money had and received, and that it was immaterial whether the bond was given at the time of the deed, or afterwards. *Brown v. Cowell*, 461.

See TOWN, 1, 8.

MONEY PAID.

One who indorses, for the accommodation of a partnership, a promissory note signed by one member of the partnership in his own name as maker, and by the other as indorser, can recover, in an action against the partnership for money paid to its use, the amount which he is obliged to pay as indorser. *Thayer v. Smith*, 363.

MORTGAGE.

I. Of Real Estate.

1. Where tenants in common of land, for the purpose of making partition, execute mutual deeds of release of specific portions thereof to each other, and a mortgagee, who has a mortgage from one tenant upon an undivided half of the land, joins with the mortgagor in his release, such release and partition have, as to the interest of both the mortgagor and the mortgagee, the effect to substitute for an undivided half of the whole land the whole of the portion set off to the mortgagor in severalty. *Torrey v. Cook*, 163.
2. A mortgagee of land cannot execute a power of sale in the mortgage by selling less than the whole title of the mortgagor and himself in the mortgaged premises; and a sale and conveyance of an undivided half of the land mortgaged passes no title to the purchaser. *Ib.*
3. Recovery of judgment in an action upon a mortgage note, without payment, is not a bar to a writ of entry to foreclose the mortgage. *Ib.*

4. A., who was tenant in common with B. of a lot of land, mortgaged to C. one undivided half thereof. A. and B. then made a partition of the land and executed mutual releases to each other, and C. joined with A. in his release. C. afterwards sold to D. under a power of sale in the mortgage one undivided half of the land released to A. for a sum not sufficient to pay the mortgage debt. He afterwards recovered judgment against A. for the remainder of the sum due; and subsequently, the judgment remaining unpaid, brought a writ of entry against A. and D. to foreclose the mortgage on that part of the land released to A. *Held*, that he was entitled to conditional judgment. *Ib.*
5. A conveyance of real estate made by a mortgagee both in his own name and as attorney of the mortgagor, and which declares that it is made by virtue of every other power and authority then thereto enabling, as well as by virtue of and in execution of the power of sale contained in the mortgage deed, operates as an assignment of the mortgagee's interest, even if the fee is not conveyed by reason of a defect in the execution of the power; and if the assignee is in possession of the premises after condition broken, the owner of the equity of redemption cannot maintain a writ of entry against him. *Brown v. Smith*, 108.

See JUDGMENT, 2; MILL; TRUST AND TRUSTEE, 3.

II. Of Personal Property.

6. If the mortgagee of a chattel orally authorizes the mortgagor to sell it, a sale by the latter passes the title to a purchaser in good faith. *Pratt v. Maynard*, 388.
7. A manufacturer bought materials, and borrowed money from time to time to carry on his business, from a person to whom he gave, as security, mortgages on his stock and manufactured property. One of these mortgages included a boiler which was afterwards paid for by the purchaser, and by his direction placed by the maker on a lot near his shop. The purchaser had dealt with the maker for three years before, buying stock and materials included in such mortgages, and sometimes paying the maker and sometimes the mortgagee, who had a general knowledge of this course of dealing, and acquiesced in it. *Held*, on the trial of the issue whether the purchaser or the mortgagee had the better title to the boiler, that the jury would be warranted in finding that the mortgagee gave the mortgagor a general authority to sell mortgaged property bought by the plaintiff, and that evidence that the mortgagee did not know of the sale of the boiler or of the delivery of it to the purchaser was immaterial. *Ib.*

See ATTACHMENT, 1.

MUNICIPAL COURT.

Under the Gen. Sts. c. 116, § 13, and the St. of 1866, c. 279, § 8, the Municipal Court of Boston has concurrent jurisdiction with the Superior Court of a complaint charging an assault and battery upon a police officer while in the discharge of his duty. *Commonwealth v. Hirsch*, 349.

NATIONAL BANK.

See EVIDENCE, 11; JURISDICTION; LARCENY, 3, 4; SURETY, 2, 3.

NEGLIGENCE.

See ACTION, 2; EXCEPTIONS, 19; RAILROAD, 4, 5; SEWER; WAY, 16.

NEW TRIAL.

See EXCEPTIONS, 15.

NUISANCE.

A declaration which alleges that a nuisance has been created and maintained by discharging through a box drain filthy and polluted water upon the land of A. is supported by proof that the waters of a natural stream have been polluted, and by means of a box drain placéd partly in the watercourse and partly upon the land of A., discharged upon said land; and A. is not deprived of his remedy for the nuisance by the fact that he has a right of action for the pollution and diversion of the natural stream. *McGenness v. Adriatic Mills*, 177.

See BOARD OF HEALTH; EQUITY, 3; EVIDENCE, 6; INTOXICATING LIQUORS, 25, 25-28; SEWER.

PARTIES TO ACTION.

See PLEADING, I.

PARTITION.

See ESTOPPEL; EVIDENCE, 4; MORTGAGE, 1.

PARTNERSHIP.

1. One who, by representing himself to be a partner, induces another to give credit to the supposed partnership, is liable to him as a partner, whether actually a partner or not. *Rice v. Barrett*, 312.
2. If a mortgage of partnership property is made by two partners who are minors, and after one of them comes of age part of the consideration is received by the mortgagors, and a part payment is made by them on the mortgage, the ratification by the one who is of age may be inferred as a fact, and replevin will not lie against the mortgagee in possession by the partner who is still a minor, to whom the interest of the other partner has been transferred on the dissolution of the firm. *Keegan v. Cox*, 289.

See COMPROMISE; DEED, 2; MONEY PAID; RECEIPTOR; VARIANCE.

PAUPER.

1. In an action under the Gen. Sts. c. 70, § 16, by a physician against a town, to recover for medical attendance furnished a female pauper who had a legal settlement in another town, the jury were instructed that if the pauper was in need of medical aid, and neither town furnished it, the plaintiff could

recover for services rendered after notice to the town sued ; that the fact that the town in which the pauper had her settlement had made an arrangement with a person to take care of her, would not prevent the plaintiff from recovering, if neither the agent nor the town sued furnished medical attendance ; that if the plaintiff was informed that such an arrangement was made, it was his duty to stop attending the pauper until he could ascertain whether or not she was furnished with other medical attendance ; and if he found she was not so attended and was in want, he might then have attended her and recovered his pay of the defendant. *Held*, that the plaintiff had no ground of exception. *Wing v. Chesterfield*, 353.

2. In an action under the Gen. Sts. c. 70, § 16, by a physician against a town, to recover for medical attendance furnished a female pauper having her legal settlement in another town, there was evidence that a person acting as the agent of the latter town to take care of the pauper told the plaintiff, after he was called to attend the pauper, that if he cured her he would pay him well, but if he failed he would pay him nothing. There was no evidence that the plaintiff made any reply, or that he knew that the person was an agent. The judge instructed the jury that, if they believed this evidence, the plaintiff could not maintain the action. *Held*, that the evidence would warrant the jury in finding that the attendance was furnished by the plaintiff under an agreement to be well paid for it if successful, and that if he failed he was to receive nothing ; and that the instruction was correct. *Ib.*
3. The husband of a pauper had a derivative settlement in a town from his grandfather, acquired under provisions of law in force prior to February 11, 1794. The father of the husband had also resided in the town for ten years together, and paid taxes there for five years, while the husband was a minor. Neither the husband, nor the pauper after his death, had complied with the conditions necessary to acquire a settlement in their own right. *Held*, that the pauper had a legal settlement in the town. *Adams v. Ipswich*, 570.
4. The transfer, authorized by the Gen. Sts. c. 71, § 7, of an inmate of a state lunatic hospital, from that institution to another, is properly made under the authority of the original mittimus. *Ib.*
5. The right of the Commonwealth to recover from the town of a pauper's settlement money paid out of the treasury for his support at a state lunatic hospital under the Gen. Sts. c. 73, § 24, and the St. of 1862, c. 223, § 11, is not affected by the St. of 1870, c. 105. *Ib.*
6. The right of the Commonwealth to recover from a town money paid for the support of a pauper at a state lunatic hospital is not limited by the fact that the town had no notice that the pauper was chargeable to it, or of his commitment to the hospital. *Ib.*
7. On the issue whether a female pauper had a settlement in the town of S., derived from her grandfather, there was evidence that the grandfather was born in that town in 1759. An aged witness testified that he knew a lot of land near the line between the towns of R. and S., which he was accustomed in his youth to see and hear people of the town point out and

speak of as the lot of the father of said grandfather, the lot where he lived. It appeared also in evidence that in 1790 a part of the town of S. had been set off and made another town; and it was provided by statute that persons born in the limits of the new town, and becoming chargeable for support, should be the poor thereof. *Held*, that the burden of proof was on the plaintiff to show that the pauper's grandfather had a settlement within the present limits of the town of S.; and that there was no evidence to warrant a judge, who tried the case without a jury, in so finding. *Adams v. Swansea*, 591.

See LIMITATIONS, STATUTE OF, 3.

PAYMENT.

1. If A. demand payment of a sum of money from B., and B. gives him the sum demanded, stating that he does so upon certain conditions, and A. receives the money and remains silent, he will be presumed to have acquiesced in the conditions. *Hall v. Holden*, 172.
2. A payment made on an account current, in the absence of an appropriation by the parties, is to be applied to the earlier items of the account, although for some of these the creditor has a lien, and has none for others. *Workley v. Emerson*, 374.
3. Where a person agrees with a publisher to pay a certain sum for every copy of a book sold, payments to be made at stated intervals, and he makes payments on statements furnished him by the publisher which include copies not properly comprehended among books sold, but do not indicate the fact, he may, in an action to recover the balance due, have so much of the money paid as was not properly chargeable to him, applied in payment of said balance. *Burr v. Crompton*, 493.

See INSURANCE.

PERJURY.

1. It is perjury to swear falsely as to any material circumstance which has a legitimate tendency to prove or disprove the fact in issue. *Commonwealth v. Grant*, 17.
2. A complaint was made against a woman for larceny from a man. The defence was that the man was her husband. At the trial the man testified that he had not been married to the woman, that he had never represented himself as her husband, that they had never lived together as man and wife, that he had not gone with her to a minister and been married by him, and that he had not entered into an agreement of separation with the woman. On an indictment of the man for perjury, in which the above statements were alleged to have been knowingly falsely made by him, the jury were instructed that if the defendant swore wilfully, falsely and corruptly in relation to any matters set forth in the indictment which were material to the issue whether he was married to the woman, though such matters were only circumstantial, then the defendant was guilty, and that it was perjury.

for the jury to find that the defendant was in fact married to the woman, or had gone through the form of a marriage with her. *Held*, that the instructions were correct. *Ib.*

PLEADING.

I. Parties to Action.

1. One who has purchased in another state choses in action belonging to the estate of a bankrupt cannot prosecute in this Commonwealth a suit thereon in his own name. *Leach v. Greene*, 534.
2. A judgment creditor may bring an action on the judgment in his own name, although another person is entitled to the avails of it. *Goodrich v. Stevens*, 170.

See BASTARDY PROCESS, 3; CONTRACT, 1; EQUITY, 4, 5; MECHANIC'S LIEN, 2; MONEY PAID; PROMISSORY NOTE, 1.

II. Declaration.

See ASSIGNMENT; BASTARDY PROCESS, 4; SET-OFF, 2; VARIANCE.

III. Motion to Dismiss.

3. A motion to dismiss cannot be sustained which is not founded on matter of law apparent on the record. *Crosby v. Harrison*, 114.

See EXCEPTIONS, 2.

IV. Answer.

4. Under an answer to a declaration on an account annexed for the price of intoxicating liquors sold to the defendant, alleging ignorance of the claim sued, and that if it shall be made to appear that the plaintiff sold said items to the defendant, it will also appear that the liquors were sold in violation of law, it is not competent for the defendant to prove that they were thus sold. *Suit v. Woodhall*, 547.
5. An answer to a declaration upon a promissory note for \$280 alleged that "if it shall appear at the trial of this suit that the defendant made and signed said note, it will also appear that the said plaintiff, by a bill of sale in writing, sold to the defendant all the property used by him" in carrying on a specified business, to the value of \$1280; that at the time of said sale he paid the plaintiff \$1000; that it was then agreed between the parties that the balance was not to be paid until the plaintiff had performed certain acts; that the note, if given at all, was given at the time the bill of sale was given, and in consideration that he should perform said acts; that the plaintiff had not performed said acts; that there was no consideration for said note; that the defendant denied owing anything on the note. *Held*, that the first part of the answer set up no legal defence. *Held*, also, that the rest of the answer, if it could be treated as a separate allegation, showed no want of consideration, and was insufficient. *Jackman v. Doland*, 550.
6. Where the answer to an action upon an account annexed alleges that all the charges were furnished under a special contract, and the plaintiff files

a replication alleging that such contract, if made, is invalid under the statute of frauds, the only issue is as to the existence and validity of the contract, and the plaintiff cannot prove that the account annexed was also for other items outside the contract. *Friend v. Pettingill*, 515.

See EXECUTOR AND ADMINISTRATOR, 2.

POLICE OFFICER.

See MUNICIPAL COURT.

POOR DEBTOR.

1. A poor debtor duly presented himself for examination at the time and place to which a hearing pursuant to a notice given under a recognizance entered into in accordance with the Gen. Sts. c. 124, § 17, had been adjourned. The magistrate was absent, and the proceedings were not continued by any other magistrate, under the St. of 1870, c. 77. The debtor took no further steps towards an examination. *Held*, that there was a breach of the recognizance. *Morrill v. Norton*, 487.
2. Where a debtor arrested on an execution enters into a recognizance under the Gen. Sts. c. 124, § 17, to appear for examination, and duly presents himself for examination at the time and place appointed, but is prevented from proceeding in the examination by the absence of the magistrate, statements made by the officer who arrested him are inadmissible in an action for breach of the recognizance, either to relieve the debtor from the penalty of such breach, or to show that there had been an adjournment of the examination by the magistrate. *Id.*

See AMENDMENT, 2; ARREST; EVIDENCE, 19.

POWER.

See MORTGAGE, 2, 4, 5.

PRACTICE.

See AMENDMENT; APPEAL, 1, 2; ARBITRAMENT AND AWARD, 1; ARREST; EXCEPTIONS, 2, 4.

PRESUMPTION.

See ARREST; PARTNERSHIP, 2.

PRINCIPAL AND AGENT.

See ACTION, 2; APPEAL, 3; BROKER; DEED, 1; EVIDENCE, 6; INSURANCE; LAW AND FACT; PROMISSORY NOTE, 1.

PRINCIPAL AND SURETY.

See SURETY.

PROBATE COURT.

See EXECUTOR AND ADMINISTRATOR, 4-9; INSOLVENT ESTATE; REMOVAL OF ACTION, 1.

PROMISSORY NOTE.

1. A principal may sue in his own name on a promissory note not negotiable made in his behalf and for his benefit, although by its terms it is payable to the agent. *National Life Ins. Co. v. Allen*, 398.
2. It is no defence to an action by an indorsee against the maker of a negotiable promissory note made in this state and payable here, that the indorsee received the note from the payee in satisfaction of a preëxisting debt, and that the note was delivered by the maker to the payee without consideration, and under an agreement that he should only use it to raise money by pledging it as collateral security to his own debt. *Woodruff v. Hill*, 310.

See ARBITRAMENT AND AWARD, 4; COMPROMISE; CONFLICT OF LAWS; CONTRACT, 2, 3; EVIDENCE, 16; MONEY PAID; PLEADING, 5; TRIAL.

QUIETING TITLE.

1. A petition under the Gen. Sts. c. 134, § 49, will not lie to compel a person to bring an action to try his alleged title, unless the petitioner has an exclusive and adverse possession which works a disseisin of the respondent. *Tompkins v. Wyman*, 558.
2. Land held in common was divided among the proprietors and held by them in severalty, but improved as a common pasture in proportion to the land owned by each. The greater part of the proprietors conveyed their lands to A., who gave a deed of the entire estate to B., the deed containing covenants of warranty except as against C., who had the title of the other proprietors. B. entered upon the entire tract of land. Held, that B. had not an adverse possession against C., and could not by petition, under the Gen. Sts. c. 134, § 49, compel him to bring an action to try his title. *Ib.*

RAILROAD.

1. County commissioners have no power, under the St. of 1872, c. 262, to change the grade of a railroad where it crosses a highway. *Boston & Albany Railroad v. County Commissioners*, 73.
2. A petition by the directors of a railroad corporation to the county commissioners, under the St. of 1872, c. 262, representing that in their opinion it is necessary for the security and convenience of the public that the method of crossing two streets by their railroad should be altered, and requesting the county commissioners "to prescribe such an alteration as will separate the grade of said railroad from the grades of said streets and allow said streets to pass under said railroad," does not prevent the railroad corporation from objecting that an order passed by the county commissioners upon that petition is invalid, because it undertakes to change the grade of the railroad. *Ib.*
3. Under the St. of 1872, c. 262, § 2, one of the special commissioners to determine by whom an order of the county commissioners for an alteration in the crossing of a railroad by a highway in a city shall be carried into effect, and the expenses thereof paid, is to be named by the county commissioners, and not by the mayor and aldermen, although the highway is wholly within the city. *Ib.*

4. A passenger, who attempts to get on a railroad train while in motion, is so wanting in ordinary care that he cannot, in the absence of evidence of any circumstances to excuse his act, maintain an action for an injury thereby received. *Harvey v. Eastern Railroad*, 269.
5. In an action against a railroad corporation, for injuries occasioned by a train coming into collision, at a highway crossing, with a carriage in which the plaintiff was driving in the daytime, it appeared that the plaintiff, in attempting to cross the track, was struck by a car of a freight train which had been separated from the rest of the train for the purpose of making a running switch. The plaintiff's evidence tended to show that she was driving with care, and, in approaching the crossing, saw a train pass, but saw no flagman and received no warning that another car was coming. At a point forty-six feet from the crossing she could have seen along the track forty-six feet in the direction from which the car came; at thirty feet from the crossing, she could have seen the track for more than half a mile; but she did not look in that direction from those points, and gave as a reason therefor that she did not suppose that one train would follow another so closely. *Held*, that the question whether the plaintiff was in the exercise of due care was for the jury. *French v. Taunton Branch Railroad*, 537.

See CERTIORARI, 1, 3, 4; COUNTY COMMISSIONERS, 2; DEED, 3; EQUITY, 1; EXCEPTIONS, 22; SPECIFIC PERFORMANCE, 3; WAY, 2, 12.

RAPE.

See ASSAULT AND BATTERY, 2; VERDICT, 3.

RATIFICATION.

See DEED, 1, 2; PARTNERSHIP, 2.

REAL ACTION.

See QUIETING TITLE; WRIT OF ENTRY.

RECEIPTOR.

1. Goods of a partnership were attached in an action against one of the members thereof, and were delivered to a receiptor who signed a receipt reciting the value of the goods and that they were free from incumbrance, and agreeing to keep the goods without expense to the attaching officer, to deliver them to him as he should appoint, and to save and keep him harmless from all cost, trouble and expense that should arise to him through default in consequence of his entrusting the goods to the receiptor. At the time of the attachment the partnership had not enough property to pay the partnership debts, and more than four months afterwards the members of the firm went into bankruptcy and received their discharge. A special judgment was obtained against the property attached in the original action and a demand made upon the receiptor. *Held*, in an action by the attaching officer against the receiptor that the latter was not estopped to set up the bankruptcy pro-

ceedings, and that the action could not be maintained. *Lewis v. Webber*, 450.

2. Where goods attached as the property of A. are delivered to a receptor, who agrees in writing that the goods are the property of A., and that he will on demand return them to the attaching officer, or pay him the amount of the debt and costs recovered in the suit against A., evidence is inadmissible, in defence to an action on the receipt, that some of the goods were not the property of A. at the time of the attachment, and that the others were not attachable. *Bacon v. Daniels*, 474.

RECEIVING STOLEN GOODS.

The offence of receiving stolen goods is a substantive crime in itself, and not merely accessorial to the principal offence of larceny. *Commonwealth v. Barry*, 1.

RECOGNIZANCE.

See AMENDMENT, 2; POOR DEBTOR.

RECORD.

See COUNTY COMMISSIONERS, 1; EVIDENCE, 13; EXCEPTIONS, 12; TRUSTEE PROCESS, 2.

RELEASE.

See ARREST.

REMOVAL OF ACTION.

1. A claim against the insolvent estate of a deceased person, pending in the Superior Court on appeal from the decision of commissioners appointed by the Probate Court, cannot be removed to the Circuit Court of the United States, under the U. S. St. of 1867, c. 196. *Du Vivier v. Hopkins*, 125.
2. If, at the time a suit is brought, both parties to it are citizens of this state, one party, by becoming a citizen of another state, is not entitled to have the suit removed to the United States Circuit Court, under the U. S. St. of 1867, c. 196. *Tapley v. Martin*, 275.

See ACTION, 3.

REPLEVIN.

1. A creditor who has proved a claim against an estate in bankruptcy, as for goods sold and delivered to the bankrupt, cannot maintain an action of replevin for the goods by proof that he did not sell them to the bankrupt. *Ormsby v. Dearborn*, 386.
2. The value of goods replevied need not be alleged in the writ. *Blake v. Darling*, 300. *Litchman v. Potter*, 371.
3. A writ of replevin, served by a constable, did not state the value of the goods to be replevied, but the parties agreed in writing on the writ that the value was \$225. The *ad damnum* in the writ was \$500. The judge pre-

siding at the trial allowed the plaintiff to amend the writ by inserting \$225 as the value of the goods, and overruled a motion to dismiss. *Held*, that the defendant had no ground of exception. *Lüchman v. Potter*, 371.

4. A writ of replevin commanded the officer to replevy "the goods and chattels following, viz: the contents of a grocery store," described the store, and stated the person by whom the goods were taken and held. *Held*, that the description was sufficient under the Gen. Sts. c. 143, § 11, and was not so vague and indefinite as to be bad on demurrer. *Ib.*

See PARTNERSHIP, 2.

REPORT.

The submission to the jury of an issue which ought to be decided by the judge does not enable the Superior Court to refer questions of law to this court by report under the Gen. Sts. c. 115, § 6. *Tryon v. Merrill*, 299.

RESTRAINT OF TRADE.

See CONTRACT, 5, 9.

REVIEW.

See EQUITY, 10; EXCEPTIONS, 3.

SALE.

1. An unconditional delivery of goods sold for cash is a waiver of any condition in the contract of sale, and the seller cannot maintain an action for the conversion of the goods against a person who has bought them of the original purchaser. *Freeman v. Nichols*, 309.
2. If goods sold for cash are unconditionally delivered to the purchaser, and the seller brings an action for the conversion of the goods against a person who has bought them of the purchaser, an instruction, that where goods are sold for cash the title does not pass to the purchaser, notwithstanding delivery, until the money is paid, or there is a waiver of the cash payment, is erroneous. *Ib.*
3. A boiler made for a person was by his direction placed by the maker on a lot of land belonging to him in the rear of his shop, and was paid for. *Held*, that as between the maker and the purchaser, the title passed to the latter. *Pratt v. Maynard*, 388.

See CONTRACT, 10, 11; EQUITY, 2; EVIDENCE, 14, 15; EXCEPTIONS, 17; LIMITATIONS, STATUTE OF, 1; MORTGAGE, II.

SAVINGS BANK.

See ACTION, 4; TRUSTEE PROCESS, 2.

SCHOOL.

One member of the school committee of a town made a rule that if a scholar was twice tardy the teacher should send the scholar to him. The other

members of the committee subsequently assented to the rule. The plaintiff was excluded by a teacher from a school for refusing to comply with this rule. *Held*, that the scholar was not unlawfully excluded within the Gen. Sts. c. 41, § 11, although there was no record made of the order of the committee. *Russell v. Lynnfield*, 865.

SEARCH WARRANT.

See INTOXICATING LIQUORS, 13, 14.

SELECTMEN.

A town made a contract with A. to keep its highways and bridges in repair for a year, appropriated money for such work, and took a bond from A. for the performance of his contract. A. refused to perform his contract, and notified the selectmen thereof, and they made a contract with B. to do the work. *Held*, that the selectmen could not, without express authority, make such a contract, although the contract with A. was not available, the roads were out of repair, and the selectmen were left with no other means for putting the roads in repair, except by employing some person to work thereon. *Clark v. Russell*, 455.

SERVICE OF WRIT.

See DOWER, 1.

SET-OFF.

1. On the coming in of an auditor's report, an amended declaration which was relied on before the auditor, the defendant's answer and declaration in set-off, and the plaintiff's answer thereto, were filed together. At the trial the plaintiff asked the court to rule that the declaration in set-off was not filed in season. *Held*, that this request was rightly refused. *Looney v. Looney*, 283.
2. Under the Gen. Sts. c. 180, § 17, a set-off is a matter of pleading, and is governed by the rules relating thereto. *Ib.*

See WAR, 5.

SETTLEMENT.

See PAUPER, 1-3, 5, 7.

SEWER.

A bill in equity against a city to abate a nuisance alleged the conversion by the city, under authority of the Legislature, of the channel of a natural stream into a sewer, and the opening into it of other sewers and drains into which all the sewage of the city was received; that it flowed thereby into another natural stream and was discharged upon the plaintiff's land, thereby creating a nuisance and causing special damage to property of the plaintiff. *Held*, upon demurrer, that, in the absence of any allegation of negligence

on the part of the city, either in the mode of discharging the sewage, or in omitting to take proper precautions to purify it, the bill could not be maintained. *Washburn & Moen Manufacturing Co. v. Worcester*, 458.

See BETTERMENT, 3, 4.

SLANDER.

1. A count in a declaration for slander alleged that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of adultery, by words spoken of her substantially as follows: I (meaning the defendant) was speaking to a certain lady about Mrs. Y. or Mrs. Y.'s case, (meaning the accusation that Mrs. Y., the plaintiff, had a loathsome venereal disease of some kind and had given it to a married man by the name of C. W.) *Held*, that the count did not set forth such circumstances as would show an accusation by the defendant that the plaintiff had committed the crime of adultery, and that the want of such averment was not cured by the innuendo; and that it was bad on demurrer. *York v. Johnson*, 482.
2. The defendant, a member of a church, was appointed, with the plaintiff and other members of the church, on a committee to prepare a Christmas festival for the Sunday-school. He declined to serve, and being asked his reason by a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it, said he did not know, but that "he had been with the plaintiff," who was a woman. *Held*, that this was not a privileged communication. *Ib.*
3. In an action of slander for repeating defamatory words, evidence that rumors, charging the plaintiff with the same offence, previously prevailed in the vicinity, is not admissible either in bar or in mitigation of damages. *Peterson v. Morgan*, 350.
4. It is no defence to an action for slander by words imputing larceny of the defendant's property, that the plaintiff, by taking the property in jest, has caused the defendant to believe that the words uttered were true. *Clark v. Brown*, 504.
5. In an action for slander by words imputing larceny, the jury were instructed that "the plaintiff must prove that the defendant used the words alleged, or some of them sufficient to charge the crime of larceny as alleged. *Held*, that the defendant had no ground of exception. *Ib.*
6. Where the declaration in an action of slander charges two distinct utterings of similar words in separate counts, the first of which is a privileged communication, evidence of the words charged in the second count is competent to show express malice under the first count; and the plaintiff may recover under each count for the slander charged therein. *Ib.*
7. In an action of slander, the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation is bad, and may also show that his general reputation is bad in respect to the charges made by the alleged slanderous words. *Ib.*

See VERDICT, 4.

SPECIFIC PERFORMANCE.

1. The right of a person to specific performance, who has made an oral agreement for the purchase of a parcel of land for a building lot, and who, having paid the full consideration, has entered into possession, and erected a substantial building thereon, is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of the circumstances of the case. *Curran v. Holyoke Water Power Co.* 90.
2. When a bill in equity is brought for specific performance of a contract for the sale of land, the rights of persons not parties to the contract sought to be enforced are equitable considerations, to be regarded in adjudicating the rights of the parties to the contract, although such rights vested after the contract was made. *Ib.*
3. Where a deed to a railroad corporation contains a stipulation that the grantee shall erect a convenient bridge over the granted premises, at a spot to be afterwards designated by the grantor, but is silent as to the time for performance, the law implies an agreement by the grantor to perform his part within a reasonable time; and a neglect for twenty years to call upon the grantee for performance amounts to such laches as to preclude the grantor from maintaining a bill in equity for specific performance. *Williams v. Hart*, 513.

See DEVISE AND LEGACY, 1; WAY, 1.

STATUTE.

The reenactment, without substantial alteration, of a statute already construed by this court, must receive the same construction as that statute. *Low v. Blanchard*, 272.

See BRIDGE; PAUPER, 5, 7; WAY, 1.

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SUPERIOR COURT.

See REPORT.

SUPREME JUDICIAL COURT.

See BRIDGE; EXCEPTIONS, 21-23; REPORT.

SURETY.

- 1 If A. is arrested in a suit against himself and B. as copartners, and gives a bail bond to appear, answer and abide the judgment in the suit, the liabilities of the sureties on the bond are not affected by a discontinuance against B. in the original action. *Sanderson v. Stevens*, 133.
- 2 A surety on the bond of the cashier of a bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although

they were guilty of gross negligence in not discovering them. *Tapley v. Martin*, 275.

8. In an action by a surety on the bond of an officer of a bank to recover an amount paid on the bond without suit, against one who had agreed to save him harmless from all loss which he might suffer as surety, the court instructed the jury that if the plaintiff made the payment without the assent of the defendant, he must show that he was legally liable, but if he procured the assent in good faith he could recover. *Held*, that the defendant had no ground of exception. *Ib*.

See BOND ; EXECUTOR AND ADMINISTRATOR, 10, 12-15, 17.

TAX.

Land of a county used for county purposes is exempt from all taxation, whether imposed for public purposes or for local improvements of a public nature. *Worcester County v. Worcester*, 193.

See BETTERMENT ; INTOXICATING LIQUORS, 28.

TENANTS IN COMMON.

See MORTGAGE, 1.

TOWN.

1. A vote of a town to refund money paid to its agent on a condition, and by him wrongfully delivered to the town treasurer, is an express promise for a valuable consideration, and is competent evidence in an action against the town for money had and received. *Hall v. Holden*, 172.
2. A town, into whose treasury money belonging to a person has been wrongfully paid by a town agent, to whom it was given by the person on a condition, may lawfully pass a vote to repay the money, and such a vote is not revocable by a subsequent vote. *Ib*.
3. Evidence that A. deposited money with a member of a committee, appointed at a town meeting to investigate a claim of the town against A., to hold until such time as A. made an explanation of the matter to the town; that the committee paid the money into the treasury of the town; and that the town afterwards voted to repay it; is sufficient to sustain an action for money had and received brought by A. against the town, within six years from the passage of said vote. *Ib*.
4. If, in an action against a town to recover money deposited with its agent on a condition, and by him wrongfully paid to the town treasurer, it appears that the town at one time voted to repay said money, evidence is not admissible that subsequently the town passed another vote rescinding the first. *Ib*.
5. A town having a claim against A. appointed a committee to whom the matter was referred. A. paid the money to the committee, and in an action by him to recover the money against the town, put in the report of the committee for the purpose of showing the receipt of the money by the town. The report stated that A. had paid the money in settlement of the claim,

and that the committee had paid it into the town treasury. *Held*, that evidence of what was said between A. and the committee at the time the money was paid tending to show that the money was not in payment of the claim, was admissible. *Id.*

See SELECTMEN; WAY, 12-16.

TRADE FIXTURE.

See FIXTURE.

TRESPASS.

See FENCE.

TRIAL.

On the issue whether an indorsement on a promissory note was genuine, the maker of the note testified that he had had business transactions with the defendant, who had indorsed notes for him, and, among others, one corresponding in date and amount to the note in suit; that these transactions were entered in his books of account which were in the possession of the defendant. *Held*, that if the defendant did not put the books in evidence, the plaintiff might comment on the omission in his argument to the jury. *Huntsman v. Nichols*, 521.

TROVER.

An engine placed by a tenant on solid masonry, to which it is affixed by iron belts, and connected with a mill by pipes, belts, shafting and gearing, as well as a boiler connected with the engine, and set upon solid masonry but not affixed thereto except by its weight, and which cannot be removed without tearing down brick work surrounding it, and also part of the building, are not mere chattels for which trover will lie by one deriving his title, after condition broken, from the person who sold them to the tenant by a conditional sale, in the absence of evidence that the tenant placed them upon the premises without the consent of the vendor. *Raddin v. Arnold*, 270.

TRUST AND TRUSTEE.

1. A testator bequeathed a sum of money to a religious society in trust to invest and apply "the interest thereon and increase thereof" "towards defraying the expenses of maintaining a minister and public worship" in a mission chapel devised by the will to the same trustees. The will provided that the rent of certain real estate should be applied "in keeping the premises," which included the chapel, "in repair, in paying the contingent expenses, in conducting and managing the same," and "the surplus, if any, towards the support of the minister." It further provided that the principal of the fund might be applied to rebuilding the chapel if destroyed. The trustees applied a small part of the income of the trust fund to the payment of the sexton, and for fuel used in the chapel. *Held*, on a bill of information, that such use of the income of the fund was not a misapplication of it. *Attorney General v. Union Society*, 167.

2. A contract by which a trustee purchases trust property directly from the *cestui que trust* will not, if fairly made, be set aside because of the relation of the parties, and whether such contract was fairly made is a question of fact for the jury. *Brown v. Cowell*, 461.
 3. A trustee, authorized by his *cestui que trust* to sell land and receive one half in cash and to take a mortgage for the balance, is liable to the *cestui que trust* for the whole amount, although the note is not due, if he gets the mortgage note discounted and uses the proceeds himself. *Id.*
- See EQUITY, 5, 8, 10; EXECUTOR AND ADMINISTRATOR, 16; JUDGMENT, 2; MONEY HAD AND RECEIVED, 2.

TRUSTEE PROCESS.

1. Persons having in their hands funds of a firm composed of J. R. P. and E. A. B. may be charged as trustees in an action brought originally against L. L. P. and E. A. B., and, after the trustees' answer, changed by amendment into an action against J. R. P. and E. A. B.; and, where no other party has acquired intervening rights, the liability of the trustees in such case is not affected by the fact that since the service of process upon them and before the amendment they have paid over the funds due to the defendants and taken from them a bond of indemnity. *West v. Platt*, 308.
2. In an action against the New Bedford Five Cents Savings Bank to recover back money deposited by the plaintiff, the case was submitted on an agreed statement of facts, from which it appeared that the defendant had been summoned as the trustee of the plaintiff, and had paid the money in controversy on an execution which recited a judgment against the defendant, (the present plaintiff,) and that "execution was likewise awarded against the goods, effects and credits of the said defendant in the hands and possession of the Five Cents Savings Bank, trustee of the said defendant." The agreed statement of facts contained the following: "It did not appear by the record, nor by the docket of the court, that said savings bank was ever adjudged trustee." Held, that, notwithstanding the last recited statement, and the misnomer of the trustee, the defendant was entitled to judgment. *Leonard v. New Bedford Five Cents Savings Bank*, 210.
3. In *scire facias* against a trustee, his answers, in the absence of any allegation of fact not stated or denied by him, are to be taken as true, and the questions arising thereon are to be decided by the court. *Tryon v. Merrill*, 299.

UNITED STATES COURTS.

See REMOVAL OF ACTION.

VARIANCE.

- ▲ declaration on an account annexed contained two items, each for one month's labor of certain persons. The evidence showed that while the plaintiff and defendant were in partnership, the latter agreed that if the plaintiff should employ his sons to work for the partnership, the defendant would employ

some one to offset those services; that the sons worked four months, and the defendant did not employ any one. *Held*, that although the partnership was dissolved before suit brought, and there were no other debts, the action could not be maintained upon the declaration. *Dodd v. Tarr*, 287.

See INTOXICATING LIQUORS, 13, 15.

VERDICT.

1. In a criminal case, not capital, the jury may be authorized by the court, without the assent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return a verdict in open court in accordance with the result so stated and sealed up. *Commonwealth v. Carrington*, 37.
2. In a criminal case, not capital, the jury were instructed, that if they should agree on a verdict during an intermission, they should seal it up, and then might separate. The following paper was handed to them as the form of their verdict: "In case of *Commonwealth v. —*, the jury find defendant guilty or not guilty, as the case may be." The foreman of the jury added the word "Guilty," signed his name, sealed it up, and the jury then separated. On the coming in of the court, the verdict sealed up was opened by the clerk, who read it to the jury, and inquired of them if their verdict was that the defendant was guilty. They replied that it was. *Held*, that a verdict of guilty was properly ordered to be recorded. *Ib*.
3. On an indictment charging an assault with intent to ravish, the jury were instructed that they might find the defendant guilty of an assault or of an assault with intent to ravish. They returned a verdict that the defendant was guilty of both charges. The judge then instructed them that if they found the defendant guilty of the whole charge, they should return a verdict of "Guilty," and upon being asked by the clerk for a verdict, the foreman said "Guilty," and this verdict was affirmed. *Held*, that there was no irregularity in receiving or affirming the verdict. *Commonwealth v. Thompson*, 846.
4. In an action of slander, the jury returned a verdict for \$11.75. The defendant's exceptions were overruled, except one as to the exclusion of evidence offered in mitigation of damages. *Held*, that the plaintiff might retain his verdict if he should elect to have it amended to one for nominal damages. *Clark v. Brown*, 504.
5. If a demurrer to the different counts of a declaration is wrongly overruled as to one count, and the jury render a general verdict for the plaintiff, and the counts upon which their verdict is rendered cannot be determined from the bill of exceptions, the verdict will be set aside. *York v. Johnson*, 432.

See BOARD OF HEALTH, 5; WRIT OF ENTRY, 2.

VOTE.

See TOWN.

WAIVER.

See EVIDENCE, 15; SALE, 1, 2.

WARRANTY.

See BANKRUPT, 8; DAMAGES.

WASTE.

See LEASE, 1.

WATERCOURSE.

See NUISANCE.

WAY.

1. The St. of 1861, c. 107, amending the charter of the city of Lynn and giving the mayor and aldermen of that city, with the concurrent vote of the common council, exclusive authority to lay out, alter or discontinue any street or town way, to establish the grade thereof, and to estimate the damages any individual may sustain thereby, does not apply to a case where damages are sustained by repairing a highway or town way, and any person whose property is injured by such repair may enforce his remedy under the Gen. Sts. c. 44, §§ 19, 20. *Thurston v. Lynn*, 544.
2. While a petition of the mayor and aldermen of a city in which a railroad crossing is situated, and of the directors of the railroad corporation, to the county commissioners under the St. of 1872, c. 262, for an alteration of the crossing, so as to allow the highway to pass under the railroad, is pending, the mayor and aldermen are not authorized to join with the common council in changing the grade of the highway at the same place, even with the consent of the railroad corporation. *Powers v. City Council of Springfield*, 84.
3. The betterment act of 1871, c. 382, § 1, does not repeal § 16 of the highway act, Gen. Sts. c. 43. *Sexton v. North Bridgewater*, 200.
4. A petition to the county commissioners for a jury to assess damages, alleged that the petitioner's land had been taken by the selectmen in the alteration of a town way; and the trial was by a sheriff's jury, whose verdict was certified to and accepted by the Superior Court. *Held*, that the proceedings could not be considered by this court as proceedings under the betterment act of 1871, c. 382, but must be considered as proceedings under the highway act, Gen. Sts. c. 43. *Id.*
5. At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the petitioner requested an instruction that the jury, in estimating the benefits to be allowed in set-off, were to consider only the special benefit which he might have derived over and above the general benefit to him in connection with others. This instruction the presiding officer declined to give; and instructed the jury that they should allow by way of set-off the benefit, if any, to the property of the petitioner; and that if the laying out of the way had left the petitioner's estate of more value in the market than it was before the laying out, and

this benefit was not one common to the petitioner and others owning land on and in the vicinity of the way, such benefit was to be set off against any damage sustained by the petitioner. *Held*, that the petitioner had no ground of exception. *Ib*.

6. At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the petitioner contended that the way was laid out over a private way over which he was entitled to pass, and that the laying out was of no benefit to him. The presiding officer instructed the jury that if the private way had been opened by the owners and the public permitted to use it, it did not become a public or town way until laid out and established by the town, and that if the owners of the land had opened the way for the use of the public, with the intention that it should be used as a public way, and it had been so used, then the petitioner had a right to pass over it. *Held*, that the petitioner had no ground of exception. *Ib*.
7. On a petition for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the burden of proof is on the petitioner to prove his right to the damages claimed by him; and if he relies on a previous right of way to increase or prevent the diminution of those damages, the burden is on him to prove it. *Ib*.
8. At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the presiding officer ruled that the jury must take into consideration the more advantageous use to which the petitioner's property might be applied in consequence of opening the new street. Other instructions showed that the question whether the way was more advantageous to the petitioner was left to the jury. *Held*, that this instruction was not to be construed as a declaration that the laying out of the street was necessarily more advantageous. *Ib*.
9. At the trial for the assessment of damages sustained by the taking of land for a town way, under the Gen. Sts. c. 43, the jury are not to consider the liability of the petitioner to an assessment under the betterment act. *Ib*.
10. In estimating damages under the Gen. Sts. c. 43, § 73, for land taken for a private way, the jury may include in their assessment an allowance for interest from the time when the land was taken. *Kidder v. Oxford*, 165.
11. When the damages for land taken for a private way, other than by way of interest, awarded by a jury on a petition under the Gen. Sts. c. 43, § 73, are the same in amount as those awarded by the selectmen, the charges arising on the application for a jury must be paid by the petitioner. *Ib*.
12. A town is primarily liable, under the Gen. Sts. c. 44, for a defect in a highway occasioned by the careless, negligent or unskillful conduct of a street railway corporation, notwithstanding the St. of 1871, c. 381, § 21. *Hawks v. Northampton*, 420. *Bailey v. Boston*, 423, n.
13. In an action against a town to recover for personal injuries occasioned by an alleged defect in a highway, the question whether a hole in a culvert, covered with a flat stone, is so covered as to make the highway safe and

convenient for travel, is a question of fact for the jury. *Hodgkins v. Rockport*, 573.

14. In an action against a town for injuries caused by a crutch on which the plaintiff was leaning being accidentally placed in a hole in a culvert usually covered with a flat stone, but then uncovered, the jury were instructed that the town would not be responsible on the ground that the hole was uncovered and the way thereby dangerous, because it did not appear that the hole was uncovered twenty-four hours or that the town had notice; but that if they were of opinion that a hole, covered as this had been for many years, rendered the way defective, and the plaintiff proved all other necessary parts of his case, he could recover. *Held*, that the defendant had no ground of exception. *Ib*.
 15. In an action under the Gen. Sts. c. 44, § 22, against a town for an injury resulting to a traveller, it appeared that the alleged defect in the highway consisted of two bolts, each five eighths of an inch in diameter, standing vertically an inch and a half or an inch and three quarters in height above an iron plate forming the cover to a sewer which they served to keep in place; that the plaintiff struck his foot against one of the bolts, fell and injured his knee against the other. The question whether the bolts were in the line of travel for foot passengers was in dispute. *Held*, that it was a question for the jury whether there was any defect in the highway for which the defendant was liable. *Dowd v. Chicopee*, 93.
 16. In an action by a boy fifteen years old against a town, to recover for injuries sustained from a defect in the highway, the plaintiff must show that he exercised that degree of care and attention which might fairly and reasonably be expected from boys of his age and capacity; and he is not bound to exercise the same care as is required of an adult. *Ib*.
- See BETTERMENT, 1, 2; BRIDGE; CERTIORARI, 1, 3, 4; COUNTY COMMISSIONERS, 2; DEED, 4; EQUITY, 1; EVIDENCE, 20, 21; LAW AND FACT; RAILROAD, 1-3; SELECTMEN.

WILL.

1. On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the evidence of a witness who had had an interview with the testator three weeks before the date of the will, that he "observed no incoherence of thought in the testator, nor anything unusual or singular in respect to his mental condition." is competent. *Nash v. Hunt*, 237.
2. On the issue whether an instrument offered for probate as a will was executed when the testator was of sound and disposing mind, the answer of a witness, who is admitted to be an expert in mental diseases, to a question as to his opinion of the testator's insanity, based upon various hypotheses, is not rendered incompetent because the witness has already testified that he was ignorant of the effect of a certain disease upon a person's mental condition, and the fact that the testator had this disease was included in the facts assumed in the question. *Ib*.

3. On the issue whether two instruments offered for probate as a will and codicil were procured by undue influence, it appeared that the alleged will recited that the testator was a partner in a firm, and recommended his trustees, after making certain payments, to leave the residue of the estate in the hands of the firm, "leaving it to said firm to pay to my son such share of the net profits of their business, as to said firm may seem fair and just, and according to our verbal understanding." There was no other evidence than the will of any verbal understanding on the subject. The son was not a partner in the firm, and the testator had, after the will was made and just before signing the codicil, endeavored to have the firm employ his son. The partners refused to make any definite agreement, but said perhaps they would give the son a certain sum a year. This answer was reported to the testator, who said, "Well, we will leave it as it is." The codicil was then signed. *Held*, that the will did not indicate an agreement that the son should have an interest in the firm, or be paid any definite share of the net profits, and that in the absence of evidence showing that the expectation of the testator was encouraged by the partners, the party contesting the will was not entitled to have the jury instructed that if the will was made upon an understanding with the partners, or either of them, that a share of the net profits of their business should be paid to the son, and if they denied any interest of the son under the will, the jury would be authorized to find that the will was made under undue influence. *Id.*

See DEVISE AND LEGACY; EVIDENCE, 2, 3, 18; EXCEPTIONS, 7, 12; GIFT, 3.

WITNESS.

See BASTARDY PROCESS, 2; EVIDENCE, 21; EXCEPTIONS, 5.

WORDS.

- "As soon as may be." See *Bentley v. Ward*, 338.
 "Erections." See *Holbrook v. Chamberlin*, 155.
 "Kindred of the half blood." See *Larrabee v. Tucker*, 562.
 "Maintaining a minister and public worship." See *Attorney General v. Union Society*, 167.
 "Taxation." See *Boston Seamen's Friend Society v. Aldermen of Boston*, 181; *Worcester Agricultural Society v. Worcester*, 189; *Worcester County v. Worcester*, 198.

WORK AND LABOR

See MECHANIC'S LIEN.

WRIT.

See DOWER, 1; REPLEVIN, 2, 3.

WRIT OF ENTRY.

1. A writ of entry may be maintained by proof of title by deed to part of the demanded premises, and by adverse possession to the rest, although the

jury cannot say how much the deed covers. *Howard v. College of the Holy Cross*, 117.

2. A general verdict for the demandant upon a writ of entry which describes the demanded premises as bounded beginning at the intersection of two streets named, thence northerly on one of those streets three hundred and forty feet to the river, thence easterly on the river forty-eight and a half feet to a willow tree, thence southerly on land of the tenants three hundred and sixty-five feet to the first mentioned bound, is sufficiently definite. *Id.*
3. A judgment upon a disclaimer upon a writ of entry does not transfer the title, or operate otherwise than by estoppel. *Currier v. Esty*, 577.

See DEED, 5; EVIDENCE, 17; MORTGAGE, 2-5; QUIETING TITLE.

ERRORS NOTED IN VOL. CXV.

- Page 97, 8th line from bottom. Substitute "defendants" for "defendant."
- Page 101, 17th line from top. Substitute "or" for "on."
- Page 114, head line. Substitute "April" for "March."
- Page 209, 4th line from bottom. Substitute "any" for "and."
- Page 214, 18th line from top. Substitute "residue" for "window."
- Page 270, 16th line from top. *Dele second "*
- Page 347, 14th line of head note. Substitute "1000" for "2000."
- Page 356, 3d line from top. Substitute "defendants" for "defendant."
- Page 411, 5th line from bottom. Substitute "drawn" for "brawn."
- Page 517, 11th line from top. Substitute "8" for "2."
- Page 535, 10th line from top. Substitute "no waiver" for "nowaiver."
- Page 561, 1st line from top. Substitute "the" for "that."
- Page 574, 12th line from bottom. Substitute "mortgagee" for "defendant."
- Page 638, last line. Substitute "8-13" for "9-13."

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